

Case Name:
R. v. J.S.

Between
Regina, and
J.S.

[2003] B.C.J. No. 2877
2003 BCPC 442
Vancouver Registry No. 18276-1

British Columbia Youth Court
Vancouver, British Columbia
Romilly Youth Ct. J.
December 18, 2003.
(70 paras.)

Counsel:

Sandra Dworkin, for the Crown.
David G. Baker, for the defendant.

REASONS FOR SENTENCE

[para1] ROMILLY YOUTH CT. J.:-- The accused, who was a youth at the time of the offence aged 17 years, has been charged with Manslaughter under Section 236 (b) of the Criminal Code in respect of the death of Aaron Webster on November 17, 2001 in Stanley Park in the City of Vancouver, Province of British Columbia.

[para2] It seems that originally the Crown sought to have the accused raised to adult Court because of the seriousness of the offence under the then Young Offenders Act, but appeared to have withdrawn that application upon some agreement with counsel for the accused which seemed to include his entering a plea of guilty to the offence in Youth Court.

[para3] The following Summary of the Facts was entered by the Crown with no opposition from accused counsel:

- "1. On November 17, 2001 at approximately 2:00 - 2:15 in the morning in Stanley Park, near Second Beach, a couple observed a male beating a shirtless man with a stick or a club - there were two or three others with this male. The couple pulled over and called scared and left the area.
2. Another witness heard sounds of a commotion, kids laughing, hollering, thumping noises and what sounded like someone whacking taillights on cars.
3. Another witness was looking for empty bottles and cans on the trails near second beach. He heard a commotion on the road. He described the noise as being similar to someone kicking a car. He heard a male yell "get him" and another male yelling something indiscernible. He looked out onto the roadway and saw a white van drive by, stop and back

- up. Heard the driver ask if the male was OKAY. This witness went out to join the driver.
4. The driver of the van, Tim Chisholm, discovered the naked, battered body of Aaron Webster. Mr. Chisholm was a friend of Aaron's. At that point Aaron Webster was unconscious, bleeding from the mouth, in convulsions and not breathing. The driver of the van tried to perform CPR at the scene, to no avail.
 5. EHS personnel attended to Aaron Webster at 2:39 a.m. and found him lying on the pavement in a parking lot near Second Beach and an area that is frequently(ed) by members of the gay community. He was found unclothed except for shoes and socks, and in full cardiac arrest. He was later pronounced dead at the scene.
 6. Autopsy results revealed that he had a variety of injuries that appeared to be caused by more than one instrument. These injuries included a fractured jaw and rib, injuries to his neck, back, ribs, left forearm, left leg, both buttocks and right shin.
 7. The cause of death was caused by a blow to the left side or back of the victim's neck. This blow caused a tear to the vertebral artery which resulted in a massive and rapidly fatal hemorrhage at the base of the brain.
 8. After the homicide of Aaron Webster the police acted on various tips, some reported to be first hand, received was that J.S. had told someone that he and another male beat Aaron Webster in Stanley Park, but did not mean to kill him. J.S.'s name came up more than once during the continuing investigation.
 9. On February 12, 2003, police attended at the residence of J.S. for the purpose of interviewing him to determine his involvement and knowledge in the murder of Aaron Webster. He accompanied them down to the police station. At the police station he gave a warned and videotaped statement at first denying any involvement; he then advised the Detective that "he wanted to come clean" and admitted the following:
 - a) He advised that he and four other males, R.C., A.C., D.R.#1 and D.R.#1's brother were drinking together on the evening of November 16th, 2001. In the early hours of November 17th they went down to Stanley Park. J.S. described himself as being quite drunk.

2001, they had parked their car in the third beach parking lot. They walked down an area near second beach. They went into the bushes and hid. They saw Aaron Webster walking naked

down the road. They burst out of the bushes and started running after him. He ran from them.

- c) J.S. held a bat. The others had weapons of some kind as well. J.S. hit Aaron first or second, on the back near the shoulder. At that point Aaron said "that's enough guy"

Statement Tab 1, 1st statement Page 29 line 11
- 27 Page 39 line 13/1

- d) They chased Aaron Webster to his car. Aaron fell to the ground after a blow given by another. The males surrounded him. J.S. struck Aaron a second time on the legs. He noted at this time that Aaron "was out cold".

Statement Tab 1, 2d statement Page 16/23 line

- e) J.S., R.C. and D.R.#2 ran into the bushes. A.C. and D.R.#1 continued to hit Aaron Webster "wailing on him" as he lay unconscious on the ground. J.S. estimated that they hit him approximately 7 times each.

- f) As J.S. was hiding in the bushes he was thinking "if you don't want to kill the guy, what are you doing? Like why don't you stop? They just kept on going. I didn't say anything, didn't yell anything out.

Statement Tab 1, 1st statement Page 40 line
3-5, page 41 line 8-16.

- g) They then all ran down to the seawall, back to their vehicle at third beach and left the park. As they were leaving the park they saw the ambulance attending to Aaron Webster, attempting CPR.

died. He met with the others to discuss what to do about it... It was suggested by someone that they lie - "just say you weren't there. They got no evidence or anything like that."

Statement Tab 1, 1st statement, Page 46 line
5-12.

- i) J.S. advised the police that they went down to Stanley Park for the purpose of finding "peeping toms" to beat up.

PC: Is it fair to say that anybody coming that way would've got a beating?

S: yeah

PC: It just didn't matter who it was?

S: No, actually it did. Well, we were looking for those, those peeping tom guys.

making out.

S: fucking voyeurs. Yeah. Exactly.... And they fight back as well, you know....

PC: Oh, they do?

S: Yeah

PC: ... how many times did you say you guys did that, would you go out and look for guys?

S: Oh, I've done it like three times

Tab 1, 1st statement page 43 lines 18-30.

Also Tab 1, 2d statement, Page 8 line 25, page 9 line 8

Statement Tab 1, 1st statement page 23 lines 10-12

Tab 1, 2d statement, Page 4/23 Lines 11-17;

Tab 1, 2d statement, Page 10 line 25, page 11 line 3

See also Tab 1, 1st statement p 24 lines 7-13

1st statement page 24 lines 7-13, page 26 lines 6-14

PC: And just again, just so it's clear in my mind, why, why did you guys go out to do that" Like what was the, was it a fun thing or?

S: Yeah.. It's ..um entertainment.... I hate to say it"

Tab 1, T1st statement Page 48 lines 15-18.

k) When asked by Sergeant McCluskie how he felt about this whole thing, J.S. responded; to bed it's like things remind me about it. Like every time I hear the word Stanley Park, see it some map or something, it's just dreaded"

Tab 1, 1st statement Page 49 lines 10-14.

10. Later on February 12th the police spoke to a good

friend of J.S.'s, C.B., who advised that he had questioned J.S. about his involvement the day after the death of Aaron Webster. J.S. had told him in the past they had gone into the park and beat "peeping Toms". J.S. had initially denied any involvement. Several months later, while intoxicated, J.S. admitted his involvement in the death of Aaron Webster. J.S. said that he had taken the first swing and that they had used baseball bats and golf clubs."

[para4] For reasons which would be apparent later on in the judgment, I wish to quote the following excerpts from the Taped Interview with the accused by Sergeant McCluskie of the entered as an Exhibit unopposed:

"Page 1 from Line 28

M ... How old are you J.S.?

S Eighteen. ...

Page 2 from Line 29

M ... So I, I, I'll go through those right now, just so you know that right now we're investigating the death of Aaron Webster.

S Mhmm.

Page 3 from Line 1

M Okay. And that's a death that occurred back in November seventeen, two thousand and one in Stanley Park.

M Okay. Are you familiar with that?

