

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Gannon*, 2015 NSPC 97

Date: September 24, 2015

Docket: 2780151

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Kyle Gannon

LIBRARY HEADING

JUDGE: The Honourable Judge Frank P. Hoskins, J.P.C.

DECISION: September 24, 2015

SUBJECT: *criminal law – conditional sentence – swarming – assault causing bodily harm – principles of sentencing – purposes of sentencing – first offenders – rehabilitation – youthful offenders*

SUMMARY:

The accused and two of his friends, B and C swarmed the victim and assaulted him without provocation while he was attempting to break-up a physical confrontation between several female combatants. The accused, B and C punched the victim numerous times until he fell to the ground. C then kicked the victim as he lay motionless before the three men walked away leaving the victim in need of medical assistance. The victim sustained physical injuries, including fractures to his facial bones and a concussion, coupled with emotional trauma which prevented him from going to work for 48 days. The accused was charged with assault causing bodily harm contrary to section 267(b) of the *Criminal Code*.

HELD:

The accused is guilty of assault causing bodily harm contrary to section 267(b) of the *Criminal Code*. The sentence ordered is a 12-month conditional sentence and 18-month period of probation.

The sentencing of youthful, first offenders requires careful consideration of their unique and individual characteristics. This is necessary in order to impose a sentence that balances the principles of sentencing and emphasizes the purposes of deterrence and denunciation without abandoning the goal of rehabilitation. While sentencing for youthful offenders should be directed at rehabilitation and reformation, in cases of serious violence a sentence is required that emphasizes denunciation and deterrence. The court must impose a sentence that fits not only the offence but also the offender.

Conditional sentences can provide sufficient denunciation and deterrence for more serious offences. No offences are excluded from the conditional sentencing regime *except* those with a minimum term of imprisonment. There should not be presumptions in favour of or against a conditional sentence for specific offences, including violent offences.

Given the circumstance of the offence in the present case, denunciation of the unlawful conduct and specific and general deterrence must be considered in the context of a serious crime of violence. While a short period of incarceration may express society's condemnation for the offence, a lengthy term of imprisonment in the community will address society's condemnation and also fulfill the objective of rehabilitating, restoring and promoting a sense of responsibility in the accused. The accused is a first offender, without any previous convictions and was not subject to any court orders at the time of the offence. The accused's participation in the swarming and assault of the victim is a serious offence which calls for a serious disposition, however, his actions were not as egregious as C's act of kicking the victim in the head while he lay motionless on the ground. The 12-month conditional sentence will appropriately achieve the principles of denunciation and deterrence by restricting the accused's liberty. The significant period of probation will provide the accused the opportunity to further rehabilitate himself and the use of carefully crafted conditions will promote a sense of responsibility.

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JUDGE: The Honourable Frank P. Hoskins

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CHARGES: THAT on or about the 8th day of July, 2014 at or near Dartmouth, Nova Scotia did in committing an assault on Garrett Ward, cause bodily harm to Garrett Ward, contrary to section 267(b) of the *Criminal Code*.

COUNSEL: Michelle James, for the Crown
Laura McCarthy, for the Defence

By the Court (Orally):

Background

[1] On July 8, 2014, Kyle Gannon and two of his friends, Mr. Power and Mr. Brushett, assaulted a Good Samaritan while he was attempting to break-up a physical confrontation between female combatants in the parking lot of the Bus Terminal located in Dartmouth.

[2] As shown in the video, Exhibit 1, the victim, a transit operator, (bus driver), observed several women engaged in a physical confrontation in the parking lot of the bus terminal. He exited the bus and hurried to intervene in the physical confrontation. As he was breaking-up the confrontation, he was suddenly and unexpectedly struck by the three young men. He was punched by two men, Mr. Power, and Mr. Gannon, and was viscously kicked by Mr. Brushett while he lay motionless on the ground, defenceless and helpless.

[3] As Mr. Ward, lay motionless on the ground, after having been repeatedly assaulted, the three young men walked away leaving Mr. Ward in need of immediate assistance.

[4] Mr. Ward sustained physical injuries, including fractures to his facial bones and a concussion, coupled with emotional trauma which prevented him from going to work for 48 days.

[5] As previously mentioned, Mr. Ward was attacked while he was merely trying to break-up a physical confrontation between several combatants.

[6] Mr. Gannon pleaded guilty to offence of assault causing bodily harm.

[7] On Friday, September 18, 2015, last week, Mr. Brushett was sentenced for his involvement in this incident. He received a six month custodial sentence coupled with a 24 month period of probation, for the assault causing bodily harm, and one month, concurrent, for breaching probation. I imposed a concurrent sentence after having considered the principles of proportionality and totality.

[8] In my view, there are significant distinguishing features between the personal circumstances surrounding Mr. Brushett, and Mr. Gannon, as well as, their respective conduct in committing the offence, which will be addressed later in these reasons. I mentioned this because I am mindful of the *disparity principle* pursuant to s. 718.2 of the *Criminal Code*, which states that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This means that any disparity between sanctions for different offenders requires justification. In this case, there is disparity, as Mr. Gannon comes before the court as a first offender, without any previous convictions, and was not subject to any court orders at the time of the offence. Moreover, his actions of punching Mr. Ward are not as egregious as Mr. Brushett's actions of kicking Mr. Ward in the head, while he lay motionless on the ground. Nonetheless, Mr. Gannon's action of punching a defenceless person, who was in the process of breaking up a violent physical confrontation, is a serious offence which calls for a serious disposition.

