CanLII

R v McMillan, 2016 MBCA 12 (CanLII)

Date: 2016-01-28
File number: AR13-30-08068
Other citation: 326 Man R (2d) 56
Citation: R v McMillan, 2016 MBCA 12 (CanLII), <http://canlii.ca/t/gn6lw>, retrieved on 2018-03-23

Citation: R v McMillan (BW), 2016 MBCA 12 Date: 20160128

Docket: AR13-30-08068

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IN THE COURT OF APPEAL OF MANITOBA

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Coram : Chief Justice Richard J. Chartier
Mr. Justice Marc M. Monnin
Mr. Justice William J. Burnett

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***B E T W E E N*:**

HER MAJESTY THE QUEEN	)	***M. A. Conner*** *for the Appellant*
Appellant	)	***R. D. Harrison*** *and*
	)	***B. M. P. Moen***
- and -	)	*for the Respondent*
BRYCE WILLIAM MCMILLAN	)	***S. M. Telles-Langdon*** *and*
	)	***A. M. Menticoglou***
(Accused) Respondent	)	*for the Intervener*
	)	
- and -	)	
	)	*Appeal heard:*

THE ATTORNEY GENERAL OF CANADA	)	***October 26, 2015***
	)	
	)	*Judgment delivered:*
Interve ner	)	***January 28, 2016***

On appeal from 2013 MBQB 229 (CanLII), 297 ManR (2d) 185

CHARTIER CJM

Introduction

[1] This is a sentence appeal. The accused appeared before the sentencing judge for having repeatedly fired a gun into a home. Despite correctly acknowledging in his reasons that the accused's actions amounted to "a crime of extreme violence" (at para 16), the sentencing judge imposed a one-year period of imprisonment. That sentence sends the wrong message. Canadian neighbourhoods are not war zones. The public expects that the sentence will reflect society's denunciation and condemnation for such conduct and that it will serve as a general deterrent to prevent others from acting so recklessly in the future.

[2] The accused pled guilty to one count of intentionally discharging a firearm into a house while being reckless as to whether someone was inside (see section 244.2(1)(a) of the *Criminal Code* (the *Code*)). Section 244.2(3)(b) provides for a four-year mandatory minimum sentence. Given the Crown was content with recommending the mandated minimum and that counsel for the accused was not challenging it, the accused knew the sentence he was likely facing.

[3] The sentencing judge was not comfortable with the four-year recommendation. He was of the view that their submissions were being driven by the mandatory four-year minimum provision rather than the fundamental principle of proportionality that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender (see section 718.1 of the *Code*).

[4] The sentencing judge advised the Crown that he was "giving you notice [of a constitutional question] right now" and put the matter over to allow counsel for both the accused and the Crown to present submissions as to whether section 244.2 of the *Code* was contrary to the *Canadian Charter of Rights and Freedoms* (the *Charter*). Ultimately, the

sentencing judge concluded that the four-year minimum sentence violated section 12 of the *Charter* and imposed a one-year term of imprisonment followed by two years of supervised probation.

[5] The Crown appeals the sentence arguing, first, that the sentence is wholly unfit, and second, that section 244.2 does not violate section 12 of the *Charter*. It further submits that, if this Court agrees that the sentence imposed was demonstrably unfit, it would be unnecessary to engage the *Charter* issue on this appeal. The accused's argument is understandably focussed exclusively on the *Charter* issue because he cannot argue in law that a one-year sentence is fit when it falls under the mandated four-year sentencing floor. The Attorney General of Canada intervened in this matter because of the constitutional challenge to a section of the *Code*.

[6] For the reasons that follow, I conclude that the sentencing judge committed several errors in principle and that these errors led him to impose a wholly unfit sentence.

The Facts

[7] A little background is necessary. Approximately two years before this shooting incident, the accused, while a youth, broke into a home in this usually quiet southwestern Manitoba town and stole a pair of girl's panties. A year later, he pled guilty to this break, enter and theft. After his guilty plea, the accused became the subject of ongoing harassment by certain individuals in the small community. For example, graffiti identifying the accused by name and calling him a "panty thief" appeared on the town's Post Office on more than one occasion.

[8] I now return to the incident before us. In the middle of the night, the 19-year-old accused was driving home from a party and saw the graffiti, which had been there for an extended period of time. The accused believed that a person (T.M.) was responsible for this graffiti. He decided it was time to retaliate. The accused walked through town, armed with a loaded .22 calibre rifle, to T.M.'s home. He had 18 live rounds with him. He proceeded to fire six times at the house, stopping only because his rifle jammed. Four of the bullets went through the front window of the house, narrowly missing T.M. and another person who were lying on a couch just below the window. A third person was asleep elsewhere in the house. The accused then left the scene and threw the rifle into the bush. It was still loaded with six shells in the magazine.

