2003 ABPC 174
Alberta Provincial Court

R. v. F. (L.M.)

2003 CarswellAlta 1344, 2003 ABPC 174, [2003] A.J. No. 1171

HER MAJESTY THE QUEEN and L.M.F., J.R.D. and M.R.D. (Young Persons Within the Meaning of the Youth Criminal Justice Act)

Pahl Prov. J.

Heard:
Judgment: August 14, 2003
Docket: 030289508Y1, 030292395Y1, 030292403Y1

Counsel: Mr. J. Snider for Crown
Mr. B. Wood for Young Person L.M.F.
Ms. K. Williams for Young Person J.R.D.
Mr. L. Grey for Young Person M.R.D.

Subject: Criminal
Related Abridgment Classifications
Criminal law
XXIII Sentencing by offence
XXIII.4 Firearms and other weapons
XXIII.4.b Careless use, carrying, handling, shipping, transporting or storing
Criminal law
XXIII Sentencing by offence
XXIII.4 Firearms and other weapons
XXIII.4.h Possession offences
XXIII.4.h.vii Unauthorized possession in motor vehicle
Criminal law
XXIII Sentencing by offence
XXIII.12 Wilful and forbidden acts in respect of certain property
XXIII.12.b Cruelty to animals
Criminal law
XXIII Sentencing by offence
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XXIII.12.c Mischief
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Headnote
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s. 3 — referred to

s. 38 — considered

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s. 39 — considered

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***Pahl Prov. J.*:**

1 I thank counsel for their submissions and I am indebted to the Probation Office for the provision of Pre-Sentence Reports in respect of the accused. I have carefully noted the comments of defence counsel in respect of some aspects of the those reports.

2 The offences to which guilty pleas have been entered occurred over a period of nine days in January 2003, from January 11 th to and including January 19 th , and all in and about the vicinity of Bonnyville, Alberta. While certain of the individuals were not charged with all of the offences, all were usually present when the offences occurred. It is not my intention to impose sentences where offences have not been charged, or pled to, but for the above reason, however, I do not consider it necessary to discuss the individual offences. The charges include the careless use of a firearm, occupation of a vehicle containing a firearm, the killing and wounding of four horses and numerous charges of mischief through the wilful damage of property. The charges in respect of the horses proceeded by indictment. Suffice to say, all three accused are complicit in these offences, but commensurate with the pleas entered, some more so than others.

3 Before imposing sentence I consider it of importance that there be a clear understanding of the parameters available to me and particularly, the principles applicable to sentence in youth matters. These three young men are, and were at the time of these offences, "young persons" as is defined in the *Youth Criminal Justice Act*. This *Act*, which is federal legislation, replaced

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the *Young Offenders Act* on April 1st, 2003 and by its transitional terms, governs the sentence which can be imposed upon these accused.

4 The *Youth Criminal Justice Act* sets forth its principles in section 3 and while I do not choose to repeat those now, I mention them so that the parties will be aware that I have considered them. It is clear on a reading of these principles that public protection is a primary purpose of the youth justice system and that this is best achieved through prevention, meaningful consequences and rehabilitation. The Purposes and Principles of sentencing under the *Act* are of more direct interest and should be known to the accused, as I am sure they are already, but also to the public at large. Those Purposes and Principles are set forth in sections 38 and 39. I wish to specifically refer to them as they are of significant importance in my consideration of appropriate sentences in this matter. I quote the relevant portions:

> **38.** (1) *Purpose* — 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.
>
> (2) *Sentencing principles* — A youth justice court that imposes a youth sentence on a young person shall determine the sentencing 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 person, ...
>
> (e) subject to paragraph (c), the sentence must
>
> (i) be the least restrictive sentence that is capable of achieving the purposes 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.
>
> (3) *Factors to be considered* — 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 aggravation and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

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> **39.** (1) *Committal to custody* — A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless
>
> (a)the young person has committed a violent offence;
>
> ...
>
> (d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.
>
> (2) *Alternatives to custody* — If any of paragraphs (1)(a) to (c) apply, a youth justice court shall not impose a custodial sentence under section 42 (youth sentence) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.
>
> (3) *Factors to be considered* — In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to
>
> (a) the alternatives to custody that are available;
>
> (b) the likelihood that the young person will comply with a non-custodial sentence, ...
>
> (c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.
>
> ...
>
> (5) *Custody as social measure prohibited* — A youth justice court shall not use custody as a substitute for appropriate child protection, mental health or other social measures.