The Aggravating Circumstances Surrounding the Offence and Offender

[9] There are several aggravating factors surrounding the offence and offender which include the following:

- a) The assault which caused bodily harm was a brutal, unprovoked, random, and senseless attack;
- b) Mr. Gannon viscerously punched Mr. Ward while he was in a defenceless and helpless position; and
- c) The unprovoked assault on Mr. Ward by Mr. Gannon and the other two men was a swarming incident wherein all three men committed random and gratuitous assaultive behaviour on Mr. Ward while he was involved in breaking up a physical confrontation between several young women. As shown in the video, Exhibit 1, Mr. Ward was attacked by the men as he was involved with the female combatants. He was defenceless as the assault against him occurred. He was struck repeatedly by more than one person, as he was surrounded by a flurry of punches, including Mr. Gannon's punches.

[10] The circumstances of this offence are unfortunately all too common in this community and often end in tragic consequences. As observed by Justice Pugsley in *R. v. Cormier*, [1994] N.S.J.No. 150, wherein he stated at para. 7:

Judicial notice can be taken of the increased activity of gangs of youths "swarming" innocent citizens on the streets of Halifax-Dartmouth over the last several years. This was one such attack. It was directed at an older man of small stature, who was acting as a good samaritan. The public has a right to walk the streets of the metropolitan area without fear of being terrorized and beaten by groups of young men. Those who engage in such activities must know that such acts of random violence will be punished by custodial

sentences.

[11] Mr. Ward, the victim, has sustained bodily harm, which includes emotional trauma that has had lasting effect on him, including preventing him from working for 48 days.

[12] As I stressed in the *Brushett* sentencing decision, (unreported), it is my view that Mr. Ward was not acting in his duties as a bus driver when he left the bus and attempted to break-up the physical confrontation between the female combatants, rather he was acting as a Good Samaritan. Put differently, he was not engaged in the performance of his duties when he was attacked. Had he been assaulted while on the bus or while in the execution of his duties and/or responsibilities as a bus driver, which related to his performance of his duties, then it would have been a statutory aggravating factor. Nonetheless, it is still an aggravating factor when a Good Samaritan is trying to do something good and is assaulted.

The Mitigating Circumstances Surrounding the Offence and Offender

[13] There are several mitigating factors surrounding the offence and offender which must be considered, including the following:

- a) Mr. Gannon pleaded guilty and accepts full responsibility for the offence;
- b) He is a youthful first offender, without any previous convictions;
- c) He has expressed remorse for his behavior;
- d) His pre-sentence report is positive, as are the letters of support which

have been submitted;

- e) This offence seems to have been out of character for Mr. Gannon;
- f) He was acting under the influence of alcohol at the time of the offence;
- g) He has expressed a willingness to engage in rehabilitative treatment programs, and has enrolled in an anger management program; and
- h) Mr. Gannon has the support of his family and the community.

Positions of the Crown and Defence

[14] The Crown submits that a fit and proper punishment for these offences and offender, Mr. Gammon, is a custodial sentence of 9 months, followed by a period of probation for 24 months.

[15] The Crown contends that the gravity of this violent offence requires a sentence which emphasizes denunciation and deterrence, and thus, it is necessary to incarcerate Mr. Gannon.

[16] The defence contends that a Conditional Sentence Order, a term of imprisonment to be served in the community, is an appropriate disposition for the offences and offender as the principle of denunciation and deterrence can be achieved with stringent conditions, particularly if the length of the conditional sentence is increased over that which might be imposed for a custodial sentence.

[17] Further, the Defence submits that while denunciation and deterrence are important considerations, other sentencing principles are also important to consider

given that Mr. Gannon is a youthful first offender, having never been convicted of a criminal offence and thus rehabilitation should not be abandoned. The Defence submits that Mr. Gannon is attempting to make real and substantial positive changes in his life, including engaging in a treatment program, and is willing to participate in any further rehabilitative program.

The Personal Circumstances Surrounding Mr. Gannon

[18] Mr. Gannon is 20 years of age, having been born on July 8, 1994. According to the Pre-Sentence Report (PSR) dated, July 8, 2015, he is the eldest of six children. He had a normal upbringing; in that, he has never been subject to any form of abuse or neglect. He has a close relationship with his parents and his siblings.

[19] It would appear from the PSR and the letters submitted to the Court, this offence was out of character for Mr. Gannon.

[20] As noted in the PSR at p. 3, Mr. Gannon's mother commented:

Kyle has always been a quiet, respectful child. We never had any behaviour problems with him when he was growing up. He is sincere in trying to find work and I have been encouraging him not get discouraged. We have never seen any problems with alcohol or drugs and never had any evidence that he has anger problems.

[21] Mr. Gannon completed his grade 12 at Citadel High School in June 2012. The author of the PSR, at p. 3, noted that Mr. Gannon described himself as "an average student with satisfactory attendance and no major behaviour issues".

[22] As of the date of the PSR, the most recent PSR, dated July 8, 2015, the report

states:

The subject is currently unemployed. Mr. Gannon finished an employment program on June 1, 2015 which had been sponsored by the Halifax Regional Municipality. This program commenced in March, 2015 and exposed him to work experience in Culinary Arts at St Andrew's Recreation Centre, Halifax NS. In June, 2015 the subject was employed by a moving company, but was dismissed as he was late reporting for work. Between January and June 2014, Mr. Gannon was employed in the construction industry, but reported that he quit due to safety concerns working around asbestos. Mr. Gannon was employed as a dance instructor for one year in September, 2013 with the Halifax Regional Municipality. Information was received from Kilby McRae, Employment Counsellor at Phoenix Learning and Employment Centre. Ms. McRae noted that the subject utilized their services in June, 2014 for an Assisted Job Search. She described Mr. Gannon as: "It was very pleasant working with Kyle who readily took advice as we revised his resume and talked about employment possibilities. Within weeks Kyle found employment with a construction company. He worked with the company until March, 2015. Since then he has been steadily looking for work. Kyle understands the value of working. I believe he will soon find employment based on his willingness to work hard and on his positive personality.