Issues

[9] The Crown raises the following two grounds of appeal:

1) Is the sentence imposed by the sentencing judge demonstrably unfit or the result of an error in principle?

2) Does the four-year minimum sentence required by section 244.2(3)(b) violate section 12 of the *Charter* and, if so, is the infringement demonstrably justified in a free and democratic society, pursuant to section 1 of the *Charter*?

[10] The Crown submits that the one-year jail sentence is demonstrably unfit because it falls outside any acceptable range of sentences and is the result of several errors in principle. It argues that the sentencing judge erred:

1) by failing to give sufficient weight to denunciation and general deterrence;

2) by overemphasizing bullying as a mitigating factor and underemphasizing the accused's high degree of moral blameworthiness; and

3) by equating strict bail conditions to pre-sentence custody and giving credit for same.

[11] The Crown further submits that, if we agree that the sentence imposed was demonstrably unfit, it would be unnecessary to engage the *Charter* issue on this appeal.

Analysis

Failing to Give Sufficient Weight to Denunciation and General Deterrence

[12] The jurisprudence clearly establishes that firearm-related offences are serious crimes (see *R v Nur*, 2015 SCC 15 (CanLII) at para 6, [2015] 1 SCR 773) and that for these type of offences, denunciation and general deterrence are the most important sentencing considerations (see *R v Morrisey*, 2000 SCC 39 (CanLII) at para 54, [2000] 2 SCR 90; and *R v Kennedy*, 2016 MBCA 5 (CanLII) at para 60). When denunciation and general deterrence are the paramount sentencing objectives, the focus is more on an offender's conduct than any circumstances particular to that offender. Put another way, while factors personal to the accused remain relevant, they necessarily take on a lesser role (see *R v Nur (H)*, 2013 ONCA 677 (CanLII) at para 107, 311 OAC 244).

[13] In *R v M (CA)*, 1996 CanLII 230 (SCC), [1996] 1 SCR 500, the Supreme Court of Canada explained what a denunciatory sentence seeks to accomplish (at para 81):

> 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. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass".
>
> [emphasis original]

[14] Despite acknowledging the importance of the principles of general deterrence and denunciation at the beginning of his reasons, I conclude that the sentencing judge greatly underemphasized these principles. Two reasons underlie my conclusion. First, the sentence does not reflect the fact that the accused encroached on one of our society's high communal values: that one's home is one's castle. As was explained by Dickson J (as he then was) in *Eccles v Bourque et al*, 1974 CanLII 191 (SCC), [1975] 2 SCR 739 (at pp 742-43):

> For these principles, we go back to vintage common law, to 1604, and *Semayne's Case* [77 ER 194], in which the principle, so firmly entrenched in our jurisprudence, that every man's house is his castle, was expressed in these words: "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose . . .".
>
> [emphasis added]

[15] This common law principle is firmly entrenched in our jurisprudence (see *Eccles* at p 743). Society expects a home to be a place of "repose", a place of rest and peace as well as a place of security, free from crime. When offenders breach that sanctity they must be punished accordingly. In my view, the one-year sentence imposed in this case simply does not communicate society's condemnation or reflect society's abhorrence of this type of transgression. Simply put, the punishment does not fit the crime.

[16] Second, I find support for my conclusion that the sentencing judge greatly underemphasized denunciation and general deterrence, by looking at the sentence itself. A one-year sentence for repeatedly firing a gun into a home is wholly unfit. Obviously, it is not possible, because of the four-year mandatory minimum, to find a section 244.2 sentence comparable to the one-year sentence imposed. However, it is worth noting that the accused was unable to point to one case where such a lenient sentence was ever imposed for a similar youthful and remorseful first-time offender committing a similar, or somewhat less serious, firearm offence. Looking at two recent cases involving similar offenders committing similar or less serious firearm offences, it becomes clear that the one-year sentence imposed on the accused was demonstrably unfit.