S Yup. ...

Page 17 from Line 16

M Um, do you know the reason for your interview today?

S Yeah.

M Can you tell me what that is?

S Um, I'm guessing, well there's rumours around the school that me and bunch of guys were going to Stanley Park and beating, beating up people so...

M Yeah

S ...that's pretty much why I'm here I'm

Page 19 from Line 7

M Um, let me ask you this, and I, you know again, I'm going to, I'm going to reiterate the fact, J.S., that I'm a real straight shooter okay?

S Okay.

M And I really want to deal that way. Did you kill Aaron Webster?

S No.

M Do you know who did it?

S I, no I don't know.

M How do you feel about being interviewed...

S Oh, horrible.

S Of course I, disgusting. Angry.

M Why are you angry?

S Well, being blamed for such a, a thing to do.

M What do you think should happen to somebody who, who kills somebody like that?

S I really haven't put much thought into it. I don't know.

M Well I mean if there's, do you think they should be given another chance or, like should they, I mean, what do you think should happen?

S Probably jail I guess. It's logical. ...

Page 21 from Line 2

M Is there any reason at all that your that scene?

S No.

M No? You can't think of any?

S No. ...

Page 22 from Line 1

M Um, this is uh like photograph evidence of the crime scene at the, the night of the incident.

Um, this is where Mr. Webster was killed, and his car here. I mean there's, there's lots and lots of pictures here to go through. Uh and I will go through them with you but uh, I just want to take a couple of minutes. Just let me get something else then I'll come back and we can go through that. Okay? Just give me uh two minutes here.

S Okay.
Sergeant McCluskie leaves

Returns a few minutes later"

[para5] It is obvious that this was a clever move on Sergeant McCluskie's part to leave the pictures behind on the table, knowing full well that the accused would be forced to look at them and feel guilty enough to confess which in fact he did upon his return.

"Page 22 from Line 25.

M Uh, but now what we, what I really want to try and figure out is why. Like what happened. And in, in, let me just kind of give you a thought about what I um, I think that...

S You know, I just want to come clean. I was there.

M Okay.

M Okay. What happened?

S You know, it really feels good to get this out too. ...

Page 23 from Line 5

M Tell me, tell me what happened.

S Cause, we went out there before right. We went out there before...

M Who's we?

S Me, me, it was me, N., A.C., R.C. and D.R.#1 and D.R.#2. You know D.R.#2?

M Yeah. Yeah

S Uh, went out there all drunk and you know, we feel like we, you know, with bats and shit, you sounds (inaudible) stupid now.

M That's okay.

S And uh, we've done it before and I, I, yeah I remember.

M Just tell me what happened.

S I remember we got out and just looking for fucking people and...

M Go ahead. Get it off your chest. You can't...

S We saw, yeah, we saw him there naked. I was behind the tree. Ran after him. I hit him.

M With what?

S Uh, I think, I think it was a bat. Tiny bat. Guess it really doesn't matter now but, and um, I'm not sure who hit him first but he fell to remember D.R.#1 and A.C. hitting him, and that was it. And trust me, it had nothing to do, we had no intention...

M No intention of killing him?

S Yes. Obviously not.

M Okay. Well let me ask you (ahem) let me ask you. Let's go back to the beginning of the night, okay, and let's start from there and let's, let's go through it in a sequential uh, you know, events. Let's, let's start from the night. You guys all got together and then...

S Yes.

M ...and, and when you say you were looking for people, you were looking for gays were you?

S No.

S Yeah.

M Okay. Just start from the beginning.

S Actually, peeping toms. You ever notice in Stanley Park...

M Yes.

S ...there guys go up to cars to look for guys to making, people making out in cars. And so, and, and I guess one night, I don't know, (inaudible) noticed that, cause some guy went to his car, went up to his car and I guess they were drinking at Stanley Park and (inaudible)

looking in there like that and that's, gave them the idea.

M And so start at the beginning of the night.

S Start at the beginning. I think uh, I think we where, A.C.'s friends or something like that.

M Do you remember their names?

S No.

M Okay.

S Um, and then we dropped them off. We all drank at A.C.'s house that night and then...

M What, what were you drinking?

S I don't remember.

M Okay.

S Probably something hard. I don't know. And um, and then uh, yeah we dropped the girls off then I guess we went to Stanley Park. It was me, N. had nothing to do with this.

S No. It was me, D.R.#2, D.R.#1, A.C., N. and R.C.

M D.R.#1, D.R.#1 was in...

S Oh, did I say N....

M Yeah.

S ...N. again?

M Yeah.

S Sorry.

M You said, who, who was in the, who was in the car with you that night? Who was in that car?

S D.R.#2, A.C., R.C. and D.R.#1. That's it.

M D.R.#2, A.C., R.C. and D.R.#1?

S Yeah.

M And you.

S Mhmm.

M And who did you say had nothing to do with

this?

S N.

M N. He was there.

S He was at home.

M Oh, he didn't go?

S No.

M N. didn't go to this thing.

S No.

M Okay. Okay so you guys were drinking at who's house?

S A.C., N.'s.

M Okay and then you, who's car did you go in?

S R.C.'s.

M What was it? Do you remember?

S Jeep Cherokee.

M Jeep Cherokee? And...

S I don't even want to see those pictures there.

M You don't? Okay, well I don't have to show them to you. Alright? Just, just continue. So you guys were out drinking, you got in a Jeep Cherokee and where did you go?

the girls off, then I guess we came back to A.C.'s place. I don't really remember. It was a long time ago. And then, and then I guess we went to Stanley Park.

M Okay, well I don't want you to guess. I want you to tell me you, I'm...

S Well, I...

M ...commending you for, for...

S ...I just want to remember.

M Okay. So then you guys get to Stanley Park and your idea was what now?

S I think we had more liquor and just drinking there. And then the idea was to find, get in a fight or, get in a fight with someone.

M To get in a fight
S Did, didn't really matter.

M You were just looking for anybody anywhere?
S Yeah.

M And now...
S Well not anybody but just guys we seen before looking into cars and stuff.

M In Stanley Park.
S Yeah.

M Okay. And so you get into Stanley Park and what happens?
S We waited in the bush, in the bushes...
M So you parked somewhere.
or something. I don't really remember.

M Second Beach? Okay.
S And then um, uh I, and then I remember sitting behind the tree and then running after him cause we saw him there.

M Where, where did you see him come from?
S You know, right, right by, right by where he died.

M Yeah.
S About fifty meters, um, I don't know which, yeah uh the, the other direction. Not, not coming, not going downtown but going back into Stanley Park.

M In, could you draw it? Would it be, make more sense to draw it for me? Cause I don't
S Okay, there's like, there's like the parking lot here, right?
M Right.
S I think this is where he was. And there's like bushes here...
M Right.

S ...and we were hiding here. Trees here. And then ran after him here.

M Where did you see him coming from?

S This way. He was coming this way.

M Okay. Is there a road here?

S Yeah.

S Yeah.

M He...

S He, well he just wandering and we were here.

M Was he naked when you saw him?

S Yeah.

M And so he's coming down this road here. You guys were hiding right here about, this is how far from here to here?

S About, I don't, forty, thirty meters.

M Thirty meters. Forty.

S And not, not even.

M Okay. And so he, now he walks...

S Maybe about fifteen.

M ...he walks by you guys.

S Yeah.

M Then what happens?

S And then we ran after him.

M Okay. And who's all in the bush?

S D.R.#1, A.C., N. and D.R.#2, and me.

M And R.C.

S Yeah.

M And...

S Did I say N. again?

S Oh geez. Sorry. He wasn't, he had nothing to do

with it. Cause, he's went with us before...

M To beat...

S Yeah.