5 As will be noted, the legislation imposes rigorous and specific constraints on the exercise of judicial discretion.

6 Proceeding then in accordance with the *Youth Criminal Justice Act*, we must first address, as a comparison, the punishment of an adult convicted of the same offences committed in similar circumstances. Thankfully, incidents such as this are relatively rare, but such cases as I have reviewed, bearing at least some reasonable similarity to the matter at bar, satisfy me that an adult found in these circumstances might well expect a sentence in custody ranging as high as one year. I conclude therefore that custodial sentences within that range would not offend this principle.

7 The sentences here must be similar to sentences imposed in the region on similar young persons found guilty of the same offence committed in a similar circumstances. There are, to my knowledge, even less of such examples other than the young man previously sentenced by my brother Judge Fraser and who was involved with these accused in three offences, only one of which resulted in property damage. He was placed on probation for a period of one year and ordered to pay compensation for his share of the damage.

8 The sentences here must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence. I will discuss this later in the judgment.

9 I must then consider all available sanctions other than custody that are reasonable in the circumstances. Those choices are set forth in section 42 of the *Act* and range from a minimum of "a reprimand", to various forms of discharge, fines, compensation orders, restitution orders, community service, prohibitions, probation, custody and supervision and deferred custody and supervision. I will explain my choices in respect to these options in due course.

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10 Further, these sentences must also be the least restrictive that are capable of achieving the broad purposes and principles earlier mentioned, must be ones most likely to rehabilitate these young persons and reintegrate them into society and must promote a sense of responsibility and acknowledgement of the harm done to the victims and community.

11 Finally, I must take into account the degree of participation by the young persons in the commission of the offence. Here I find, largely as a matter of the charges to which pleas have been entered, but also from my consideration of the facts put forward by the Crown and reiterated by the probation office, that L.F. participated, for all practical purposes, in all of the offences save only those two specific to each of J.D. and M.D.. In particular, L.F. was a direct participant in both the indictable offences charged, namely, the killing and maiming of the horses and in general, filled a *quasi* leadership role in the entirety of the events. J.D. was the next most involved but I find, as compared to L.F., somewhat more as a follower than as a leader although, to my mind, given the time continuum of these offences, this distinction is somewhat less important. Finally, M.D. was least involved, but only marginally because of the above consideration and also because he was often present as a driver, while not actually a participant, and not charged, in a number of the offences of L.F. and J.D..

12 I next consider the harm done to the victims and whether it was intentional or reasonably foreseeable. The harm done by these offences is significant and I find, on the facts agreed to, it was both intentional and reasonably foreseeable. The property damage alone is estimated in excess of $30,000. This however does not begin to include the harm done to individual victims and the community. This incident terrorized the community, cause economic loss, badly frightened some individuals who were or could have been in proximity to the gun fire, and I am sure, apart entirely from financial loss, caused deep upset to those who owned and loved the animals which were killed or maimed.

13 I have been advised that to date, no reparations have been paid by the accused although to his considerable credit I am advised by Mr. Wood, L.F.'s counsel, that the sum of $7,000 is in hand and will be paid forthwith against whatever compensation I shall hereafter order.

14 Mr. Snider, on behalf of the Crown, advises that none of the accused spent any time in detention, other than perhaps briefly during the course of investigation, and that therefore I need not consider detention for the purpose of credit against the sentences to be imposed.

15 Next, I am bound to consider any previous findings of guilt of these young persons, To their credit, none of these young men have a previous criminal record.

16 Finally, I must consider any other aggravating and mitigating circumstances as may be relevant.

17 I have already, albeit briefly, alluded to the serious aggravating circumstances of the economic and psychological damage done to both the community and individuals affected. In that light, I find as a significant aggravating circumstance the very fact of the time period over which these offences were committed. This was not a spontaneous act, fuelled either by drink or drug, an act of inexplicable, momentary stupidity, but rather, a connected series of acts over nine full days, when at any moment simple reflection could have brought the incidents to a close. It is remarkable to me and I am sure, to others, that these accused could continue for nine days knowing full well the furor that was being created and never once stop for sober reflection or consideration of the mindlessness of their continuing acts. This reality speaks to the callousness and indifference of all three accused. The killing of three horses, and the wounding of another, was vile, cruel and despicable. Finally, none of the accused came forward voluntarily. Good police work led to their apprehension and only then after some initial hesitation did they fully cooperate.

