

# R. v. A.M., 2016 MBQB 161 (CanLII)

Date: 2016-09-01

Docket: YO 15-01-34471

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(Winnipeg Centre)  
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## **COURT OF QUEEN'S BENCH OF MANITOBA**

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### **BETWEEN:**

HER MAJESTY THE QUEEN ) Counsel:  
N )  
- and - ) MICHAEL DESAUTELS a  
 ) nd  
A.M., ) KRISTA BERKIS  
 ) for the Crown  
 )  
young person. ) MARTIN GLAZER and  
 ) JOSHUA ROGALA  
 ) for the young person  
 )  
 ) JUDGMENT DELIVERED:  
 ) SEPTEMBER 1, 2016

***Restriction on Publication:*** Section 110(1) of the Youth Criminal Justice Act, which prohibits the publication of any information that may identify a person as having been dealt with under this Act, applies.

[1] A.M. has pled guilty to second degree murder in the shooting death of Nigel Dixon. The Crown is seeking an order that an adult sentence be imposed, pursuant to s. 64 of the *Youth Criminal Justice Act, S.C. 2002, c. 1* (the "*YCJA*").

[2] The sentencing hearing proceeded by way of an agreed statement of facts. A pre-sentence report prepared by Jennifer Williams of Probation Services, and a forensic assessment report by Dr. Gary Fisher, a clinical psychologist, were filed as exhibits. Ms. Williams was also cross-examined with respect to one aspect of her report. In addition, the running record, several incident reports and a behaviour summary report concerning A.M.'s time in custody, letters from A.M.'s aunt and a former teacher, and several certificates of completion regarding programs A.M. has taken while in custody were also filed.

## **VICTIM IMPACT STATEMENTS**

[3] A total of seven victim impact statements from Nigel Dixon's family were read, mostly by them, in court. This large and obviously loving family has lost a beloved son, brother, cousin and friend, in circumstances and for reasons that are really quite inexplicable. A happy, sweet, easygoing 20-year-old, Nigel was deeply connected to all of them, and to his father in particular. They are devastated that someone so dear and so full of promise has been taken; their hearts are broken and their lives are shattered, perhaps forever. Nothing I can say or do will, of course, change any of this and the sentence I impose on A.M. is not a measure of the value of Nigel's life. His life and his family's loss are immeasurable. It is unfortunate that A.M. was not able or willing to say something to them in court when given the opportunity, as it is important to families to hear from an offender.

[4] While not in any way a substitution, I add my voice at this point. Part of the role of a judge is to speak on behalf of the community. This happens in many different ways, and here I speak on behalf of the community in saying to Nigel's family and friends how truly sorry I am that this terrible tragedy happened. I can only hope for them that they can find peace in the months and years ahead.

## **CIRCUMSTANCES OF THE OFFENCE**

[5] Nigel Dixon, his stepsister Samantha Meekis and their two friends were walking down the back lane between Langside and Young Streets, in Winnipeg, mid-afternoon on April 2, 2013, on their way to play pool.

[6] They came upon A.M. in the company of several members of the Mad Cowz street gang, all of whom had been directed to do a "G-check" – that is, to find out if the group was associated with another gang – by a senior gang member who was also there. Samantha Meekis told them they were from "The Rez" and not with any gang. The direction was given to allow the group to pass, and they continued on their way.

[7] Despite this, however, A.M. followed Dixon's group with a loaded 9mm handgun in his waistband. As they passed through a narrow space between two

houses they had to walk in single file. Dixon was last in line and Meekis was in front of him. A.M. was about eight feet behind when, for no discernible reason, he shot Dixon four to five times in the back. Two bullets went through Dixon and hit Meekis in the back. Dixon died at hospital a short time later. Meekis was hospitalized for several weeks.

## **THE LAW**

[8] The test for determining whether an adult sentence should be imposed on a youth is set out in [s. 72](#) of the [YCJA](#). This section has been in place since the [YCJA](#) was passed in 2002, and has been the subject of much interpretation since. It was amended in 2012 as part of Bill C-10, and now provides:

### **Order of adult sentence**

72(1) The youth justice court shall order that an adult sentence be imposed if it is satisfied that

(a) the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and

(b) a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.