M ...people or whatever. Okay so I'm going to make sure I got this right. It was D.R.#2, A.C., R.C. and D.R.#1, and you were in the car. There was five of you in the Jeep Cherokee. Is that right? And that was R.C.'s car.

S Yeah.

M Okay. Okay. So now...

S D.R.#2, A.C., R.C., D.R.#1.

M And you.

M Right. And what has everybody got?

S Oh bats. Nothing. Pipes or something.

M Bats. And a pipe?

S Yeah.

M Was there anything else?

S Not that I, I don't remember.

M Okay so he, he runs, he was walking by you, you guys run out of the bush, right? Is that, is that correct? Don't make me put words in your mouth. I'm asking you.

S Yeah, we run out of the bush and then...

M And then what?

hitting him.

M Okay. And how many times did you hit him?

S Once.

M Where'd you hit him?

S Um, I don't remember.

M Well, it's really important. I mean...

S Um...

M ...you remember this part.

S Yeah I...

M You know and I'm, J.S., J.S....

S It must, I think in the back cause he was running this way.

M And did you (inaudible) down on him?

S No. I must hit it, I hit him more than that. Twice.

M You hit him twice?

S Yeah.

M And, and what kind of motion did you use to strike him with your bat?

S Like this.

M Over the head? So, so it is possible you hit him on the head?

S No.

M Where did you think...

S I, I know I hit him on the back.

M On the back?

S And then he was on the ground within...

M Did that knock him down?

S Hit him in the leg. No.

M When you hit him on the back, did that knock him down?

S No.

M So then, okay and then what happened? Somebody else hit him as well I'm assuming?

S Yeah.

M What, and did, did this guy say anything?

S Who? Aaron?

S. Uh, I'm trying to think what he said. He said, he said something. He said, "That's enough guys."

M He said, "That's enough guys?"

S Yeah.

M And what'd you guys say to that? Or who, who...

S No-one said anything.

M ...did any, did anybody respond? I mean were you guys saying anything to him?

S No. No. I, I, no I don't remember.

M Okay. So you hit him with a bat on the back and then you, when he goes down, you hit him on the leg?

M Okay. And then what happened?

S This is by the car. Right beside it.

M Right beside the car?

S Mhmm.

M And then what happened?

S I ran back in the bush and then I saw A.C. and D.R.#1 just hitting on him more.

M Well...

S And me and R.C. were back in the bush. D.R.#2 I don't even think hit him.

M So D., who, who, I mean I, I, first of all, I'm going to tell you something that you impress the hell out of me because you're a stand-up something, right?

S Mhmm.

M I mean that is a big thing. You know. And I know this is hard on you. I understand that completely. This has got to have been weighing a tremendous amount on your shoulders in the last while. Probably for a year. You must've just...

S Since this happened.

M Eh?

S Since it happened.

M And, and you found out the next day that he died? Or did you guys...

S Found out the next day cause we ran, just left him there.

M Did you see anybody attending to him?

S We drove by the ambulance.

M You drove by the ambulance?

S Yeah. And he was there on the ground. We saw them, I think someone said saw them pumping his heart or something like that.

M They were pumping his heart? So you had an indication that night that you, he might've been killed.

S Yeah.

M Did you guys talk about that later on?

S Of course. No, not that night. No. In the morning cause figured he might've lived or something and then fuckin', and N. told us in the morning. N., cause N. was on the Net or was just scared to hell.

M Yeah. You've been scared since as to...

S Yeah.

M Well it's been a rough ride. I know, there's no question. You know what? This is...

S So what's going to happen?

M Well I can't answer that. I can't answer that and I'm being honest with you because I don't get to say what happens.

S Yeah.

M But um this is a, a continuing investigation and um, you know we'll, I'll, I'll, I'll address that in a, you know, in just a couple of minutes here what I, could possibly happen cause I don't know myself other than, you know, that, right? I mean, I'm not going to bullshit you. I told you from day one that I'd, I'd give you straight goods.

S Mhmm.

M And I, I, again I'm going to commend you for being really honest with me.

S Has, have you interviewed anyone else?

M Um, not yet.

S No?

M We will be though. I think everybody's carrying the same weight.

S Yeah. I was, you know I was almost waiting for you guys to come.

M Yeah. I get the feeling, and correct me if I'm from these guys after this incident?

S Oh, totally.

M How come?

S Because I didn't want to, they're bad kids so just known for stealing cars. A.C., you know, breaking windows and shit like that, ever since I went to school with him since Grade Three.

M Who killed Aaron Webster?

S I don't know if we hit him in the head.

M Who said he was hit in the head?

S Well, I saw it in the newspapers.

M It wasn't you?

S No.

M Do you remember what everybody had? You said you had a baseball bat. What did R.C., what was R.C. carrying.

S Probably the same thing.

M Well I don't want probably. Do you know if he was?

S I don't remember. It's...

M Okay what about...

S ...I think, I don't, I think it was the same thing.

M I mean did you guys, where did you get this equipment?

S It was all R.C.'s. All R.C.'s.

M R.C. had the equipment?

S Yeah.

M Everything that was taken that night came from R.C.'s house?

S Yeah.

M Has he got, still got that stuff?

S I don't know.

M Was there any talk of getting rid of it?

S Yeah. Uh, he said, I remember that there's houses outside his house or cops outside his house across the street with a camera on him or something like that. I don't know if this is true or not but...

M He's probably a little nervous.

S Yeah.

M So let's just go back to this now. So you guys are hiding the bush. You see Aaron Webster walking down the road there. What time of night is it?

S Two. Three.

M Two or three in the morning? So it was really dark. Was it raining? Was it dry? Do you remember?

S Uh, it was muddy. It was, was wet. Wasn't raining.

M Wasn't raining. And so you run out of the bush. Are you the first to strike him?

S I uh hit him in the back.

M So you, were you actually, did he start to run? Or did you have to chase him? Or was he just walking?

S Yeah, he started running.

M He started running?

S When he saw us.

M So you hit him...

S I don't remember very clearly but that's how I...

M A-and can you tell me again how you hit him with the bat?

S It was like this, about the shoulder.

M Like what?

S (Inaudible) hit him in the shoulder so, like that.

M Okay. And then, he didn't go down then?

S No.

M He kept running? Did somebody else hit him right after you?

S Uh, I think A.C. did.

M And where did A.C. hit him?

S I can't, I don't remember. It's all a blur. I was drunk. ...

Page 33 from Line 31

M Now you hit him in the shoulder.

S Mhmm.

M He doesn't go down. He keeps running.

S Yeah.

S Yeah.

M And then...

S (Inaudible) someone hit him that made him fall but I, I don't know who. He was just surrounded by people.

M Okay. And he goes down. Now you come over and you hit him one more time?

S Mhmm.

M And do you remember where you hit him?

S Just like the leg.

M Like where abouts, on his left or right leg or?

S I don't remember what leg it was.

S Like the thigh.

M Like up high here?

S Yeah.

M And either the left or the right leg.

S I don't, I don't remember.

M You don't. Okay.

S I think, think it was the left. It'd say, I think he fell down flat, like on his back.

M He fell on his back.

S Yeah.

M So somebody must've hit him good to knock him down.

Side A ends

Side B begins

M ...is that it? Or is it possible you hit him more than that?

S No. I hit him one time and then I remember going in the bush.

M So you hit him twice total.

S Yeah.

M And when you're hitting him on the leg, there must be other people hitting him.

S Yeah.

M Who else is hitting him?

S Uh, D.R.#1, A.C. and R.C. D.R.#2 I don't even

M You don't think D.R.#1 hit him?

S No. I don't think D.R.#2, his brother hit him.

M D.R.#2, what's his last name again?