[23] Under the heading in the PSR, *Health and Lifestyle*, the author noted:

The subject noted that he is physically healthy. Mr. Gannon noted that he has never had any difficulties with emotional or mental health

issues. With regard to alcohol, Mr. Gannon indicated he had his first drink at the age of 17 and is an occasional light social drinker. With regard to other substances, the subject noted that he used cannabis on two isolated occasions but did not like the way it made him feel. Mr. Gannon does not feel that he has any issues with either alcohol or any other substances. Mr. Gannon met with a counsellor on five occasions in the spring of 2015, but could not remember her name and did not find the sessions helpful.

The subject is enrolled in the Anger Management Program for Men sponsored by Veith House. This writer spoke to Chris Hessian, the Social Worker at Veith House who indicated that this is an eight week program held at Veith House and facilitated by social workers. The program is held one evening per week and offers a cognitive behavioural approach to dealing with anger issues and stresses the stages of change. Mr. Gannon indicated that he is quite motivated to complete this program.

This writer spoke to Dalyce Loppie who indicated she has known the subject for five years. Ms. Loppie described the subject as follows: "I have always found Kyle to be friendly, dependable and honest. Kyle is very dedicated to his family and friends. He loves to be involved with the community and has a strong passion for dance and hopes one day to have his own dance studio. He possesses a great deal of integrity and constantly strives to make sure he is doing the right thing." This writer also spoke to Caitlin Fenton who indicated that she and the subject have been friends all their lives. Ms. Fenton indicated: "We have been close friends since elementary school and I have watched him grow into a nice confident young man. He is a good

person who is dedicated to his family and community. I would describe him as dependable, responsible, honest and courteous. He is currently looking for work and is also actively in getting involved in anger classes and employment programs that will benefit his life."

[24] Also, under the *Offender Profile* section of the PSR, it states:

The subject presented himself in a polite and insightful manner during the interview for this report. Mr. Gannon assumed full responsibility for his actions with regard to this offence expressing genuine remorse. The offender noted that the offence occurred on his birthday and that he had been drinking. Mr. Gannon did not use these actions to excuse his behaviour stressing that he does not have any problems with alcohol and is usually a calm, passive individual.

[25] As previously stated, the writer of the PSR noted that Mr. Gannon presented himself in a polite and insightful manner during the interview He assumed full responsibility for his actions with regard to the offence while expressing genuine remorse. Mr. Gannon explained to the writer of the PSR that on the date in question, he was celebrating his birthday and that he had been drinking. According to the writer of the report, Mr. Gannon "did not use these actions to excuse his behaviour stressing that he does not have any problems with alcohol and is usually a calm, passive individual".

[26] The author of the PSR noted at pages 4 to 5, under the section *Assessment of Community Alternative/Resources*, that:

Kyle Louis Gannon is a 20 year old first time offender who is before

the Court on one charge of assault causing bodily harm. The subject has expressed full responsibility and remorse for his actions concerning this incident. Mr. Gannon has enrolled in an anger management program at Veith House. Collateral sources indicate that the subject has never had any issues with alcohol. Mr. Gannon has not been able to gain full time meaningful employment and would appear to lack focus as to his future occupational goals. He has expressed past interest in completing a course at the Nova Scotia Community College, but does not have any concrete plans as to choosing a program. Should the Court deem Mr. Gannon a suitable candidate for community supervision it is recommended that he complete the anger management program at Veith House and make a concerted effort to seek full time employment.

[27] I have also considered the letters of support from Mr. Gannon's, Grandmother, his mother, and a good friend of the family, as well a *Certificate of Achievement* that Mr. Gannon received in recognition of his participation in the Youth Force Program.

The Law

[28] The offence of assault causing bodily harm is a hybrid-offence or a dual procedural offence, and in this case the Crown elected to proceed *summarily*. Therefore, the maximum punishment for this offence is 18 months incarceration.

[29] Generally, it is recognized that a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender.

[30] Judges are required, of course, to sentence offenders in accordance with the purpose, objectives and principles of sentencing found in ss. 718, 718.1 and 718.2 of the *Criminal Code*. This includes the fundamental principle that “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”.

[31] The gravity of an offence lies in the nature and comparative seriousness of the offence, in the circumstances of its commission, and in the harm caused.

[32] Although the sentencing process is highly contextual and necessarily an individualized process, the judge must also consider the nature of the offence, the victims and community. As Lamer C.J. observed in *R. v. M.(C.A.)*, [1996] 1 S.C. R. 500, at para. 92, sentencing requires an individualized focus, not only of the offender, but also of the victim and community as well.

[33] As stated, sentencing is governed by the specific purpose and general principles of sentencing provided for in the *Criminal Code* under s. 718, and the common law.

[34] In addition to complying with these principles of sentencing, dispositions or sentences must promote one or more of the six objectives identified in s. 718; (a) to (f), inclusive.

[35] The purpose of sentencing is achieved by blending the various objectives identified in s. 718 (a) to (f). The proper blending of those objectives depends upon the nature of the offence and the circumstances of the offender. Thus, the judge is often faced with the difficult challenge of determining which objective or combined deserves priority. Indeed, s. 718.1 directs that the sentence imposed must fit the

offence and offender. Section 718.1 is the codification of the fundamental principle of sentencing which is the principle of proportionality. This principle is deeply rooted in notions of fairness and justice.

[36] I have considered the fundamental purpose of sentencing as clearly and succinctly expressed in s. 718, of the *Criminal Code*, the fundamental principle as stated in s. 718.1 of the *Criminal Code*, and the other sentencing principles as set out in 718.2 the *Criminal Code*, which stipulates that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or offender.

[37] I am also mindful of the *principle of restraint* which underlies the provisions of s. 718 of the *Criminal Code*.

[38] Accordingly, in accordance with s. 726.2 of the *Criminal Code*, what follows are my reasons for imposing the sentence that I view as a just and appropriate for this offender and for the offence.