### **Order of youth sentence**

(1.1) If the youth justice court is not satisfied that an order should be made under subsection (1), it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed.

### **Onus**

(2) The onus of satisfying the youth justice court as to the matters referred to in subsection (1) is on the Attorney General.

[9] Section 72(1)(a) is new, but does not appear to materially change the law as it had evolved since 2002. What is different, however, is the addition of s. 38(2)(f), adding the principles of individual deterrence and denunciation as considerations. This provision is best considered in light of the entirety of s. 38:

### **Purpose**

38(1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

### **Sentencing principles**

(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

- (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
- (b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
- (c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
- (d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;
- (e) subject to paragraph (c), the sentence must
  - (i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
  - (ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
  - (iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community; and
- (f) subject to paragraph (c), the sentence may have the following objectives:
  - (i) to denounce unlawful conduct, and
  - (ii) to deter the young person from committing offences.

### **Factors to be considered**

(3) In determining a youth sentence, the youth justice court shall take into account

- (a) the degree of participation by the young person in the commission of the offence;
- (b) the harm done to victims and whether it was intentional or reasonably foreseeable;
- (c) any reparation made by the young person to the victim or the community;
- (d) the time spent in detention by the young person as a result of the offence;
- (e) the previous findings of guilt of the young person; and
- (f) any other aggravating and mitigating circumstances related to the

young person or the offence that are relevant to the purpose and principles set out in this section.

[10] Because s. 72(1)(b) incorporates s. 3(1)(b)(ii) by reference, I include it here as well:

**Policy for Canada with respect to young persons**

3(1) The following principles apply in this Act:

. . . . .

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

. . .

(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

. . . . .

[11] Our Court of Appeal, in ***R. v. T.R.K.***, [2016 MBCA 14 \(CanLII\)](#), concluded that s. 38(2)(f) is permissive, and it is an error in law for a sentencing judge to consider it mandatory. Here, the Crown did not ask that I consider this section in coming to my decision, so I will not do so.

[12] The position of the parties is that the 2012 amendments to the **YCJA** essentially codified that common law as it has evolved since 2002. If s. 38(2)(f) is not considered, this is clearly so. Thus, on an application for an adult sentence the focus remains the principle of accountability, and the fundamental issue is that articulated in [s. 72\(1\)\(b\)](#): whether a youth sentence is of sufficient length to hold the young person accountable.

[13] As stated by the Ontario Court of Appeal in ***R. v. O. (A.); R. v. M. (J.)***, [2007 ONCA 144 \(CanLII\)](#), 84 O.R. (3d) 561, accountability in the context of the **YCJA** is the equivalent of the adult sentencing principle of retribution:

[44] While s. 38 sets out principles of sentencing that could have individual as well as societal purposes, these must be read in light of the purposes of sentencing in the youth justice context. Thus, for example, s. 38(2)(c) sets out as a principle of sentencing that the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence. In the context of the **YCJA**, proportionality must be seen as providing an upper limit on the sentence that can be imposed on the offender.

In other words, even if a long sentence were deemed necessary to rehabilitate the offender and hold him or her accountable, the sentence still must not be longer than what would be proportionate to the seriousness of the offence and the offender's degree of responsibility. That is not a concern in this case. The offences in this case are so serious that an upper limit fixed by the principle of

proportionality would not be less than what might be necessary to hold the offenders accountable.

[45] Thus, the question in this case is what is meant by the terms accountability, meaningful consequences, rehabilitation and reintegration. One obvious point is that meaningful consequences cannot be synonymous with rehabilitation and reintegration. Parliament has used the different terms and is presumed to have intended different meanings. See for example, *R. v. Barnier*, 1980 CanLII 184 (SCC), [1980] 1 S.C.R. 1124, [1980] S.C.J. No. 33, at pp. 1135-36 S.C.R.; *Winko v. British Columbia (Forensic Psychiatric Institute)*, 1999 CanLII 694 (SCC), [1999] 2 S.C.R. 625, [1999] S.C.J. No. 31, at para. 134.