[17] In *Nur*, the Supreme Court of Canada, as well as the five-member Ontario Court of Appeal, did not disturb the original 40-month sentence imposed on the 19-year-old first offender for a section 95 charge of possessing a loaded prohibited handgun. Clearly, the offence to which the accused pled guilty in the case at hand (intentional discharging a firearm into a dwelling house which carries a range of sentences of four to fourteen years) was more serious than in the *Nur* case (possessing a loaded firearm which used to carry a range of sentences of three to ten years). If a 40-month sentence for a less serious offence was within an appropriate range of fit sentences, it is easy to conclude that a 12-month sentence for a more serious offence committed by a similar offender is demonstrably unfit.

[18] The second case is *R v Lyta (D)*, 2013 NUCA 10 (CanLII), 561 AR 146. That case is particularly relevant because the circumstances are remarkably similar to the case at hand. In *Lyta*, the accused was also a young adult with a minor record who had fired several shots into the duplex homes of two RCMP officers. Seven rounds struck the homes, but no one was injured. Like here, the accused did not intend to harm anyone. The sentencing judge imposed a four-year sentence. On appeal, the majority substituted a sentence of five years. The dissenting judge would have given seven. While in *Lyta*, I recognize that there was an aggravating element that was absent in the case at bar (that he had targeted the home of police officers), the Court did, in the end, impose a 60-month sentence despite dealing with a youthful offender who was in a fragile mental state and where *Gladue* considerations were at play (*R v Gladue*, 1999 CanLII 679 (SCC), [1999] 1 SCR 688).

[19] For these reasons, I have no trouble in concluding that the sentencing judge failed to give sufficient weight to the two most important sentencing principles when dealing with firearm offences: denunciation and deterrence.

Overemphasizing Bullying as a Mitigating Factor and Underemphasizing the Accused's High Degree of Moral Blameworthiness

[20] Bullying is a form of intimidation and abuse. There can be no denying that the accused was the victim of bullying and that the bullying was the motivating factor for his crime. But again, when denunciation and general deterrence are the paramount sentencing considerations, the primary focus is on the offender's conduct (repeatedly discharging a firearm into a home), not the particular circumstances of the offender (victim of bullying). While personal factors remain relevant, they are to be given less weight. In the case at hand, a fair reading of the reasons shows that the sentencing judge's attention was focussed more on the accused's personal factors than on the offending conduct.

[21] The sentencing judge wrote that "lashing out" (at para 46) may be one of the ways a victim reacts to bullying. He also noted that "to ignore the bullying to which the accused has been subjected is to ignore the central underlying cause of this crime" (*ibid*). Further he said, "This crime is an ill conceived reaction to years of bullying and public humiliation at the hands [of] T.M. and others in the community" (at para 49). During submissions, the sentencing judge opined "now we're going to victimize the victim once again and they're asking us to do it in the name of justice."

[22] The uncontested fact before the sentencing judge was that the accused's crime was motivated by, and in retaliation for, the bullying he suffered. An accused's motive to commit the crime can, depending on the circumstances, be a mitigating, aggravating or neutral factor. See Clayton C. Ruby, Gerald J. Chan & Nader R. Hasan, *Sentencing*, 8th ed (Markham: LexisNexis, 2012) at para 5.49, where examples of crimes motivated by personal factors of a temporary nature (and generally viewed as mitigating) are set out. On the other hand, as the authors also point out, the more serious the crime, the less such a factor will serve to mitigate the sentence. This is in line with the *Nur* decision from the Ontario Court of Appeal that, while factors personal to an offender remain relevant, they necessarily take on a lesser role when dealing with serious crimes where denunciation and general

deterrence are the paramount sentencing principles (see para 107).

[23] In my view, the sentencing judge greatly overemphasized the effect of bullying as a mitigating factor and, by doing so, he underemphasized the accused's high degree of moral blameworthiness. While the accused's victimization resulting from the bullying was a relevant consideration, it had little if any mitigating value in the circumstances for the two reasons that follow.

[24] First, the accused's actions were not a sudden or spontaneous "lashing out" (at para 46) to an act of bullying. The graffiti had been in place for a while, and there is nothing to suggest that T.M. had had any contact with the accused in the days prior to the shooting. The accused admitted by his words and by his conduct that his actions were not committed on the spur of the moment. They were highly premeditated. In the middle of the night, just prior to the shooting, he had told a friend that he was "going to go do his business". Twenty minutes later he told this same friend he had "done his business." What transpired during those 20 minutes is that, after obtaining a loaded rifle and 18 live rounds, he walked through town to his target's home. He then proceeded to open fire on the home, only stopping because the rifle jammed. His actions were anything but impulsive.

[25] Second, and more importantly, the accused's act of extreme premeditated violence is completely disproportionate to any reasonable and measured response to the bullying he suffered. The accused's conduct could have inflicted life-threatening injuries had one of the bullets hit one of the occupants of the home. It was not a proportionate response to the harm he had experienced.