[39] The Nova Scotia Court of Appeal has repeatedly and consistently emphasized that serious crimes of violence will be subject to sentences of imprisonment. This has been the approach in Nova Scotia, at least, since the seminal decision of *R. v. Perlin*, [1997] 23 N.S.R.(2d) 66, at para. 8, wherein MacDonald J.A., in writing for the Court of Appeal, stated:

In my opinion, the overriding consideration in sentencing with respect to crimes of violence must be deterrence, and that it is for such reason that, save for exceptional cases, substantial terms of imprisonment must be imposed.

[40] In Nova Scotia, as in other jurisdictions, the range of sentences imposed for the offence of assault causing bodily harm varies considerably. The range of sentence for this offence is very broad, it extends from the suspension of the passing of sentence to periods incarceration. Each case appears to turn very much on its own unique set of circumstances. Thus, it is often a difficult challenge to apply the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. However, what emerges from the case law are several significant factors that are often considered and applied in determination of a fit and just disposition, including the following:

- a) the degree of force used;
- b) the victim's injuries, the impact upon the victim or victims;
- c) the degree of premeditation;
- d) the number of people involved;
- e) the offender's criminal record and propensity for violence;
- f) the frequency of the offence in the community;
- g) the degree of provocation;
- h) elements of self-defence;
- i) intoxication to some degree;
- j) motive;
- k) the victim's conduct, character and lifestyle;

- l) the degree of violence used;
- m) the character of the accused;
- n) the age of the accused;
- o) the support of family and community members;
- p) the post -arrest conduct of the accused;
- q) remand time or the conditions of bail;
- r) the expression of remorse;
- s) the acceptance of responsibility, a guilty plea; and
- t) a positive or negative pre-sentence report.

[41] This list is not meant to be exhaustive but a mere demonstration of the myriad of factors that a court must consider in fashioning a just and appropriate sentence.

[42] As stated, the purpose of sentencing is to impose “just sanctions”. A *just sanction* is one that is deserved. A fit sentence in that context is one that is to commensurate with the gravity of the offence and the moral blameworthiness of the offender.

[43] In *Proulx*, [2000] 1 S.C.R. 61, at para. 82, Chief Justice Lamer repeated that principle stating:

Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the punishment fits the crime. Disparity in sentencing for similar offences is a natural

consequence of the fact the sentence must fit not only the offence but also the offender.

[44] In emphasizing the aggravating factors surrounding the commission of the offence, in the present case, the Crown stressed that this case should be characterized as a *swarming case*, because its circumstances surrounding it are similar to the circumstances in the *Cormier* case, and in *R. v. MacKenzie*, [1997] N.S.J.No. 150.

[45] I agree that the circumstances of this case (the case at bar) are similar to the circumstances in the *Cormier* case and in the *Mackenzie* case; in that, they all involve a random, unprovoked assault by several accused attacking, a helpless and defenceless person, for senseless reasons. There are, however, distinguishing features.

[46] In the *Cormier* case, three young adults repeatedly assaulted an elderly man acting as a Good Samaritan. The victim was travelling on a bus in Halifax. Three men were causing problems on the bus, and the victim intervened as a Good Samaritan. When he got off the bus, the accused, after taunting him on the bus, exited the bus at the same time as the victim. They followed the victim, and then started jostling and pushing him. The accused swarmed him, knocked his glasses to the sidewalk and proceeded to beat him. He was knocked almost unconscious by some of the blows. He suffered a fractured nose, two black eyes and suffered from severe headaches which caused him to miss work for a week. He continued to suffer headaches at the time of sentencing, some 15 months after the assault.

[47] In delivering the judgment for the Court in *Cormier*, Pugsley, J.A., at para. 37, explained why he had no hesitation in concluding that a custodial sentence was mandated in that case, notwithstanding that the appellant was a youthful first

offender. He wrote:

I come to this conclusion for the following reasons:

1. The attack on Mr. Gunning was completely unprovoked. He made no response to the provocative and aggressive behaviour directed towards him on the bus. The group of three made the choice to get off at Mr. Gunning's stop, only because he exited.

2. The physical abuse started in the bus. The respondent could reasonably expect it would continue, and accelerate, once the group decided to exit and pursue Mr. Gunning.

3. Mr. Gunning was struck repeatedly on the back and shoulders with the plastic strip by Berniquez. The respondent actively joined in the violence and intimidation by elbowing and jostling Mr. Gunning on one side while Harvey performed the same role on the other side. All three attempted to intimidate the victim by directing karate kicks towards him. Mr. Gunning testified their actions were meant "to terrorize me and they worked".

4. Mr. Gunning's plea to be left alone was greeted with a blow knocking his glasses off. When he attempted to retrieve them, they were stomped on by the respondent.

5. The violence reached a new level when the respondent struck Mr. Gunning in the temple while the victim's arms were about the respondent's waist. This blow, it is acknowledged by

the respondent, was the most significant blow struck by any of the three. It is not unreasonable to conclude that it was a major cause of the physical injuries suffered by Mr. Gunning.

6. Mr. Gunning was an older man of small stature. Berniquez, Harvey and the respondent were a great deal younger, much larger and significantly more robust.

7. Judicial notice can be taken of the increased activity of gangs of youths "swarming" innocent citizens on the streets of Halifax-Dartmouth over the last several years. This was one such attack. It was directed at an older man of small stature, who was acting as a Good Samaritan. The public has a right to walk the streets of the metropolitan area without fear of being terrorized and beaten by groups of young men. Those who engage in such activities must know that such acts of random violence will be punished by custodial sentences.

[48] Unlike in the case at bar, the circumstances in the *Cormier* case involve an offence that occurred over a longer period of time where there was a gradual persistence of intimidation, which included taunting and threatening behavior, that culminated in an attack by the three accused, who repeatedly struck the victim resulting in his treatment in the hospital for a bloodied and fractured nose, two black eyes, and severe headaches.