S R.?

M R. (name spelled out)

S Yeah. There's D.R.#1 and D.R.#2.

M Right. Right. R. and R.C. Is that right? And A.C....

S A.C. Starts with a C.

M (name spelled out).

S Yes.

S No.

M Hundred percent, N. wasn't there. Just the five of you. So now you go, you hit him twice and you're standing, are you guys sort of surrounded him? Or how is it, how is it that you're now hitting him together?

S Well the car's here and his body's here. And like I was here.

M Okay. Why don't we go to this drawing again so I understand better. The car was where? Right there.

S No, this is the car.

M His body.

S This is him, facing down. I think I, I was here. If I remember, D.R.#1 was here, A.C. was was. I think D.R.#2 was just making his way up. I left, like as soon as he fell down, went back into these bushes...

M Okay so...

S ...and then a limo drove by. ...

Page 37 from Line 29

M Okay. So he's down. Is he saying anything now?

S No. He was, looked like he was, he was knocked out.

M He was unconscious?

S Yeah.

M And...

S He was out because, yeah. That's, I remember.

M Why was he out?

S Cause someone hit him. I guess.

M Okay. And, and, when he's out, do you hit him once he's out?

S Yeah. ...

Page 43 from Line 18

M Is it fair to say that anybody coming that way would've got a beating?

S Yeah.

M It just didn't matter who it was.

S No, actually it did. Well, we were looking for those, those peeping tom guys.

M Peeping tom guys who look in cars at guys

S Fucking voyeurs. Yeah. Exactly.

M Okay. So now you're in the car...

S And they fight back as well so you know...

M Oh, they do?

S Yeah.

M So now you're, you're dri-, how many times did you say you guys did that, would go out and look for guys?

S Oh, I've done it like three times.

M How many times...

S They've done it more than me. I don't know. ...

Page 46 from Line 3

M So now what happens? You guys must talk about this and make some decisions about how you're going to deal with this.

S Yes we met separate times. Like 7-11 I remember maybe the next day talked about how we're going to get away with it.

M And how did you, what did you decide or what was said?

S We never really came up with a, a real, like an outcome but I'll maybe lie or whatever. That's all...

M Well did some, the guys come up with some ideas about...

S Yeah, like oh, just say you weren't there. Just say you weren't there. They got no evidence or anything like that.

S Evidence.

M No evidence. And did you decide, did you talk about getting rid of the bats and all that?

S Yeah. I said, I, I think I remember telling N., you know, "You gotta get rid of them," but he had them and he had them still right, he just didn't want to take them out of the house. Or wherever they were. ...

Page 47 from Line 9

M Yeah. Did you ever tell anybody what happened?

S I said, oh yeah. I told C.B.

M C.B., your friend.

S My best friend. That's it.

S He knew because he knew we used to go down there before.

M And do that.

S So he just, he suspected it right away.

M Were you looking for gays down there?

S No.

M Did you know he was gay when you got him?

S No.

M Why would you think he's walking around nude for?

S I didn't know. We were drunk and that was a good excuse to beat him up.

S Yeah. ...

Page 48 from Line 15

M And just again, just so it's clear in my mind, why, why did you guys go out to do that? Like what was the, was it a fun thing or?

S Yeah. It's um entertainment. ...

[para6] From the second taped interview conducted by Constables Chernoff and Wahl when the accused accompanied the

police officers to the crime scene:

Page 4 from Line 20

C Did you have your own uh weapons or how did you decide...

S R.C....

S Just, it was handed out in the back and he had them already. R.C., in his truck.

C And what kind of truck is that?

S It's a Cherokee.

C What colour?

S Blue.

C So do you remember specifically what you were, so you're saying that he handed them out or you took them?

S I don't remember who handed them out but we got them. I had them, one of my...

C Okay. Do you remember what that item was?

S It was a bat.

C Like a baseball bat?

S Yeah. Aluminium.

C Had you used these specific weapons in the past?

S Yup.

C So...

S Actually no, we never did.

C No?

S No.

C Why did you say...

S Well at, at least, at least I never have. They might have. ...

C ...Aaron was killed then, um, how many times had you come down here?

S I uh, twice I think. I don't remember. Went down here twice.

C Before that.

S And we never took any weapons before, before. It was just fists.

C And would you come down with the same people?

S Yup. ...

Page 12 from Line 23

S Um, Walk here with me, I remember I was here. I think A.C., everyone was here hiding right. I might've been behind the rock or behind the tree or something.

C Mmhmm.

S And then Aaron came out of nowhere, naked, walking here. And um him, he was kind of standing there for a while. We didn't know what to do like we just, we were kind of shocked, right so I guess we all decided and then we started running after him. He started running as well, we all started running.

C So he saw you first and started running?

S Uh, I think he spotted us in the trees first and he was kind of looking at us right, and we were looking at him and then I think he started walking, I think. I don't really remember but he started walking. Then we all just burst and running and then um he was kind of shocked. And he started running as well. Cause I think he knew what we had in mind cause we had all the, the weapons, right. So he started running. I think me and A.C. were in the lead, R.C. behind onto the road here and I'm not sure exactly where but I hit him in the back at the shoulder right here about, about, I think this side here in the back. ...

[para7] The Principal Pathology Findings on the autopsy Report conducted November 19, 2001 were as follows:

1. Deep bruise angle of jaw on right side. Fractured ramus of mandible.
2. Deep bruising left side and posterior neck. Deep bruising back of head.
3. Laceration intracranial portion right vertebral artery with massive basal subarachnoid hemorrhage.

4. Patterned bruising to torso and extremities typical of rounded linear object of variable diameter.
5. Left-sided posterior rib fracture. No internal trauma to organs of chest or abdomen. Minimal left
6. Acute pulmonary edema. Dilated right heart.
7. No significant antecedent natural disease.
8. Trace alcohol in post mortem toxicological samples.

[para8] The principal cause of death was described as a "massive traumatic basal subarachnoid hemorrhage due to or as a consequence of vertebral artery trauma due to or as a consequence of a beating assault to the head and neck."

[para9] There were 13 noted wounds to the body and on Page 10 of the Report the Pathologist concluded as follows:

"This man died following a beating assault.

Thirteen separate areas of discrete bruising were evident externally on his body. The appearance of these injuries was characteristic of that inflicted by a rounded linear object. The central area of the bruises showed pallor typical of blows with such a weapon. Seven of these thirteen injuries were involved over the legs, thighs, and buttocks areas....

The immediate mechanism of death was a tear of one of the vertebral arteries....

The injuries appear to have been inflicted by a weapon or weapons with varying diameters. The blows to the chest appeared to have been inflicted by a more slender object than those to the lower extremities and the buttock area. The surface characteristics of the bruise to the right side of the neck was less discrete."

ASSESSMENTS AND PRE-SENTENCE REPORT

[para10] The first assessment provided to the Court was a Youth Raise Pre-Disposition Report dated June 13, 2003 for an application to raise the accused to adult court under Section 16 of the previous Young Offenders Act prepared by Georgia Cotsonis, Youth Court Worker.

[para11] Page 5 of that Report states as follows:
"... However, all family members describe J.S. as a fun loving young man who is not capable of harming anyone. They describe J.S. as having good morals and values. Ms. K.T. states that she used to take J.S. to church when he was younger. She says that the family has always taught tolerance towards persons who are different. J.S. was described as a non-violent young man who would go out of his way to help others. Mr. S. reports that he has

noticed a change in J.S. since he was charged with the present offence. He states that J.S. is now very focused on his future and is planning for his independence. ..."

[para12] Teachers all reported that he was polite and personable and no behavioural problems and no evidence of drug or alcohol misuse by J.S.