[46] In our view, accountability in this context is the equivalent of the adult sentencing principle of retribution as explained by Lamer C.J.C. in *R. v. M. (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, [1996] S.C.J. No. 28, 105 C.C.C. (3d) 327, at paras. 80 and 81:

*Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct.*

Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.

. . . . .

Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blame-worthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct.

In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.

(Underlining in original, italics added)

[47] In our view, for a sentence to hold a young offender accountable in the sense of being meaningful it must reflect, as does a retributive sentence, "the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct" (underlining omitted). We see no other rational way for measuring accountability.

[14] As stated in s. 72(2), the onus of proof rests on the Crown to satisfy me that the conditions of s. 72(1) have been met. In ***R. v. O. (A.)*** the court concluded this

is not a heavy onus, but requires that I keep in mind the very serious consequences of an adult sentence on a young person and only order it when necessary.

[15] Turning to the situation before me, s. 42(2)(q)(ii) of the **YCJA** provides that the maximum sentence for second degree murder is seven years, comprised of a period of custody of four years, followed by a placement in the community under conditional supervision for three additional years. If sentenced as an adult, the sentence for second degree murder is life in prison with parole eligibility set at seven years, pursuant to s. 745.1(c) of the **Criminal Code**.

[16] A.M. was four months past his seventeenth birthday when he murdered Nigel Dixon. He has been in custody since his arrest on March 2014, some 2½ years. Although s. 38(3)(d) of the **YCJA** requires the court to take into account the time spent in detention as a result of the offence, this does not preclude the imposition of the maximum sentence set out in the **YCJA**. In fact, this is what A.M.'s counsel argues is the appropriate disposition.

[17] If A.M. receives the maximum youth sentence without any credit for pre-trial custody he will not be released from custody until September 2020. By then he will have been incarcerated for almost six and a half years. He would then be subject to conditional supervision for a further three years, so he would not be free of state control until September 2023 at which point he will be three months short of his 28<sup>th</sup> birthday.

[18] If A.M. is sentenced as an adult he will be sentenced to life imprisonment without eligibility for parole for seven years, which means he will be eligible for full parole on March 14, 2021, although pursuant to s. 746.1(3)(a) of the **Criminal Code** he will be eligible for day parole in late 2019. Thereafter, he will be subject to supervision on parole for the rest of his life.

[19] So, depending on how A.M. conducts himself, and his success at rehabilitation, there may be little difference in the actual time he spends in jail regardless of whether he is sentenced as a youth or as an adult. In fact, he could actually be released earlier – at least on a daily basis, if sentenced as an adult. The difference in approach is that an adult sentence will not reintegrate A.M. into the community until he has demonstrated sufficient rehabilitation; whereas under a youth sentence this will happen by the passage of time alone. As well, in the case of an adult sentence, supervision in the community would continue for life, rather than, as in the case of a youth sentence, for a period of three years.

## **CIRCUMSTANCES OF THE OFFENDER**

[20] A.M. will turn 21 in December. He has no prior involvement with the criminal justice system. He and his older brother were apprehended by Child and Family Services ("CFS") when he was approximately a year old. They were adopted by his aunt and raised by her with the support of his grandparents. His brother was removed from the home by CFS some years later and went to live with his mother in British Columbia, where she continues to reside with her current husband and daughter. A.M.'s brother also lives in British Columbia with his partner and their child. A.M. has visited his family regularly over the years and appears to have a strong connection to them, as well as his aunt and grandparents, although he

seems to have no relationship with his father. As an aside I make nothing of the incident that occurred during his last visit with his mother when he was approximately 16, as the details she reported to Ms. Williams were disputed by A.M.