[49] In this case, while the attack, the assault, on Mr. Ward, was more spontaneous, and occurred rather quickly, the results were similar; in that, Mr. Ward sustained physical and emotional trauma. Mr. Gannon's actions of punching Mr. Ward while

he was engaged in breaking up a physical confrontation between female combatants, which included Mr. Gannon's sister, is not as egregious as the serious assault inflicted by Mr. Brushett when he in kicked or stomped on Mr. Ward's head as he laid motionless on the ground. Mr. Bruschetti's kick was directed towards Mr. Ward's head with a significant degree of force which could have caused much more serious injury. The nature and manner of the kick is indicative of a real intent to cause serious bodily harm. And it seems from watching the video, Exhibit 1, that it was, indeed, vicious.

[50] Having viewed the video, Exhibit 1, it appears that Mr. Gannon was video-taping the physical confrontation between the female combatants, one of which was Mr. Gannon's sister, as I said, when he suddenly moved towards Mr. Ward punched him and then backed off into the crowd.

[51] As previously mentioned, the *MacKenzie* case is factually similar to the case at bar. In that case the circumstances surrounding the offence are set out paras. 1 to 3, as follows:

1. On the early morning hours of July the 29th, 1995, Mr. Walter Proctor, the victim in this case, was coming out of a pizza shop or sub shop on Main Street in Antigonish. He observed a fight going on between two females. He noticed that there was a large crowd around these two females basically cheering them on and doing nothing to slow down the fight. He noticed as well that one of the females was really faring badly in the fight.
2. Mr. Proctor viewed the fight, went over and separated the two girls, and then he tried to leave the area. He then was leaving the area

of the fight so as to avoid any further involvement in the incident. Instead of letting him leave, people in the crowd began taunting him. I am sure that anybody, in terms of our society, who witnessed that type of activity would be ashamed of the people that were taunting somebody who did nothing more than break up a fight where one person was being beaten or at least faring very badly. The mob actions escalated beyond taunting and Mr. Proctor was struck in the back of the head with a beer bottle. He was knocked to the ground. He was kicked and he was beaten.

3. It was noted in the Crown brief and was made clear in the evidence that he was pummeled by 15 to 20 people in the crowd including the respondent, Mr. MacKenzie. As a result of this pummeling or beating, Mr. Proctor suffered a severe break to his lower right leg above the ankle, as well as torn ligaments. He suffered a concussion, a broken nose, a black eye, cracked ribs and dislocation of his right ankle. He required an operation at the Victoria General Hospital to insert a six inch steel plate with screws to stabilize his leg.

At time of the trial, it was noted that he now suffers chronic tendinitis and muscle pain around the ankle which could lead to arthritis. He spent a week in a hospital and was off work for three months. It was a further two and a half months before he could do any physical work at his place of employment.

At the time of trial, September the 4th, 1996, well over a year after the event, Mr. Proctor was still not fully recovered from his injury. He had pain in his ankle every day. He spent two months in extensive physiotherapy and the broken ribs and broken nose took some time to

heal.

[52] On summary appeal, Justice Scanlan held that the sentence imposed by the trial judge of 90 days in custody was "clearly inadequate" and substituted a sentence of six months in jail. In considering whether a conditional sentence order would be an appropriate disposition for the offence and offender Justice Scanlan noted that crimes of violence which involved a "brutal and intentional application of force" by the offender and others as a party to a "mob scene" called for periods of imprisonment to be served in prison. He stated that crimes of this sort, where there is violence, the overall objectives as set out in s. 718 of the *Criminal Code* require, except in exceptional circumstances, that actual imprisonment be imposed. He also expressed the view that crimes of violence such as that in the *MacKenzie* case, as noted in the *Cormier* case, cry out for periods of imprisonment to be served in prison.

[53] Although there are aspects of the *MacKenzie* case which are similar to the instant case, the victim's injuries in that case were much more significant and long-standing. Moreover, the personal circumstances surrounding Mr. Mackenzie are more similar to Mr. Brushett's personal circumstances than to Mr. Gannon's personal circumstances.

[54] Mr. McKenzie had two prior, related convictions for crimes involving violence which caused Justice Scanlan to question whether anything other than a custodial sentence would deter him. At paras 75 to 76, Justice Scanlan observed:

In this case the conditional sentence did not have any real conditions attached. Some people may say that this sentence was nothing more than an easy probation. Under the *Criminal Code* it cannot be argued that the accused did not receive a custodial sentence. He has served

that sentence at home. The accused was subject to different sanctions for breach of conditions than he might have been for breach of probation.

I am satisfied that in crimes such as this, where there is violence, that the overall objectives as set out in Section 718 require, except in exceptional circumstances, that actual imprisonment be imposed. I am satisfied that in cases such as this, that the community at large would not accord the same respect to a sentence which was served in the community when you consider the circumstances of this offence. I am satisfied that a conditional sentence allows the sentencing judge to take into account the circumstances of the accused and is most appropriate when general deterrence is not a paramount concern. When general deterrence becomes a paramount concern, such as in cases of violence, then the appropriateness of a conditional sentence becomes less obvious. There must be a balancing of the need for general deterrence versus the interest of an accused. Clearly in this case, the need for general deterrence outweighs the benefits to the accused or the community in having the accused serve his sentence in the community. To allow this accused to serve his sentence in the community would not engender respect for the administration of justice. I am satisfied it would not properly denounce the conduct of the accused or others who might choose to partake in this type of mob activity. Crimes of violence such as this, as noted in the Cormier case, cry out for periods of imprisonment. Crimes of violence such as this cry out for periods of imprisonment to be served in prison.