18 The counterbalancing consideration, or mitigating circumstances, are these. The accused, once confronted, came to cooperate fully with the police and provided statements. The difficulties in investigation and proof would I assume have been significant. Ms. Williams, on behalf of her client, and by extension the other two accused, confirms this point. In a like manner, these young men have not sought to evade responsibility for their acts. They entered guilty pleas at an early stage of the proceedings. Finally, as I have said, none has any previous criminal record.

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19 The final consideration in the assessment of aggravating and mitigating factors is the issue of level of maturity. Young persons, simply as a consequence of their age, are taken to have a reduced level of maturity, and appropriately so. As, an example, we expect less of a 12 year old than we of an 18 year old. Here of course, L.F. was 17 and the D. brothers turned 17 in the midst of these offences. As such, they get somewhat less credit on this scale. L.F. marginally less than the D. brothers.

20 I have as I am mandated to do, carefully considered the severity of these offences and the degree of responsibility of all three accused. I find these offences were serious and violent in the extreme. Three horses were killed and one crippled. Thousands of dollars of property damage was caused and I do not consider it any exaggeration to say it is only fortunate that some member of the community, or even one of the accused, was not injured. There are, I readily concede, no charges before the court for such eventuality, but common sense tells us it could easily have occurred. I find that all three accused bear significant responsibility for these acts. As previously stated, I take the view that L.F. bears the highest culpability as I am satisfied that between he and the D. brothers, that he was effectively the leader and prime instigator from the inception and throughout. This is however, a matter of some degree because it is clear that the D. brothers were enthusiastic followers and did not avail themselves of ample opportunities to disassociate themselves from L.F.'s leadership. As events progressed towards finality, their eventual apprehension, I find that any distinction between L.F. and the D. brothers as to culpability or leadership becomes almost academic. Nonetheless I find the prime mover in the inception of this spree was L.F. and that responsibility must stay with him. Notwithstanding that the number of their charges differ, I see little to distinguish between the acts, and resulting culpability, of J.D. and M.D..

21 I have considered the criteria mandated by the *Act* and particularly so the statement of purpose contained in section 38(1). This statement, in large measure, says no more to us than what any good citizen already knows. In order that society function effectively we all must be accountable for our actions. Our actions have consequences, and each of us must be responsible to bear and accept those consequences. The degree to which a young person is to be held to these same standards is on a reading of the whole *Act*, clearly less, but it is as clear, given the wording of the *Act*, that the standards remain applicable to young persons and I find, to these accused.

22 I have carefully read the pre-sentence reports submitted to me and again subject to the comments of counsel. Counsel have put forward suggested sentence options, all of which are suggested as alternatives to custody. I am indebted for their advice and I appreciate their obvious concern for their young clients. That said, I come back to my consideration of the aggravating and mitigating circumstances. The most important mitigating circumstance is that none of the accused has a previous criminal record. This credit however, only goes so far. If one commences a criminal career with a simple shoplifting, that is one thing. Starting that career with an armed robbery of a bank would be another. Here, these young men have commenced with serious and continuing transgressions. I have found that these were offences including significant violence and psychological and economic harm. Two of the offences proceeded by indictment. In my opinion, non-custodial sentences would not adequately reflect the very serious nature of these offences. I therefore find that a period of custody is necessary to promote a sense of responsibility in these young men and as well, to acknowledge the harm done to their victims. That said, I acknowledge the remorse expressed by all three accused in front of me today. I find however, that these sentences, when combined with further orders of probation and compensation will, in my view, be the most effective in rehabilitating and reintegrating these young men into society. This, I believe, because the community in which they live will know they have paid a significant penalty, and in fairness (as most people do act), will accept them back as full contributors to the community. The sentences I impose will not be more severe than an adult will receive. Finally, I consider these sentences as necessary for the long term protection of the public. While deterrence is not specifically mentioned in this Act, I am of the opinion that this long standing principle of sentencing can readily be read in as an additional, but not exclusive consideration, and I do so. These events, in this community, committed over a period of nine days and effectively traumatizing the community, are exceptional in my view and require, if the repute of the justice system is to be upheld, a degree of specific and general deterrence. These young men require custodial sentences in order to fully appreciate the meaning of the rule of law, respect for property and especially, respect for life, animal or otherwise.