[21] By all reports, A.M. did well as a young child and throughout elementary school. He liked school and his teachers. He got along with peers and enjoyed sports. An incident in grade seven where he was targeted by other students for revealing information to the principal seems to have been a turning point for him, however. Within a short time he isolated himself, his attendance was poor, he began to show anger, resentment of authority, and was suspended from school for a period. It appears that this was also about the time his brother was removed from the home. He dropped out of school when he was 15 and became involved in using and selling marijuana, and developed negative peers, including gang members. He asserts that he was never a member of the Mad Cowz but merely associated with them, largely in connection with purchasing drugs. For the year or two prior to his arrest he lived more or less independently, mostly staying with a friend rather than with his aunt, in part because he did not want her to know about his not going to school and also his drug use. He went to Alberta for some period, for what reason and to do what is not clear. Following this incident he went to Vancouver and stayed with an acquaintance of the Mad Cowz until he was arrested.

[22] His claim to both Ms. Williams and Dr. Fisher that he supported himself by raking lawns and delivering flyers seems somewhat suspect as his aunt reports that he did not have employment, yet for some time had fancy material possessions, such as clothing.

[23] Both the pre-sentence report and psychological assessment indicate that A.M. has no history of violence, trauma or abuse or developmental, cognitive or intellectual issues that speak to sentencing needs. As Dr. Fisher notes, prior to his arrest, and for some time, A.M. was independent and functioning at a level well beyond what one would expect for his age, which speaks to a level of maturity beyond what would be typical.

[24] Since he has been in custody, A.M. has been involved in several incidents where he instigated or participated in conflict or aggression, challenged authority or in some way promoted gang activities. He was moved from the Manitoba Youth Centre ("MYC") to Agassiz Youth Centre ("AYC") where more intensive programming occurs. Over time, however, these incidents diminished and during the last year or so he appears to have been focussed on his studies, completing his grade 12 with a grade point average of 3.56. According to the behavioural summary from AYC he participated with interest and effectiveness in a variety of programs and has shown leadership in a positive way, including in support of younger residents. He is currently taking courses online at Athabasca University and expresses interest in becoming a social worker.

[25] A.M. has become religious, and while in custody he has actively practised his faith. This includes a daily prayer regime and observance of dietary laws. A letter from the chaplain at AYC was filed as an exhibit. He had a fair amount to do with A.M. and is of the opinion that A.M.'s interest is sincere and knowledgeable.

[26] Overall, when one looks at A.M.'s time in custody, he has progressed considerably. He has taken advantage of available programming and is considered to be both mature and respectful by those who work with him. He still occasionally

demonstrates issues with anger and problems with authority, and Ms. Williams is of the view that he would benefit from counselling to deal with issues relating to his family of origin. He is assessed at medium risk to reoffend on the Level of Service/Case Management Inventory (LS/CMI), although as she notes programming directly related to his risk factors is available and, in fact, A.M. has taken some of it.

[27] In terms of A.M.'s response to this situation, both Dr. Fisher and Ms. Williams reported that he accepts responsibility for his actions and he told Ms. Williams that his religion has taught him that he "took a life so should give a life". Having said that, I agree with Dr. Fisher that A.M.'s explanation of his actions and details seem vague and somewhat difficult to accept at face value. He told Dr. Fisher that he was with this group going to purchase marijuana and was given the gun by a friend to give it to someone else. He suddenly experienced a sense of fear which resulted in his discharging the firearm. His explanation to Ms. Williams was that he felt antsy because he never held a gun before. He tried to return the gun to the owner and also made unsuccessful efforts for another gang member to hold it. He told her that "it just happened", adding that he did not know what made him pull the trigger.

[28] As I referenced earlier, despite telling Ms. Williams that he wished to offer an apology to the family, when given the opportunity to do so in court he did not, nor did he really have anything to say. On the one hand, one cannot place too much emphasis on this fact. A sentencing hearing is obviously a highly stressful time for an offender and the environment is not easy. However, given all of what is reported about A.M. regarding his maturity, religious belief and acceptance of responsibility, I do find this both disappointing and surprising.