[26] As a result, I am of the view that the accused's motive has little, if any, mitigating value because of the premeditated and very serious nature of the crime he committed.

Equating Strict Bail Conditions to Pre-Sentence Custody and Giving Credit for Same

[27] Throughout his reasons, the sentencing judge states that the time spent while out on bail entitles him to a credit against his sentence. For example, he found that the accused deserved some "meaningful credit" (at para 40) for the 18-month period he was out on bail. Later, he states that the accused "will receive no credit for the 18 months of house arrest" (at para 62). He then remarks that the time spent on bail "is indistinguishable from a

conditional sentence order and punitive in nature" (at para 60). Finally, he says that "the four year sentence coupled with the 18 months of house arrest the accused has already served, constitutes a punishment" (at para 62).

[28] Equating pre-trial bail with pre-sentence custody is directly contrary to our decision in *R v Irvine (CW)*, 2008 MBCA 34 (CanLII), 225 ManR (2d) 281, and must be disabused. As we explained, "if any allowance is to be made for pre-trial bail, it will be because the sentencing judge considers it to be a mitigating factor" (at para 24). As has been stated many times, bail is not jail. Unlike pre-sentence custody, there is no entitlement to a credit for time spent on bail. However, if there is evidence that stringent bail conditions resulted in a significant hardship, a judge can take it into account when determining the sentence.

[29] In the case at hand, the evidence of any significant hardship suffered by the accused was lacking. There was, however, evidence showing that while he was out on bail, he obtained permission to work full time, to attend family gatherings and to access programming including counselling and anger management. In the circumstances, the sentencing judge would also have been wrong had he considered the accused's time on bail as a mitigating factor because there was no evidence that stringent bail conditions resulted in a significant hardship to the accused.

[30] As a result of the errors relating to the three issues raised by the Crown, deference is no longer owed to the sentence imposed and this Court may proceed to sentence afresh.

The Fit and Appropriate Sentence

[31] When determining the fit and appropriate sentence, the sentencing judge must weigh the different mitigating and aggravating factors and consider the various principles of sentencing according to the circumstances surrounding the offence and the particular circumstances of the offender. As already stated, the paramount principles of sentencing for firearm offences are denunciation and deterrence. In such cases, the focus is on the offending conduct. While the sentencing judge should not ignore the factors personal to an offender, they necessarily take on a lesser role.

[32] The mitigating factors are that the accused pled guilty to the offence; was young and remorseful; had no previous record of violence; and had been the victim of bullying. The aggravating factors are that the accused's course of conduct was a retaliatory and premeditated act of extreme

violence which was completely disproportionate to the wrong he suffered from the bullying. He fired six times into a home and only stopped when his rifle jammed. Since four of the six bullets went through the front window of the home, it can be inferred that he was aiming for that particular location. He fired repeatedly in a home while being reckless as to whether someone was inside. By firing through the window, he ensured the bullets would enter into the home. He was not firing at the garage or the roof of the home. He took aim at the front window. Lastly, and not the least of the aggravating factors, is the fact that the accused was on probation at the time of this incident.

[33] After considering the two recent decisions of *Nur* (40 months) and *Lyta* (60 months), I am of the view that an appropriate and fit sentence would be a period of incarceration of 48 months less the 67 days he has spent in pre-sentence custody which I shall credit to him on a 1.5:1 basis, or 100 days. I would also maintain the weapons prohibition order imposed by the sentencing judge under section 109(2) of the *Code* and order forfeiture of the firearm pursuant to section 491 of the *Code*.

[34] In light of the fact that I have determined that the fit and appropriate sentence in the circumstances does not fall below the mandated minimum sentencing floor, I am of the view that it is not necessary to engage the *Charter* issue on this appeal, other than to say that I am not endorsing the sentencing judge's section 12 reasoning.

The Request to Not Reincarcerate the Accused

[35] The accused asks this Court that he not be reincarcerated in light of the particular circumstances of this case. The Crown disagrees. The intervener, the Attorney General of Canada, takes no position on the accused's request, but submits that the proper means of doing so would be by staying the remaining custodial portion of the sentence as was done in *R v Proulx*, 2000 SCC 5 (CanLII) at para 132, [2000] 1 SCR 61; and more recently in *R v Anderson*, 2014 SCC 41 (CanLII) at para 65, [2014] 2 SCR 167. I note that the remaining custodial portion of the sentence is 33 months (48 months, less 12 months already served, less 3 months of pre-sentence custody credit).