"Mr. Gieger, school principal, described J.S. as "polite, appropriate, courteous" and as having "well developed social skills". ...

C.B. (his best friend) described J.S. as a very caring young man who went out of his way to help people. He offence is "out of character" and the "last thing J.S. would do". ...

J.S. reports that he occasionally consumes alcohol and that he has experimented with marijuana use. J.S. says that he would usually drink alcohol, mostly beer, on the weekends when he was with friends. J.S. states that he would not drink more than "a couple of beer" because of his epilepsy medication. He states that he has not been "really drunk " and he says that he does not consume hard alcohol because he has been warned by his doctor about the negative side effects it could have with his medication. J.S. reports that he has not experienced blackouts, being sick or uncoordinated because of his alcohol consumption. ...

C.B., (J.S.'s best friend) reports that J.S. "would drink a lot" on weekends with their friends. He clarified that J.S. would not consume large amounts of alcohol but that he would drink every weekend. C.B. states that when he was "hanging out" with J.S., J.S. would consume beer and hard alcohol such as vodka. ...

YOUTH COURT HISTORY

No known history. ..."

[para13] Ms. Cotsonis then went on to outline the options open to the Court in sentencing. She went on to outline that adult facilities offer rehabilitation programs similar to those offered in youth facilities. She also reported that there had been no bail violations by the accused despite the fact that his bail provisions were akin to house arrest.

[para14] Dr. Kulwant Riar, Psychiatrist at the Burnaby Outpatient Clinic, also prepared an assessment in conjunction with the Crown's application to raise the accused to adult Court. The following are some of the excerpts from that report:

"He (the accused) indicated that his lawyer's instruction to him were not to talk about the circumstances or details of the offence in question. ...

He categorically denied engaging in any antisocial or

He never drank more than one drink every one to three weeks. Around the age of seventeen, he was drinking on the weekend with his friends and had been drunk. ... He described himself as a happy drunk who was never rowdy or picking fights, etc. ...

He described himself as hetero sexual by orientation and has never had homosexual thoughts. He went on to say that people having alternative lifestyles do not bother him. ...

I found him quite remorseful and he had the ability to take responsibility and empathize with people. Having said that, in the absence of his disclosure of the incident in question, it is obviously hard to figure out his real feeling towards the offence in question. Also, during the interview, I did not elicit any antisocial attitudes or values. ...

I noted that he told the investigating police officer that he had been in Stanley Park in the company of others at least on a couple of other occasions before the incident in question. Besides that, there is no history of any aggressive, violent, or criminal behaviours. ...

Diagnostically, J.S. certainly qualifies for Substance Abuse Disorder, that is alcohol, but does not suffer from any other psychological or psychiatric disorders. I believe that there are some underlying abandonment and self-esteem issues that have expressed themselves in his tendency to seek and crave attention and emotional support. I believe that in his life he has achieved this support by being funny and pleasing and impressing others. He does not have any psychopathic, criminal, or antisocial traits and overall, has been quite pro-social. ...

... He does not have any conduct disorder, antisocial personality or psychopathic traits. ...

On the issue of remorse or empathy, although I found him quite remorseful, these issues are really hard to assess in the absence of knowledge of the person's thinking at I find that he has the ability to empathize and take responsibility.

On the issue of his future risk of offending, except for the offence in question and his substance abuse problem, there is no other significant factors which increases his risk substantially to re-offend in the future. Overall, I consider him at low risk for any kind of antisocial or criminal acts in the future. ..."

[para15] The Court was also provided with a psychological report prepared by Dr. Patrick Bartel in conjunction with the

Crown's application to raise the accused. He seemed equally impressed with the accused as Dr. Riar. He states inter alia as follows:

"On the issue of substance abuse, J.S. states that he began drinking in about grade nine or ten. He states since that time he generally engages in alcohol abuse to the point of intoxication every weekend. ...

... J.S.'s pathway to the present alleged offence is violent criminality in his past and his apparent pro-social identifications and interests. ...

... Thus J.S.'s intoxication and association with what appear to be more negative and violence prone individuals may have disinhibited him such that he engaged in very violent acts in which he would likely have not had he been alone....

Nevertheless, after reviewing police reports and the synopses of the alleged offence, it is clear that this offence involved clear and purposeful planning, pre-meditation and intent, as indicated by a repeated pattern of aggression towards males in the Stanley Park area and the purposeful bringing and use of objects such as golf clubs and a baseball bat in the commission of the beating. Further more, my own review of police reports indicate that the offence involved an extremely violent and unprovoked attack by reportedly five males against one individual who was attempting to flee and avoid engaging in violence. The beating involved multiple blows to the victim, causing contusions to the back, face, neck indications that J.S. made any serious efforts to stop or prevent the assault from occurring. Overall, this offence reflects a great deal of callousness and lack of empathy toward the victim."

[para16] He concluded that the accused presents a low risk for future serious violence and/or criminality.

[para17] J.S.'s lawyer had him attend at Dr. Robert G. Ley, a Clinical and Consulting Psychologist and Dr. Ley provided a report dated November 23, 2003. Unlike the other assessment where the accused was instructed by his lawyer not to discuss the circumstances of the offence, Dr. Ley was not so restricted. He stated that he agreed with the findings of the other assessments except for the finding by Dr. Riar that the accused may have low self-esteem. He stated inter alia as follows:

"... I found J.S. to be likeable and personable. ...

More generally, J.S. is not an antisocial person, nor is he psychopathic. He does not have a criminal value system psychiatric illness or significant psychological disturbance. ...

In regards to the psychological circumstances of J.S.'s offense, I agree with the view of Dr. Bartels who notes that alcohol likely exerted a dis(in)habiting effect upon J.S., such that in a social context with peers who may have been more aggressive or violent than J.S., a state of intoxication would likely serve to impair J.S.'s judgment and social controls, such that he would act in a violent fashion by conforming his attitudes and behaviours temporarily to those of his referenced group. Given my understanding of J.S.'s personality and characteristic psychological functioning, it is my opinion that he most likely had a subordinate role in the offense, in that he would be unlikely to be an active planner or organizer or the violent and mayhem.

In regards to a risk assessment of J.S., both clinical and statistical methods of estimating risk of violent recidivism yield a conclusion that J.S. represents a low risk for future violence. From a clinical standpoint, and remorse for his role in the killing of Aaron Webster. He takes responsibility for his involvement and violent actions, which he deeply regrets and grieves. These psychological attitudes and feelings exert a deterrent effect against future violence. Additionally, J.S. has excellent family support, particularly from his father (and paternal grandmother), and family/social supports are good buffers against future stress. ...

In conclusion, I hold the same opinion as Drs. Riar and Bartels, namely, that J.S. represents a very low risk for future violence recidivism. Any such risk that he does represent can be well managed within the community, and within a set of conditions or restrictions that would be comparable to that which he experienced while on bail, awaiting trial and sentencing. In terms of J.S.'s treatment needs, he would benefit from counseling for substance abuse, even though his abstinence appears to be well maintained currently. ..."

[para18] The Pre-Sentence Report was prepared by Georgia Cotsonis who also prepared the assessment in conjunction with said in that report.

[para19] Victim Impact statements were given viva voce by the deceased's mother, his sister and his cousin. The Court extends its deepest sympathies to them on their tragic loss. A written statement was provided by a member of the Gay Community who states that the incident happened in an area in Stanley Park normally frequented by gays and shared the media's view that the killing was a "gay-bashing" which spread terror and fear in that community. There was some objection to this particular statement being relevant because of the accused statement that he and his friends went to the park looking for "peeping- toms" and he had no idea that the deceased was homosexual. I however choose to accept this statement as having some relevance to the issues of this case.

