



Criminal Law News

Robert Gee

R. v. D.B. - Good Law Made by Good Lawyers from Right Here in Hamilton

This case just goes to show that you never know when someone walks through your door, or your phone rings, where their case may wind up taking you. I'll bet when D.B., a young person, contacted local lawyer Dean Paquette's office looking for help, neither Dean, nor his associate Paola Konge, thought they'd wind up in Ottawa at the Supreme Court making important new law. But, that's just what happened here.

The facts of this case were relatively straightforward and not too uncommon amongst young males. It was the unexpected tragic consequences on this occasion that led this case down the path it ended up taking. On December 13, 2003, D.B., who was 17 at the time, was at Limeridge Mall in Hamilton with a group of friends. The 18 year-old victim was also at the mall with a group of his friends. For some reason, the two groups encountered one another and started to exchange insults. A fight erupted between members of the two rival groups. The victim, while watching this fight with his hands at his sides, was sucker-punched by D.B. and fell to the ground. D.B. then jumped atop of him and punched him four more times at which point the victim lost consciousness. D.B. and his group then fled.

An ambulance was called, and by the time it arrived the victim had no vital signs. He was immediately transported to the hospital, but could not be revived. Later that night, D.B. received a call ad-

vising him that the victim had died and the next morning he turned himself into the police. On July 2, 2004, D.B. pleaded guilty to manslaughter.

Since he was 17 at the time of the commission of the offence, D.B. was subject to the provisions of the *Youth Criminal Justice Act* (the "YCJA"). One of the provisions of the YCJA was that a number of the more serious offences, such as murder, manslaughter, attempted murder etc. are deemed what was called "presumptive offences." If a young person, 14 or older committed a presumptive offence, an adult sentence was automatically imposed, unless the young person could prove, in all the circumstances, that a youth sentence was more appropriate.

Given that he was 17, and that he committed manslaughter, that's the spot D.B. found himself in. He had to convince the court that a youth sentence was more appropriate, and that's precisely what Dean Paquette set out to do. But that wasn't all Dean had in mind. In addition to arguing for a youth sentence in this matter, he also set out to challenge to constitutionality of the reverse onus provisions of the YCJA that required the defence to prove a youth sentence was appropriate instead of leaving the burden of proof where it belonged, with the Crown.

The case was heard initially in the Superior Court here in Hamilton where it came on before a lifelong Hamilton trained lawyer turned jurist, Justice Thomas Lofchik. Justice Lofchik, who

also deserves a great measure of credit in this case, decided the case in favour of D.B. and agreed with Mr. Paquette's arguments that the reverse onus provisions for presumptive offences were contrary to section 7 of the Charter and not saved by section 1, and therefore unconstitutional. He also ultimately decided that D.B. would be better served by a youth sentence and in the end imposed an intensive rehabilitative youth sentence on D.B.

The Crown appealed. A unanimous Court of Appeal though, dismissed the appeal and upheld the decision of Justice Lofchik. The Crown appealed further to the Supreme Court. At this point, it should be noted that a lot of counsel would have referred the matter out to those who specialize in appeal and Supreme Court work, but to their credit, Dean and his associate Paola Konge stuck with it to the bitter end. And not only is an appearance before the Supreme Court enormously stressful, it's a heck of a lot of work. The research, the briefs of authorities and the factum that were prepared primarily by Ms. Konge were a monumental task, not to mention the argument before the court itself, which was undertaken by Dean.

At the Supreme Court it was Dean and Paola for D.B. up against the Appellant, represented by the Attorney General's office from Ontario, and if that isn't enough, the A-Gs from five other provinces intervened as did a representative for Justice for Children and Youth. Ouch, sounds like David v. Goliath II. But, as in the original version of David v. Goliath, the little guy again came out on top.

At the Supreme Court though the decision was closer, that is, about as close as it gets: a 5-4 split. For the majority Madam Justice Abella found that the reverse onus provisions of the YCJA that required young persons to prove a youth sentence was appropriate for presumptive offences was a violation of s. 7 of the Charter and not saved by s. 1.

What Justice Abella said was that since at least 1857 through various parliamentary enactments up to the present YCJA, we have treated youthful offenders differently from adult offenders. We do it because we recognize a lesser level of moral blameworthiness for youthful offenders. Here's how she described it at par. 41:

[41] What the onus provisions do engage, in my view, is what flows from why we have a separate legal and sentencing regime for young people, namely that because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a presumption of diminished moral blameworthiness or culpability. This presumption is the principle at issue here and it is a presumption that has resulted in the entire youth sentencing scheme, with its unique approach to punishment.

What she found was that in relation to the presumptive offences, since it is the offence itself that triggers a more severe penalty as opposed to the maturity level of the offender, these reverse onus provisions cannot be reconciled with our concept of the treatment of youthful offenders and as such are unconstitutional. She summed it up in this way at par. 76:

[76] No one seriously disputes that there are wide variations in the maturity and sophistication of young persons over the age of 14 who commit serious offences. But the onus provisions in the presumptive offences sentencing regime stipulate that it is the offence, rather than the age of the person, that determines how he or she should be sentenced. This clearly deprives young people of the ben-

efit of the presumption of diminished moral blameworthiness based on age. By depriving them of this presumption because of the crime and despite their age, and by putting the onus on them to prove that they remain entitled to the procedural and substantive protections to which their age entitles them, including a youth sentence, the onus provisions infringe a principle of fundamental justice.

She further held at par 82 that in adult sentencing procedures, the burden is always on the Crown to demonstrate why a more serious sentence is justified and since the YCJA scheme reverses this, s. 7 of the Charter is violated.

The minority judgment, written by Justice Rothstein would have upheld the reverse onus provisions. He recognized the lesser moral blameworthiness aspect of youthful offenders but found that other provisions in the YCJA, even in the cases of the imposition of adult sentences, adequately reflect this notion to the extent that s. 7 is not violated. For instance, he cites the example of youths sentenced as adults for murder being eligible for parole earlier than their adult counterparts, as but one way their lesser moral culpability is preserved.

What I should also point out is that Supreme Court also upheld the original youth sentence imposed on D.B. by Justice Lofchik. Remember, just because the reverse onus provisions were struck down, that doesn't mean a youthful offender can't be subject to an adult sentence, it only means that the burden remains with the Crown to justify an adult sentence in the proper case. Although it still would have been a great victory for Dean and Paola if the Supreme Court had just struck down the reverse onus provisions, it wouldn't have been much of a victory for D.B. if he found himself sentenced as an adult

in any event.

This case just goes to show what we here have known all along, that extremely talented and extremely intelligent lawyers practise good law beyond the boundaries of the GTA. It's just great to see when counsel such as Dean and Paola (and Justice Lofchik) can remind the blokes in Toronto and Ottawa of this as well.

(For the full case see: *R. v. D.B.*, 2008 SCC 25, released May 16, 2008.) ■

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