[36] The question of whether to reincarcerate has been the source of much appellate consideration recently, particularly in the Ontario Court of Appeal which has dealt with this issue six times in the last year. See *R v Shi*, 2015 ONCA 646 (CanLII), 2015 ONCA 646 (QL); *R v HE*, 2015

ONCA 531 (CanLII), 2015 ONCA 531 (QL); *R v Owen (P)*, 2015 ONCA 462 (CanLII), 336 OAC 95; *R v Dufour (C)*, 2015 ONCA 426 (CanLII), 336 OAC 52; *R v Schertzer (J) et al*, 2015 ONCA 259 (CanLII), 333 OAC 308; and *R v Ghadban*, 2015 ONCA 760 (CanLII), 2015 ONCA 760 (QL). Suffice it to say that a non-exhaustive list of factors to consider on the issue of whether to stay the remaining custodial portion of the sentence on a successful Crown appeal against sentence were conveniently set out by the New Brunswick Court of Appeal in *R v Veysey (JM)*, 2006 NBCA 55 (CanLII), 303 NBR (2d) 290 (at para 32):

> (1) the seriousness of the offences for which the offender was convicted; (2) the elapsed time since the offender gained his or her freedom and the date the appellate court hears and decides the sentence appeal; (3) whether any delay is attributable to one of the parties; and (4) the impact of reincarceration on the rehabilitation of the offender.

As can be seen by these factors, the analysis as to whether the accused should not be reincarcerated is fact-sensitive in nature.

[37] The first factor relates to whether the seriousness of the offence should require the accused to serve the balance of the sentence. The accused recognizes that the offence is a serious one and that the length of the sentence remaining to be served is not insignificant. The accused correctly concedes that this would tend to justify that he be reincarcerated. However, he argues that the rest of the considerations more than counter that important first factor.

[38] Counsel for the accused points out:

- that the accused was sentenced to a 12-month period of incarceration on October 2, 2013, and that he has served his entire jail term, being released because of earned remission on June 2, 2014, after serving eight months or two-thirds of the sentence;

- that he spent over two months in jail in pre-sentence custody;

- that approximately four and one-half years has elapsed since the incident occurred (September 5, 2011) and that he has complied with all of the conditions of his bail and supervised probation during that time;

- that over the four and one-half-year time period he has not reoffended in

any way;

- that the principal reason for any delay in bringing this matter to final disposition was to consider section 12 mandatory minimum *Charter* arguments;

- that he has maintained a positive law-abiding lifestyle and that he has been fully employed when not in custody;

- that he has successfully completed a number of counselling programs since the incident;

- that the Crown has been unable to raise any concerns regarding his positive progress towards rehabilitation; and

- that sending the youthful first offender who expressed remorse, (who was 19 years of age at the time of the incident and who is now 24 years old) back to jail would negatively impact on his successful rehabilitation.

[39] I also note that the accused stands before us having spent two periods of custody in the provincial jail system in relation to this offence. The first time was a two-month period of pre-sentence custody (without any enhanced credit). The second period was the eight months he spent in custody when he was serving his 12-month jail sentence. The 12-month period of jail was reduced to eight months because of his earned remission. Under the provincial system, prisoners have the right to be released after two-thirds of their sentence by way of earned remission if they obey prison rules and participate in available programs while incarcerated. Under the federal penitentiary system, the accused would be eligible for day parole after 10 months (six months before eligibility for full parole) and full parole after 16 months (one-third of the 48 month sentence).

[40] While no one can predict the future, recent past conduct is generally a good indicator of future behaviour. The accused's good behaviour while locked up in the provincial jail system allowed him to earn a reduction in his jail time and be released after eight months of custody. With the two months of pre-sentence custody he spent a total of 10 months' custody in the provincial system. Had the accused spent this time under the federal system, his good behaviour would have earned him the right to either day parole after 10 months or full parole after 16 months.

[41] This is not an easy case. I recognize that this is a serious offence and that the need for denunciation and general deterrence would normally

require that the accused be reincarcerated. However, when I balance all of the relevant factors, I am of the view, in the totality of the circumstances, that the remaining custodial portion of the sentence should be stayed. The principal factors that have offset the first factor are: the time elapsed since the sentence was first imposed; that sending the youthful first offender back to jail would negatively impact on his successful rehabilitation; the fact that the original jail sentence has already been served; that he has been successfully completing his period of supervised probation since his release on June 2, 2014; and had a 48-month sentence been imposed at the outset, he would already be out on day parole as a result of the time he has now served and be but six months away from full parole when the pre-sentence custody is added.