POSITIONS TAKEN BY THE PARTIES

[para20] Crown counsel suggests that a sentence of 28 to 32 months would be appropriate given the mitigating circumstances of the accused pleading guilty and cooperating with the police.

[para21] The Crown also requested that the Information be endorsed that the offence is a serious violent offence in accordance with s. 42(9) of the Youth Criminal Justice Act. There was no position taken by counsel for the accused on this request.

[para22] The Crown also seeks a warrant to take bodily substances from the young person for DNA analysis for which the young person has pled guilty to a "primary designated offence" in accordance with s. 487.051 of the Criminal Code. There was no position taken by counsel for the accused on this request.

[para23] The Crown also requested a mandatory weapons prohibition under section 51 of the Youth Criminal Justice Act. Once more counsel for the accused took no position on this request.

[para24] Counsel for the accused listed the mitigating circumstances as the fact that the accused confessed, assisted the police, pled guilty, expressed remorse, he is not a principal in the offence, he was highly intoxicated and he very much in keeping with that recommended by Dr. Ley in his report, with the addition of some conferencing with the family of the victims to bring about some healing. He states that in the event that I find that a custodial sentence is warranted, I should consider a custodial sentence of some six months up to the accused's 20th birthday, after which I should place him on an Intensive Support and Supervision Order. He relies heavily on the findings in the assessments regarding the accused reported "unblemished" character and likelihood to re-offend.

ANALYSIS

[para25] I am fortunate to have the benefit of the recent Court of Appeal decision of R. v. S.L. [2003] B.C.J. No. 2397, October 24, 2003 to guide me with regards the principles to be taken into account in sentencing a youth. I also have the benefit of another recent decision of our Court, R. v. K.I.D. 2003 BCPC 427, File No. 18313, Vancouver Registry, December 5, 2003, a judgment of Judge B.K. Davis, where the principles laid down by the Court of Appeal were considered.

requests by the Crown.

SHOULD THE INFORMATION BE ENDORSED THAT THE OFFENCE IS A SERIOUS VIOLENT OFFENCE?

[para27] Section 2(1) of the Youth Criminal Justice Act defines a serious violent offence as follows:

"serious violent offence" means an offence in the commission of which a young person causes or attempts to cause serious bodily harm.

[para28] The case of R. v. B.W.P. [2003] M.J. No. 331 states at paragraph 12 of the judgment as follows:

"At page 492 of his text Youth Criminal Justice Law, Irwin Law, Professor Nicholas Bala says, "A serious violent offence" usually involves significant physical injury to the complainant, or an attempt to cause injury. There is no ambiguity in the words "serious violent offence" where the offence is manslaughter. Manslaughter as defined in the Criminal Code is one of the three types required for the crimes of murder and infanticide the end result is again the causing of death of another human being.

13. There can in this regard be no more appropriate statement than that of Lamer C.J.C in R. v. Creighton (1993) 83 C.C.C. (3d) 346, who at page 355 states:

"Clearly, there can be no conduct in our society more grave than taking the life of another without justification."

[para29] Relying on this decision and the decision of Judge Davis (supra), I am satisfied that it would be appropriate to endorse the J.S. Information with the designation of a serious violent offence.

SHOULD THERE BE DNA ANALYSIS?

[para30] The facts of this case demonstrate quite clearly that when it comes to random attacks where there is no case here, investigating police officers have very little to go on to make an arrest. It is to be noted that in this case, that it was only after J.S. confessed some one and one half years later to this random attack were the police able to arrest anyone for this crime.

[para31] Counsel for the accused has taken no position on this request and therefore there was no evidence before me that the impact on the young person's privacy and security of the person would be grossly disproportionate to the public interests in the protection of society and the proper administration of justice as required by the above noted section of the Criminal Code. Relying also on Regina v. K.I.D. (supra), the taking of a sample or samples is hereby authorized.

SHOULD THERE BE A MANDATORY WEAPONS PROHIBITION?

[para32] No argument was advanced by counsel for the accused, but in light of the circumstances of this offence and

the weapons used in its commission, I would certainly have some concerns with the accused being able to possess a weapon. accused and others, to make the prohibition order which I order should be for a period of two years.

SENTENCING

[para33] I wish to state from the onset that it causes me some alarm that all the professionals involved in the assessment of this young person seemed so "charmed" by J.S.'s personality that no "alarm bells" went off on reading the statement by the accused that he and his friends went to the park looking for "entertainment" which they found by beating up innocent victims. I realize that at least two of the persons preparing assessments were restricted by the fact that counsel for the accused advised his client not to discuss the circumstances of the crime with them, which they considered quite a barrier to their assessment. However they obviously thought that their assessments could stand despite the lack of this important fact, and this I certainly question. Dr. Ley, of course, agreed with their assessments and stated that he had the benefit of discussing the circumstances of the offence with the accused, and would have come to the same conclusion. I attribute this to the fact that this report may not have for his defence.

[para34] Counsel for the accused took objection to Crown counsel referring to his client as being part of a "gang." I however will describe them as a "thug brigade stalking human prey for entertainment" in a manner very reminiscent of Nazi Youth in pre-war Germany. The civilized world continues to regard with abhorrence such pursuits, and I have every reason to believe that Canada is a shining example in decrying such intolerance.

[para35] I made the comment during submissions when counsel for the young person kept referring to all the glowing reports from family, friends and teachers that J.S. "would not harm anyone" and how tolerant he was, that they were obviously not aware of J.S.'s nightly pursuits.

[para36] I am totally amazed that Dr. Riar, supported by Dr. Ley and Dr. Bartel could conclude given the confession of J.S. that "He does not have any psychopathic, criminal, or antisocial traits and overall has been quite "pro-social."

calls the crime for what it is and makes the following comments with which I am totally in agreement:

"... Nevertheless, after reviewing police reports and the synopses of the alleged offence, it is clear that this offence involved clear and purposeful planning, pre-meditation and intent, as indicated by a repeated pattern of aggression towards males in the Stanley Park area and the purposeful bringing and use of objects such as golf clubs and a baseball bat in the commission of the beating. Furthermore, my own review of police reports

indicate that the offence involved an extremely violent and unprovoked attack by reportedly five males against one individual who was attempting to flee and avoid engaging in violence. The beating involved multiple blows to the victim, causing contusions to the back, face, neck, forearm, leg, and ribcage. In addition, there are no indications that J.S. made any serious efforts to stop or prevent the assault from occurring. Overall, this offence reflects a great deal of callousness and lack of empathy toward the victim."

all the assessments, and I assume therefore that he is also in agreement with the above comments by Dr. Bartel.

[para39] In R. v. S.L. (supra) the B.C. Court of Appeal states in paragraph 3 as follows:

"The YCJA emphasizes accountability, rehabilitation, reintegration of the young person into society, and most important in this appeal, alternatives to custodial sentences. ..."

Paragraph 22:

"The comparable Policy in s. 3 of the YOA puts more emphasis on crime prevention, the protection of society and imposing responsibility on young persons for their offences. ..."

23. Section 38, which sets out the purpose of sentencing under the YCJA, echoes the statements of principle in section 3, emphasizing accountability, "through imposition of just sanctions that have meaningful reintegration into society, thereby contributing to the long-term protection of the public."

[para40] On the subject of "Accountability" Professor Nicholas Bala, Professor of Law, Queen's University in his book Youth Criminal Justice Law states on page 92 as follows:

"... Accountability of offenders may involve some element of "retribution," that is, the "imposition of a just and appropriate punishment." Retribution is not, however, equivalent to vengeance, as Chief Justice Lamer stated in a case dealing with sentencing adults: "Vengeance [is] motivated by emotion and anger, as a reprisal for harm inflicted.... Retribution... by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which 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."