[55] Later in his reasons, Justice Scanlan emphasized that when the crime and the offence cry out for general deterrence, the provisions of s. 718 must be considered.

He stated, at para. 28:

The Court in this case is not prepared to impose a sentence to be served in the community. I am not satisfied it would send the proper message to others who might commit this type of offence. This is not a commercial crime. This is not a crime which is founded in neglect or accident. This was a brutal and intentional application of extreme force by Mr. MacKenzie and others. Mr. MacKenzie was fully a member of and party to that mob scene. He was a party to the entire assault and is to be held equally responsible in terms of the injuries which this victim sustained. He is a man who stands convicted at least twice before of violent offences. I am satisfied that the safety of the community is in danger if this Court does not impose a sentence which sufficiently deters others who might do this type of thing.

[56] In addition to viewing the circumstances surrounding the offence in *MacKenzie* case, as being very serious, a brutal and intentional assault, where Mr. MacKenzie was fully a member of the party to the mob scene, he was also troubled by Mr. Mackenzie's previous convictions for violence.

[57] It should also be parenthetically noted that Justice Scanlan, in *MacKenzie*, at para. 25, alluded to his concern that the conditional sentence order under review "did not have any real conditions attached."

[58] Given the circumstances of the offence in the present case, I agree with counsel that denunciation of the unlawful conduct and specific and general deterrence are important purposes of sentencing in s. 718 which must be considered in the context of a serious crime of violence.

[59] In this case, given Mr. Gannon's youthful age, and his present circumstances, I find that the sentencing decision must also focus on efforts to rehabilitate him, promote a sense of responsibility and to acknowledge harm done to the victim.

[60] In other words, while I must emphasize the principles of denunciation and general deterrence, I must not do so at the exclusion of the other purposes and principles of sentencing under s. 718, such as, s. 718(d) and (f) of the *Code*, and 718.2(d), particularly when dealing with youthful first offenders.

[61] The court must also consider the fundamental sentencing principle found in s. 718.1 of the *Code* which reminds judges that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In this case, given the nature of the assault and injuries suffered by Mr. Ward, I find that the gravity of the offence is at the higher end of a continuum of assaults, since this unprovoked attack, which was brutal and an intentional application of force that caused bodily harm. Mr. Gannon was a party to a very serious assault against an innocent defenceless person. I am also mindful, however, that he was not as morally blameworthy as Mr. Brushett; in that, Mr. Brushett's actions of stomping or kicking the victim in the head while he was laying on the ground is particularly egregious as compared to the assaultive behavior of Mr. Gannon and Mr. Power. In these circumstances, as compared to the other two co-accused, I find that Mr. Brushett's degree of responsibility to be higher. Furthermore, Mr. Power's appears to have initiated the assault by being the first person to assault Mr. Ward.

[62] With respect to other principles of sentencing found in s. 718.2 of the *Code*, I am also required to consider all available sanctions other than imprisonment that are reasonable in the circumstances and not to deprive the offender of his liberty if a less

restrictive sanction is appropriate in all the circumstances of the case.

[63] In this specific case, I am mindful that I am dealing with a *first offender* and thus the *first offender rule* must be considered, as recognized in the decision of *R. v. Stein* (1974), 15 C.C.C. (2nd) 376, at p. 2.

[64] As stated, the purpose of sentencing is to impose “just sanctions”. As I said, a “just sanction” is one that is deserved. A fit sentence in that context is one that is too commensurate with the gravity of the offence and the moral blameworthiness of the offender. In *Proulx*, at para. 82 Chief Justice Lamer reaffirmed that principle wherein he stated:

Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the punishment fits the crime. Disparity in sentencing for similar offences is a natural consequence of the fact the sentence must fit not only the offence but also the offender.

[65] The Ontario Court of Appeal in *R. v. Priest* (1996) 110 C.C.C. (3d) 289, at p. 298, expressed the view that proportionality insures that an individual is not sacrificed “for sake of the common good”.

[66] It is trite to say that an appropriate or reasonable disposition will depend on circumstances of the case in the context of all relevant considerations, which includes not only the personal circumstances of the offender and the degree of responsibility of the offender for the offence, but also the gravity of the offence itself.

[67] In the present case, the accused, Mr. Gannon is only 20 years of age, and is a first offender. He is a young man without a criminal record. Section 718.2(d)

provides that an offender should not be deprived of liberty if a less restrictive sanction may be appropriate. It requires a sentencing judge to consider all available sanctions other than imprisonment that are reasonable in the circumstances.

[68] These provisions exist to discourage imprisonment when another less onerous sanction will also satisfy the relevant sentencing principles. Restraint means that prison is the sanction of last resort. Restraint also means that sentencing courts should seek the least intrusive sentence and the least quantum that will achieve the overall purpose of being appropriate and just disposition.

[69] The principle of restraint, which underlies the provisions of s. 718 of the *Criminal Code*, must be considered, especially in respect to youthful first offenders. I am mindful, however, that as the gravity of the offence become more serious, particularly, in crimes of violence, the mitigating effects of age decrease. However, even in the most serious violent offences, courts have been sensitive to the principle of restraint in cases involving youthful offenders, such as in the decision of the Nova Scotia Court of Appeal in *R. v. Colley*, [1991] N.S.J. No. 62, wherein the Court endorsed the notion that if the need to protect society can be well served by a shorter sentence as by a longer one, the shorter is to be preferred.

[70] Similarly, the Ontario Court of Appeal in *Priest*, at para. 23, has expressed the view that:

Even if a custodial sentence was appropriate in this case, it is a well-established principle of sentencing laid down by this court that a first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purposes of general deterrence.

[71] This sentiment, is often expressed in cases involving *youthful offenders* who have acted out of character in committing serious violent offences, such as in the present case.