23 L.F., you are ordered to serve 30 days in secure custody, to be followed by 15 days to be supervised under supervision in the community subject to conditions as set forth in section 97 of the *Act*.

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24 If you breach any of the conditions while you are under supervision in the community, you may be brought back into custody and required to serve the rest of the second period in custody as well.

25 You should also be aware that, under other provisions of the *Youth Criminal Justice Act*, the court could require you to serve the second period in custody as well.

26 The periods in custody and under supervision in the community may be changed if you are or become subject to another sentence.

27 I am also placing you on probation for 18 months and on the following conditions:

You must keep the peace and be of good behaviour.

You must appear in youth court when required by the court.

I designate that you will be under the supervision of a probation officer. You must report to the probation officer in person today and after that as directed by the probation officer.

You will live at a place approved by the probation officer.

You will stay in the province of Alberta unless your probation officer gives you permission in writing to go outside the province.

You will immediately advise your probation officer, in writing, of any change in address, school or work.

You will, in the sole discretion of your probation officer, follow such curfew as may be designated by your probation officer.

If you are not in school, you will make reasonable efforts to find and maintain a job and inform your probation officer of your efforts.

You will be assessed and will take counselling or treatment for psychological and psychiatric issues. You will continue to be seen by Dr. Brian Hindmarch or such other psychologist or psychiatrist as he and your probation officer may designate. You will be also assessed and will take any counselling or treatment directed by your probation officer for alcohol or substance abuse and anger management and will provide your probation officer with proof of attendance and completion of any counselling and treatment.

You will not be in contact, in any way, with J.D. or M.D. or any other person named in writing from time to time by your probation officer.

You will appear before the Bonnyville Justice Committee every four months at such date and time as they may direct.

28 You will now attend before the Clerk who is directed to give you and your parent a copy of this Order, have you read this Order or read it to you, and explain the Order to you.

29 J.D., you are ordered to serve 20 days in secure custody, to be followed by 10 days to be supervised under supervision in the community subject to conditions as set forth in section 97 of the *Act*.

30 If you breach any of the conditions while you are under supervision in the community, you may be brought back into custody and required to serve the rest of the second period in custody as well.

31 You should also be aware that, under other provisions of the *Youth Criminal Justice Act*, the court could require you to serve the second period in custody as well.

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You will live at a place approved by the probation officer.

You will stay in the province of Alberta unless your probation officer gives you permission in writing to go outside the province.

You will immediately advise your probation officer, in writing, of any change in address, school or work.

You will, in the sole discretion of your probation officer, follow such curfew as may be designated by your probation officer.

You must be enrolled in and attend school but I leave it in the discretion of the probation office as to whether you complete such schooling in person or by correspondence. Your probation officer will be entitled to obtain a record of performance.

If you are not in school, you will make reasonable efforts to find and maintain a job and inform your probation officer of your efforts.

You will be assessed and will take any counselling or treatment directed by your probation officer for alcohol or substance abuse, anger management and psychological or psychiatric issues and will provide your probation officer with proof of attendance and completion of any counselling or treatment so directed.

You will not be in contact, in any way, with L.F. or any other person named in writing from time to time by your probation officer.

You will appear before the Bonnyville Justice Committee every four months at such date and time as they may direct.

34 M.D., you are ordered to serve 20 days in secure custody, to be followed by 10 days to be supervised under supervision in the community subject to conditions as set forth in section 97 of the *Act*.

35 If you breach any of the conditions while you are under supervision in the community, you may be brought back into custody and required to serve the rest of the second period in custody as well.

36 You should also be aware that, under other provisions of the *Youth Criminal Justice Act*, the court could require you to serve the second period in custody as well.