[42] I would grant leave to appeal, allow the appeal and substitute the one-year sentence with a sentence of four years' imprisonment, less credit at the rate of 1.5:1 for the 67 days of pre-sentence custody (1.5 x 67 days = 100 days of credit). I would also maintain the weapons prohibition order imposed by the sentencing judge under section 109(2) of the *Code* and order forfeiture of the firearm pursuant to section 491 of the *Code*. Finally, I would stay the remaining custodial portion of the sentence.

_____ CJM

I agree: _____ JA

MONNIN JA (concurring in the result):

[43] I have had the benefit of reading the reasons for decision on this sentence appeal. I concur with my colleagues in the result as it pertains to the issue of the accused's reincarceration. In my view, to do so would serve no purpose and would have a negative impact on the accused's successful rehabilitation.

[44] As my colleagues, I am also of the view that the sentencing judge erred in his assessment of what would be a fit and proper sentence, but unlike them, in one aspect only. I agree that the time spent by the accused on bail, while a mitigating factor, would not allow the sentencing judge to use it to reduce the sentence to the extent that he did given that there was no evidence of a significant hardship.

[45] However, I do not agree that the sentencing judge erred in his recognition of the significant effect of the bullying of this accused and his use

of it as a mitigating factor to be considered in assessing his moral blameworthiness. The sentencing judge, an experienced rural-based judge, was in a better position to appreciate the extent to which the continuous harassment of this accused in his small community created a situation where he "snapped". The sentencing judge was clear in condemning the actions taken by the accused and appreciating the serious violence that it entailed. We should defer to his assessment of the role it played in the accused's conduct as well as how it should be used to craft an appropriate and fit sentence. To require a spontaneous lashing out in order to consider bullying as a mitigating factor is to require an immediacy which is not warranted and may be inconsistent with its role in influencing the accused's conduct. The sentencing judge was entitled to consider the negative effect of bullying on this particular accused in order to assess the fitness of the sentence.

[46] That said, I am of the view that the sentencing judge erred in the setting of the sentence. My view is that the appropriate range for this offence, absent the mandatory minimum, would be in the two-year range as acknowledged by Crown counsel at the sentencing hearing. In the circumstances of this particular accused, taking into consideration his belief that no one was home (a fact which he failed to verify, hence his recklessness), and therefore, the lack of intent to do actual harm, as well as the other factors considered by the sentencing judge, would lead me to assess a sentence in that range. However, given that consideration, the mandatory minimum sentencing is no longer grossly disproportionate to a fit and proper sentence for the accused. Therefore, the section 12 *Charter* argument falls by the wayside.

[47] This is not to say that in another case, other arguments could not be raised as to the constitutional validity of the four-year minimum using hypothetical situations such as this one canvassed during argument. As well, a section 7 *Charter* argument based upon the overbreadth of the wording of the section might also be considered. Those arguments are for another day given the outcome of this case.

[48] I only raise one further point. It would appear to me that the sentencing judge reached the sentence that he did in part to buttress the section 12 *Charter* analysis in which he engaged. It was his considered view that sentencing this accused to a four-year term was inconsistent with the rehabilitative aspects of sentencing principles. My colleagues have strongly argued that given the nature of the offence, that consideration holds considerably less weight in this case.

[49] While I agree that the jurisprudence favours placing emphasis on denunciation and deterrence with respect to these types of offences, that does not mean that rehabilitation cannot play a significant part in assessing a fit and proper sentence. To do so would be contrary to section 718(d) of the *Code* and in certain circumstances, may well lead to giving deterrence higher priority than it should. The sentencing judge properly considered that the stated purpose of the amendments to the *Code* at issue in this case, as confirmed in argument before us, was to address a particularly notorious drive-by shooting in downtown Toronto and the stated intention of the government of the day to curtail drive-by shootings in gang-related situations. The imposition of a four-year sentence on a bullied youth in rural Manitoba does little, in my view, to send a message of deterrence to gang members in large urban centers.

[50] The sentencing judge was driven to perform his analysis in order to achieve the result which he thought was fair and just in the circumstances. This exemplifies the concern raised by many as to the rigidity of mandatory minimum sentences. While Parliament certainly has the authority to pass such legislation, it creates situations, such as this one, where the fitness of a sentence in respect of a particular offender may not be the final result.

By lexum for the law societies members of the Federation of Law Societies of Canada