[para41] R. v. S.L. continues at paragraph 26:

"Section 38(3) requires the youth justice court to take into account various factors in sentencing, including the

degree of participation of the young person in the commission of the offence; the harm done to victims and whether it was intentional and foreseeable; any reparation made by the young person; the time spent in detention; previous findings of guilt; and other aggravating and mitigating circumstances relevant to the purposes and principles set out in s. 38."

[para42] Applying the above principles to the case at bar the first issue to be considered is the degree of participation of the young person in the commission of the offence. In this regard I wish to refer to the case of Regina v. Miloszewski [2001] B.C.J. No. 2765 B.C.C.A. affirming the lower Court's decision, which states at paragraph 18 of the decision as follows quoting from R. v. MacIntyre [1992] A.J. No. 1088 (Alta. C.A.):

"It is true that because of the manner in which the evidence evolved, it is impossible to determine which of the four individuals involved, if any, caused the blow to in his death. But when individuals act as part of a group or gang and perpetrate criminal acts, this gang-like feature of their activities does not permit each individual to offer his individual involvement alone, ignoring for sentencing purposes, the seriousness of their collective actions. When a person acts in concert with other members of a group or gang to victimize a single victim, that person must accept the consequences, which flow from this group action. Each member of the group must be taken to know that by committing individual assaults upon a victim, he advances, and even encourages the violence of others.

19. In short the fact that it is a group or gang-like crime colours the crime and makes it inappropriate to draw fine distinctions between one member of a gang carrying out a co-ordinated activity in pursuit of the aims of the gang from another member of the gang engaged at the same time in roughly the same activity carrying out the aims of the gang."

[para43] I find that the accused and his friends formed a death, and in view of the above the accused's degree of participation in the beating is irrelevant. Further it strikes me that the accused by using baseball bats and golf clubs to beat the accused must have been aware that death could result from these hard objects coming against a fragile body with the obvious force that was applied, and were really reckless as to the consequences of their actions.

[para44] With regards a consideration of the harm done to victims, the death of the victim is obviously the worst harm that an offender can inflict, and the accused was certainly very instrumental in causing the death of Aaron Webster.

[para45] With regards whether it was intentional and foreseeable, it strikes me that for young men to have weapons

"resident" in their vehicle for excursions into a park looking for innocent victims to beat up, is certainly intentional, and death or serious injury to the victim is certainly either foreseeable or implies a certain recklessness as to consequences. Further the fact that the accused had indulged in this activity on three previous occasions, although he says that he did not use weapons, suggests to me that their actions

[para46] With regards reparation by the young person, Mr. Webster has unfortunately been killed and reparation to the victim is impossible.

[para47] With regards time spent in detention, J.S. has spent no time in detention, although his counsel has described his bail conditions as akin to house arrest. I do not believe that this amounts to detention.

[para48] With regards previous findings of guilt, J.S. has no previous Court history.

[para49] With regards "other aggravating and mitigating circumstances", I find that in regard to mitigating circumstances, the fact that J.S. took one and a half years to confess and at first denying it until the sight of crime scene photos made him break down and confess, in my opinion certainly diminishes this aspect of mitigation. I also find that the accused has already benefited from a consideration of mitigating circumstances when the Crown withdrew its application to raise the young person to adult Court after plead guilty in Youth Court, thereby avoiding the rigours of an adult sentence. I should state that I also find that the accused's claim that he was drunk when committing the offence, merely a tactic to deflect culpability, as demonstrated by his contradictory statements to those interviewing him of his alcohol intake. I find that the clarity with which he remembered the details of events of that fateful night when he went to the scene with police officers, suggests that he was certainly not as intoxicated as he would have the professionals who interviewed him believe.

[para50] The aggravating factors in my opinion are numerous:

1. The attack and beating of Mr. Webster was in fact a "hate crime" as set out in section 718.2 (a)(1) of the Criminal Code. I am aware that the Crown has conceded that since J.S. has stated that they went to the park looking for "peeping-toms" or "voyeurs", and that he did not know that this area was frequented by homosexuals, she has no way of establishing that this was a "hate crime." I

Section 718.2 of the Criminal Code states as follows:

"A court that imposes a sentence shall also take into consideration the following

principles:

- a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and without limiting the generality of the foregoing,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,..."

"bias, prejudice or hate based" on a factor similar to sexual orientation and is covered by this section of the Criminal Code. It strikes me that this section contemplates hatred against "peeping toms" and/or "voyeurs" as being within its purview, since in my opinion such activity represents a sexual lifestyle which some may consider deviant, but is a sexual lifestyle all the same.

I have been advised that the media has been describing this incident as a "gay-bashing" with no foundation for saying so. On this point I find it incredible that the accused and his friends who were obviously in the habit of visiting the park to "beat up" peeping toms" and "voyeurs" were so naïve that they did not notice that this area was frequented by gays. In any event a gay person was "bashed" by the accused and his friends in an area reputedly frequented by gays, and in that regard I fail to see why it cannot be regarded as a "gay bashing."

- 2. The attack was cowardly and so brutal that it caused
- 3. This was a random, unprovoked attack by a group of strangers on a hapless victim who did not even fight back.
- 4. The young person confessed one and a half years later and after there were rumours around his school of his involvement. He even denied it at first.
- 5. The accused and his friends were in the habit of taking weapons in their vehicle with the purpose of seeking out certain innocent male victims and assaulting them.

[para51] In R. v. S.L., (supra) the Court continues in paragraph 27:

"Section 39 specifically addresses custodial sentences. Section 39(1) prohibits a youth court from sentencing a

young person to custody unless one of four conditions is met: the young person has committed a violent offence; has failed to comply with non-custodial sentences;..."

[para52] I need go no further since I have found that one of the four conditions have been met in that this offence is undoubtedly a "violent offence."

[para53] Paragraph 29 of R. v. S.L. continues as follows:

"Section 39(2) requires the youth justice court to consider all reasonable alternatives to custody where any of the conditions in s. 39(1)(a) through (c) is met. A youth justice court must consider all available alternatives to custody raised at the sentence hearing...."

32. Section 39(9) requires a youth justice court that imposes a custodial sentence to state the reasons why it has determined that a non-custodial sentence is not adequate to achieve the purpose set out in s. 38(1), including, where applicable, why the case is an exceptional case under paragraph 39(1)(d)...."

[para54] The Crown in this case has suggested a custody and supervision order for a period of 28 to 32 months, while Supervision Order because of what he considers the positive aspects of the assessments done with regards to his client, such order to include substance abuse treatment or counseling.

[para55] I shall now review some of the cases I shall be taking into account in imposing sentence on this accused.

[para56] The first case I wish to refer to is R. v. L.M.F. [2003] A.J. No. 1171 (Alberta Provincial Court) which held on sentencing young offenders for offences less severe than the case at bar held:

"... The significant harm done was both intentional and reasonably foreseeable. The aggravating circumstances were the time period over which the offences were committed, the effect on the victims and on the community and the failure to come forward voluntarily. The mitigating factors were the co-operation with the police, the early guilty pleas and the fact that none of the accused had a prior record. A non-custodial sentence would not have adequately reflected the seriousness of the offences. A period of custody was necessary to harm done, to reflect the principle of deterrence and to protect the public."

[para57] The case of R. v. Eneas [1994] B.C.J. No. 262 (B.C.C.A.) states at paragraph 48:

"The moral code of any society finds some of its expression in its criminal law. In this country, by creating the offences of criminal negligence causing death, dangerous driving causing death, and impaired

driving causing death, Parliament has shown that it is right to punish some acts according to their consequence. Thus, it is no answer in a case of the kind before us that someone guilty of equally mindless violence who fortuitously failed to kill his victim would receive a lesser sentence.