37 The periods in custody and under supervision in the community may be changed if you are or become subject to another sentence.

38 I am also placing you on probation for 18 months and on the following conditions:

You must keep the peace and be of good behaviour.

You must appear in youth court when required by the court.

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I designate that you will be under the supervision of a probation officer. You must report to the probation officer in person today and after that as directed by the probation officer.

You will live at a place approved by the probation officer.

You will stay in the province of Alberta unless your probation officer gives you permission in writing to go outside the province.

You will immediately advise your probation officer, in writing, of any change in address, school or work.

You will, in the sole discretion of your probation officer, follow such curfew as may be designated by your probation officer.

You must be enrolled in and attend school but I leave it in the discretion of the probation office as to whether you complete such schooling in person or by correspondence. Your probation officer will be entitled to obtain a record of performance.

If you are not in school, you will make reasonable efforts to find and maintain a job and inform your probation officer of your efforts.

You will be assessed and will take any counselling or treatment directed by your probation officer for alcohol or substance abuse, anger management and psychological or psychiatric issues and will provide your probation officer with proof of attendance and completion of any counselling or treatment so directed.

You will not be in contact, in any way, with L.F. or any other person named in writing from time to time by your probation officer.

You will appear before the Bonnyville Justice Committee every four months at such date and time as they may direct.

39 The sentences imposed herein shall be the same for each individual offence, to be served concurrently. To the extent that they may be applicable, there will be no victim fine surcharges.

40 The combined duration of these sentences, including compensation orders pursuant to section 42(2)(e) which I shall also impose, may not exceed three years. The following compensation orders will therefore be made having in mind that pursuant to section 54(10) the court may allow further time for the completion of a sentence, in these cases, being the compensation orders. I comment further, for the guidance of any future court to whom such an application for extension is made, that I am of the opinion that if a compensation order is to be made against a young person, given that they are, by definition, less than 18 years old, sufficient time should be allowed both for the young person to complete his education and also to establish himself in a work career as would permit payment of the compensation. The *Act* however in sections 42(14) and 42(15), restricts the combined duration of the "sanctions" or "sentences" to a maximum of three years. I am of the view, for all of the considerations set forth herein, that compensation should be paid to the victims. I have not in the probation orders which have been imposed, directed that any community service be performed. To that extent, these young men should get on with their lives and may better use their time towards repayment of the direct damage caused by their acts. None has any significant present means, but in my view all have the future means to pay. The damages, in the following amounts as have been agreed between the parties, shall be compensated as follows: L.F., $20,535.28; J.D., $6,378.19; and M.D., $5,143.39.

41 As monies are received from the accused, they shall be distributed pro rata. No interest will be imposed. Funds shall be paid to the Clerk of the Court at St. Paul or Bonnyville, Alberta, and shall be distributed once per year at such times as shall be convenient to the Clerk of the Court. I therefore order that the three accused shall each pay the amount allocated to him, all before the expiry of three years from this date. The official length of this compensation order, so as not to offend section 42(15), shall be 15 months, calculated from the end of the total amount of custody and supervision (which is less than three months) and the probationary period of 18 months.

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42 I expect all three accused will be required to apply for extensions of time. Given that the Act does permit, in section 54(10), such extensions of time, subject to its terms, I would if such application were made to me extend payment terms on the basis that I would allow a significant period of time for all the accused to complete their education, get established and then begin making significant payments. I am of the opinion, without intending to bind any future court, that serious payments should commence no later than when the accused reach the age of 25 years. Obviously, if circumstances permit, they should pay as much as soon as possible as they can. It would be acceptable to me if the payments were minimal until the accused reached the approximate age of 25 years. The amount due could of course be paid in full at any time and as well, the accused could if they wish and circumstances permit, avail themselves of the help of their families or others. That would be a matter between them. I also appreciate that the parties being compensated will on such a suggested scheme, necessarily wait a good while for payment, and without interest. Nonetheless, this approach has the merit of seeing some actual reimbursement to those who suffered loss. Failure by any accused to make the required payments shall be a breach of this court order and is subject to prosecution.

43 I consider it appropriate to also order that each of the accused shall be prohibited, pursuant to section 51(3) of the *Act*, from possessing any firearm, cross bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, for a period of two years.

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