## **ANALYSIS**

[29] In my view there are several important considerations that weigh in favour of an adult sentence, including:

- The seriousness of the offence itself. A youth sentence is, of course, available for murder, even first degree. Nonetheless, murder remains the most serious offence in our society.
- A.M. was very close to 18 at the time of this offence and based on his lifestyle was functioning at a level of independence and maturity beyond his years.
- The circumstances are particularly aggravating. Whether A.M. was a member or associate of the Mad Cowz gang makes no difference. He was acting with a gang to enforce its territory. He had a loaded prohibited firearm, and despite the direction of the senior gang member, chose to follow and then shoot Nigel Dixon for no apparent reason. He shot him in the back, not just once but four to five times. He also injured Samantha Meekis. All of this occurred in the middle of an afternoon in a residential area.
- There remain some lingering concerns that have been identified with

respect to A.M.'s anger management and problems with authority.

[30] At the same time, this must be balanced with other equally significant, but positive considerations:

- A.M. pled guilty and has spared the people who were with Nigel Dixon and his family the difficulty of a preliminary inquiry or trial;
- he has no prior record, and his actions appear to be out of character;
- he has no underlying cognitive, behavioural, emotional or psychological issues;
- he has availed himself of opportunities for programming presented while in custody;
- he is a serious and hardworking student and academically has accomplished a great deal, and has not only completed but has been an active and positive participant in programs;
- he has set positive and seemingly realistic goals for his long-term future;
- while he is assessed at medium risk to reoffend, he has taken several programs aimed at reducing his risk factors;
- he shows insight into his issues, including his need to address his anger;
- overall, his behaviour has improved dramatically and the incidents of aggression and acting out have minimized;
- in his conversations with both Dr. Fisher and Ms. Williams he openly accepted responsibility for his behaviour.

[31] This is not a situation where an accurate diagnosis or effective treatment program needs to be defined. Rather, A.M.'s rehabilitation appears to be well underway. The evidence indicates that the extent to which he needs counselling and programming is fairly minimal; there appear to be no real risks to public safety. While no one can predict the future, it is likely that the main consequence of an adult sentence would be to place A.M. on lifetime supervision.

[32] Counsel provided me with numerous decisions in support of their respective positions. I must say that none were of much assistance in coming to my decision. The cases provided by the Crown where adult sentences were imposed provided much more compelling reasons for that result than present here. I hold the same view with respect to those cases submitted by the defence where a youth sentence was imposed. I offer this not as a criticism of counsel, but simply in recognition that this is a very unusual situation.

[33] A maximum youth sentence will result in A.M. being in custody or under conditional supervision until he is just short of 28 years old. This means he will have been subject to control by the state for 10 years. Having considered the purpose of a youth sentence as well as the principles of the [YCJA](#), in light of all of the circumstances of this case I find that this is sufficient to hold A.M. accountable for his offending behaviour, thus I conclude the Crown has not satisfied me that an adult sentence is warranted.

[34] While I have taken into account the time that A.M. has been in custody, I am not allowing any credit for it in calculating the sentence. I, therefore, make a custody and supervision order of seven years, the first four years of which is to be served in custody and the balance is to be served under conditional supervision in the community.

[35] I will set the terms of the conditional supervision at the hearing to be

scheduled for that purpose, no later than August 1, 2020.

[36] Pursuant to [s. 42\(4\)](#) of the [YCJA](#), I state the following to A.M.:

- you are ordered to serve four years in custody, to be followed by three years to be served under supervision in the community subject to conditions;
- if you breach any of the conditions while you are under supervision in the community, you may be brought back into custody and be required to serve the rest of the second period in custody as well;
- you should also be aware that, under other provisions of the [YCJA](#), a court could require you to serve the second period in custody as well;
- the periods in custody and under supervision in the community may be changed if you are or become subject to another sentence.

[37] Pursuant to [s. 51\(1\)](#) of the [YCJA](#), I also impose a weapons prohibition for a period of six years, as well as a DNA order.

[38] The victim fine surcharge is waived.

\_\_\_\_\_ J.

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