49. Furthermore, a judge is not limited in determining the moral code of our society by the Criminal Code. A judge does not live isolated from the world unaware of the thoughts, feelings, and attitudes of the rest of the community. In my opinion, the especially by mindless violence ending in death, and expects a killing to be expiated by a substantial term of imprisonment.
50. There is no expiation in a sentence of one year which under our present parole system may not be served and, under our present penal system, if served, will be served in reasonable comfort.
51. If the court below had found, as a fact, that the respondent had beaten the accused with a rock, I would not hesitate to impose a sentence of ten, or perhaps even fifteen, years knowing that there was a considerable probability that the respondent would serve only some part of that sentence.
52. But there being no such finding of fact, I would allow the application of the Crown for leave to appeal, allow the appeal, and impose a sentence of six years.
53. In coming to this conclusion, I have not taken into mind, it matters not if the deceased is young, promising and much-loved, or old, deranged and despised by all who knew him. The law ought not to measure the value of the life taken, for to do so would be to diminish every person's essential right to live out his or her appointed span."

[para58] The case of R. v. Gillies, [1988] B.C.J. No. 1153 (B.C.C.A.) states in paragraph 11 of that decision:

"Mr. Ray for the Appellant argued that the effective sentence of 10 years was beyond the range for these circumstances and for this offence. (manslaughter) He cited a number of cases... and others which establish a range for similar cases of from four to six years for this offence. While the Criminal Code prescribes a range of from suspended sentence to life, four to six years has been the usual range for most manslaughter cases for as long as I can remember...."

[para59] The case of Regina v. Atkinson, Ing and Roberts 43 C.C.C. (2d) 342, is eerily similar to the facts of the case

[para60] Starting on Page 1 of the judgment, Dubin J.A. states:

"On the night of September 10, 1977, five youths, all residents of the Clifton House for Boys, set out to beat up "queers" in Riverdale Park, a municipal park situated close by. The park had a reputation of being a place frequented by homosexuals. The youth sought out and physically beat up three men who were complete strangers to them. The assaults were completely unprovoked. It was not a melee. After the first victim was assaulted, he was left bloodied, beaten and lying on the ground. The youths then sought out and beat up a second victim, and after finishing with him, found a third. They also were left lying on the ground. All the victims were found either unconscious or only semi-conscious. The assaults were carried out with indescribable brutality. Although no weapons were used, the respondents beat their victims with their fists and kicked them.

[para61] At the time of the offence, Atkinson was 17 years

[para62] The Court stated:

"As a general principle in considering what an appropriate sentence should be for a youthful offender the paramount consideration should be their immediate rehabilitation, and the length of the sentence determined by consideration of individual rather than general deterrence. However in assaults of this nature, that principle should not be the paramount consideration."

[para63] The Judge then went on to quote from the landmark case of Regina v. Ingram and Grimsdale (1977), 35 C.C.C. (2d) 376 which was a precursor and instrumental to the enactment of S. 718.2 of the Criminal Code:

"In the case of R. v. Ingram and Grimsdale (1977) 35 C.C.C. (2d) 376, this Court made the following observations at p. 379:

"It is a fundamental principle of our society that every member must respect the dignity, privacy and when respect for the rights of others decreases, and, in that manner, assaults such as occurred in this case attack the very fabric of our society. Parliament's concern for the incitement of racial hatred is reflected in s. 281 of the Criminal Code. An assault which is racially motivated renders the offence more heinous. Such assaults, unfortunately, invite imitation and repetition by others and incite retaliation. The danger is even greater in a multi-cultural, pluralistic urban society. The sentence imposed must be one which expresses the public abhorrence for such conduct and their refusal to countenance it."

[para64] Dubin J.A continues on page 2 of his judgment:

"The learned trial Judge appears to have been of the opinion that what was stated in the case of R. v. Ingram and Grimsdale, was not relevant since that case was concerned with a racially motivated attack. While in R. v. Ingram and Grimsdale the attack was racially motivated, the principles set forth in the judgment are assaults in this case should have been considered by the trial Judge as an aggravating factor in imposing sentence. We think the learned trial Judge erred in failing to give effect to this principle in imposing the sentences under appeal.

Here, a vicious assault was carried out by a cowardly gang of youths who selected innocent victims, complete strangers, who had the misfortune of being in a public park on that occasion. It is the type of offence which the public should not and will not countenance, and the sentence imposed must reflect that.

The maximum term of imprisonment imposed by Parliament for this offence is one of five years. We are all satisfied that the sentence imposed by the learned trial Judge was completely disproportionate to the gravity of the offences that were committed by these youths and must be increased. But for the age of the accused lengthy penitentiary terms would have been imposed. However, having regard to the age of the three accused, the fact that Ing and Roberts were first offenders, and that of violence, we think that the maximum term permissible for a reformatory sentence should be imposed."

[para65] In arriving at a decision I am also mindful of what was said by a former Chief Justice of the Province in R. v. A.H. (1991), 65 C.C.C. (3d) 116 (B.C.C.A.) wherein he said, dealing with a young offender who had stabbed a teenager and rendered him a paraplegic:

"Accordingly it becomes necessary squarely to face the dilemma mentioned above between protecting society and rehabilitation. If I thought for a moment that leaving this youth in closed custody for the balance of his sentence is necessary to protect society, I would quickly dismiss the appeal. In my judgment however the maximum deterrent or other value of this sentence achieved, both for the youth and his peer group and others, was when he was sentenced to a term of imprisonment. This youth is not a threat to public safety and the deterrent value of the sentence, if it may be called that, is not enhanced by requiring him to serve out this maximum sentence in closed custody. What happened here, however horrible, was moment. It was not planned and it was not in my judgment considered youthful criminality."

[para66] I should state with the greatest respect that I consider the reasoning in that judgment somewhat flawed.

However I note that in the recent British Columbia Court of Appeal decision R. v. S.L. (quoted extensively above) this judgment was referred to with approbation and I am therefore bound to consider it. In any event I do not find that the circumstances of this case suggest "youthful bad judgment in the heat of a tragic moment."

[para67] Having reviewed the authorities cited by both Crown counsel and Defence counsel, and the assessments and transcripts provided and hearing the submissions made, I find that the egregious and extreme aggravating circumstances of this offence warrants a sentence that must reflect the abhorrence felt by a civilized society for such a heinous crime. The words of Dubin J.A are worth repeating here: "It is the type of offence which the public should not and will not countenance, and the sentence imposed must reflect that." I find therefore for all the reasons stated above that a circumstances.

[para68] On reading both the assessments and pre-sentence reports prepared by the Youth Worker and Social Worker I note that both Youth Detention Facilities and Adult Detention Facilities have excellent rehabilitation programs which if the accused chooses to participate, would rehabilitate him and certainly help his reintegration into society. In any event he must by statute spend part of whatever custodial sentence is imposed in the community.

[para69] As I stated above, I feel that the accused has not only benefitted by avoiding the rigours of an adult sentence by the Crown withdrawing its application to raise him to adult Court, but I find that the mitigating circumstances even offered by the Crown somewhat diminished by the fact that the accused confessed some one and a half years after the offence and after rumours were going around his school about his involvement. Even then he first denied his involvement and it was only after skillful interrogation by the police that he confessed.

recommendation of 28 to 32 months but impose the maximum permitted under the Youth Criminal Justice Act for this offence and impose a Custody and Supervision Order for a period of three years. I order that two thirds of this sentence should be served in closed custody and one third in the community under conditional supervision in accordance with Section 105 of the Youth Criminal Justice Act.

ROMILLY YOUTH CT. J.

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