[72] Indeed, the Nova Scotia Court of Appeal in *R. v. Bratzer*, 2001 NSCA 166, commented at para. 40 that:

There is ample authority for the proposition that sentences for youthful offenders should be directed at rehabilitation and reformation, not general deterrence. (*R. v. Leask* [1996] M.J. No. 587 (Quicklaw) (C.A.); *R. v. Demeter and Whitmore* (1976), 32 C.C.C. (2d) 379 (Ont.C.A.); *R. v. Casey*, [1977] O.J. No. 214 (Quicklaw) (Ont.C.A.)) This is common sense. A youthful offender, particularly one such as Mr. Bratzer, who has an interest in a vocation and can be equipped with the tools to earn an honest living, is more likely to be diverted from a life of crime than would a career criminal.

[73] At para. 47, the Court observed:

... with the implementation of the revisions to Part XXIII of the *Criminal Code*, all reasonable, available sanctions are to be considered as an alternative to imprisonment and an offender is only to be deprived of liberty if less restrictive measures are not appropriate (*Criminal Code*, s.718.2(d) and (e)). Institutional imprisonment is no longer considered the only means of expressing denunciation and effecting general deterrence. In *R. v. Wismayer* (1997), 115 C.C.C. (3d) 18; [1997] O.J. No. 1380 (Quicklaw) (C.A.), Rosenberg, J.A., writing for a unanimous court, referred to the negative impact of imprisonment, particularly upon youthful or first time offenders (at p.

25). He cited a number of studies, as summarized in the Report of the Canadian Sentencing Commission, 1987 (The Archambault Report) which concluded that instead of deterring criminals, institutional incarceration often has the effect of reinforcing criminal inclinations. Reasonable alternatives to incarceration must be considered when the sole purpose of imprisonment would be general deterrence. This was, in large part, the reason for the development of the conditional sentence.

[74] And at para. 51, the Court also recognized that:

A properly crafted conditional sentence has a significant punitive element (*Proulx* at para. 35). The punitive impact is effected through conditions attached to the sentence (such as house arrest or strict curfews) which restrict the offender's liberty (*Proulx* at paras. 36 and 37). A conditional sentence can also achieve the objectives of general deterrence and denunciation. (*Proulx* at para. 66).

[75] These comments are instructive, particularly when dealing with youthful first offenders, such as Mr. Gannon, who has accepted full responsibility for his conduct, has express genuine remorse for their misconduct, both in writing and in Court, and feels the effects of public shame as reported in his PSR dated May 12, 2015.

[76] I am satisfied after having considered all of the evidence proffered in this case that specific deterrence is not a concern in this case as Mr. Gannon has felt the effects of public shame and has been deterred as a result of his experiences in dealing with this case.

[77] As stated, given that sentencing is highly contextual and necessarily an

individualized process, the Court must impose a sentence that addresses the two elements of proportionality; that is, the circumstances of the offence and the circumstances of the offender and thereby reach a sentence that fits not only the offence but also the offender. The sentencing judge must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account.

[78] It would appear from the content of the PSR and the comments of Counsel that this offence was out of character for Mr. Gannon, and would thus appear to have been an isolated incident where he was intoxicated and acted impulsively, but violently.

[79] Counsel has provided the Court with a number of cases in support of their respective positions. While the cases submitted by counsel have similarities in relation to the degree of violence inflicted on helpless and defenceless victims, they can be distinguished by the circumstances surrounding offence and offender. The cases are, however, helpful in the sense that they provide instructive guidance on the application of the relevant principles in cases involving serious crimes of violence.

The Appropriateness of a Conditional Sentence

[80] Defence counsel has submitted that it would be appropriate to order Mr. Gannon to be subject to the terms of a conditional sentence order. In *Proulx*, Chief Justice Lamer said at para. 102 that

Incarceration will usually provide more denunciation than a conditional sentence, but a conditional sentence can still provide a significant amount of denunciation. This is particularly so when

onerous conditions such as house arrest are imposed and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances.

[81] At para. 107, however, Chief Justice Lamer went on to say that:

Nevertheless, there may be circumstances in which the need for deterrence will warrant incarceration. This will depend in part on whether the offence is one in which the effects of incarceration are likely to have a real deterrent effect, as well as on the circumstances of the community in which the offences were committed.

[82] In this case, I find that a conditional sentence order is an available sanction which may be imposed by the court under section 742.1 of the *Criminal Code* as there is no maximum term of imprisonment or minimum term of imprisonment which would preclude the court from making a conditional sentence order of imprisonment to be served in the community.

[83] Furthermore, I conclude that a conditional sentence order remains an available sanction since I find that an appropriate sentence, in all the circumstances of this case, would not result in a federal term of incarceration, nor would it be a fit and proper sentence to suspend passing sentence and order Mr. Gannon to serve a period of probation.

[84] The question then remains whether a conditional sentence order is a fit and proper sentence or whether the circumstances of this offence, the particular circumstances of this offender and the needs of the community to maintain a just, peaceful and safe society require the separation of this offender from society to deter

him and other like-minded persons from committing offences of this nature.

[85] Section 718.2 (b) of the *Criminal Code* incorporates the parity sentencing principle which reminds judges that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[86] On this point, as previously mentioned, it is often difficult to find those similar cases, as the sentencing process is highly individualized and it is based upon the circumstances of the offence and the particular offender.

[87] Neither the Crown nor the Defence is under a burden to establish that a conditional sentence order is either appropriate or inappropriate in the circumstances, as the Court should consider all relevant evidence, no matter by whom it is adduced.

[88] Section 742.1 of the *Code* lists four criteria that a court must consider before deciding to impose a conditional sentence:

- (a) The offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
- (b) The Court must impose a term of imprisonment of less than two years;
- (c) The safety of the community would not be endangered by the offender serving the sentence in the community; and
- (d) A conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to

718.2.

[89] It should be stressed that no offences are excluded from the conditional sentencing regime *except* those with a minimum term of imprisonment. Nor should there be presumptions in favour of or against a conditional sentence for specific offences, including violent offences.

[90] In the present case, a penitentiary sentence is not necessary nor is a suspended sentence with probationary measures appropriate. In fact, having determined that the appropriate range of sentence is a term of imprisonment of less than two years, I now must consider whether it is appropriate for Mr. Gannon to serve his sentence in the community. In other words, the first two pre-conditions are not an impediment for consideration of a conditional sentence. It comes down whether or not it would be consistent with the fundamental purpose and principles of sentencing.

[91] I am mindful that the requirement in section 742.1(b) that the judge must be satisfied that the safety of the community would not be endangered by the offender serving his or her sentence in the community is a condition precedent to the imposition of a conditional sentence, and not the primary consideration in determining whether a conditional sentence is appropriate.

[92] In *Proulx*, Lamer C.J., addressed the issue of how should courts evaluate danger to the community. At para 69 he expressed his views in these terms:

In my opinion, to assess the danger to the community posed by the offender while serving his or her sentence in the community, two factors must be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the

event of re-offence. If the judge finds that there is a real risk of re-offence, incarceration should be imposed. Of course, there is always some risk that an offender may re-offend. If the judge thinks this risk is minimal, the gravity of the damage that could follow were the offender to re-offend should also be taken into consideration. In certain cases, the minimal risk of re-offending will be offset by the possibility of a great prejudice, thereby precluding a conditional sentence.

[93] In making this determination, I must considered the risk posed by Mr. Gannon not the broader risk of whether the imposition of a conditional sentence would endanger the safety of the community by providing insufficient general deterrence or undermining general respect for the law. Thus, the factors that I have taken into account are:

- a) The risk of Mr. Gannon re-offending; and
- b) The gravity of the damage that could ensue in the event of re-offence.

The Risk of Mr. Gannon Re-offending

[94] With regard to the risk of re-offending, the Supreme Court in *Proulx* observed at paras. 70-72:

70 A variety of factors will be relevant in assessing the risk of re-offence. In *Brady [R. v. Brady (1998), 121 C.C.C. (3d) 449]*, at paras. 117-27, Fraser C.J.A. suggested that consideration be given to whether the offender has previously complied with court orders and, more generally, to whether the offender has a criminal record that

suggests that the offender will not abide by the conditional sentence. Rousseau-Houle J.A. in *Maheu [R. v. Maheu (1997) 116 C.C.C. (3d) 361 (C.A.)]*, at p. 374 C.C.C. enumerated additional factors which may be of relevance:

[TRANSLATION] ... 1) the nature of the offence, 2) the relevant circumstances of the offence, which can put in issue prior and subsequent incidents, 3) the degree of participation of the accused, 4) the relationship of the accused with the victim, 5) the profile of the accused, that is, his [or her] occupation, lifestyle, criminal record, family situation, mental state, 6) his [or her] conduct following the commission of the offence, 7) the danger which the interim release of the accused represents for the community, notably that part of the community affected by the matter.

71 This list is instructive, but should not be considered exhaustive. The risk that a particular offender poses to the community must be assessed in each case, on its own facts. Moreover, the factors outlined above should not be applied mechanically. . . .

72 The risk of re-offence should also be assessed in light of the conditions attached to the sentence. Where an offender might pose some risk of endangering the safety of the community, it is possible that this risk be reduced to a minimal one by the imposition of appropriate conditions to the sentence.

[95] Unlike in Mr. Brushett's case, I do not find that there is a risk that Mr. Gannon will re-offend, as there is insufficient evidence in his past to warrant such a finding.

He comes before the court as a youthful first offender, which suggests that this offence was out of character for him, as it appears to have been an isolated incident.

[96] As stressed in the *Brushett* case, in my view, evidence of past conduct while serving a sentence in the community is a significant factor for consideration in assessing future conduct.

Gravity of the Damage in the Event of Re-offence

[97] With regard to the gravity of the damage in the event of re-offending the Supreme Court in *Proulx* recognized that, particularly in the case of violent offenders, a small risk of very harmful future crime may warrant a conclusion that the prerequisite is not met. At para. 74, Lamer C.J. commented:

Once the judge finds that the risk of recidivism is minimal, the second factor to consider is the gravity of the potential damage in case of re-offence. Particularly in the case of violent offenders, a small risk of very harmful future crime may well warrant a conclusion that the prerequisite is not met: see *Brady, supra*, at para. 63.

[98] I realize that consideration of the risk posed by Mr. Gannon should include the risk of any criminal activity, and it is not limited solely to the risk of physical or psychological harm to individuals.

[99] With respect to the gravity of the damage that could ensue in the event of re-offence, there is always some risk of reoffending. The risk of reoffending can never be completely eliminated, but a conditional sentence with stringent conditions can reduce the risk to an acceptable level and can minimize the risk of reoffending and can adequately protect the community.

[100] It should be noted that in the present case, it is of significance that, unlike Mr. Brushett's actions in committing the assault upon Mr. Ward, Mr. Gannon's conduct was less egregious than Mr. Brushett's. As I stated earlier, Mr. Brushett's actions of stomping on, or kicking, Mr. Ward in the head while he lay motionless on the ground after having been assaulted by Mr. Power and Mr. Gannon is the most egregious conduct of the three accused. As shown on the video, Exhibit 1, Mr. Brushett clearly stomped on Mr. Ward's head as he lay motionless on the ground.

[101] This senseless and random act can only be described as a gratuitous act of violence, which could have caused much more serious consequences to the victim. Mr. Brushett is fortunate that he did not cause more serious injuries to Mr. Ward.

[102] Let me be clear, while Mr. Gannon actions seem more spontaneous and less threatening to Mr. Ward, than Mr. Brushett's actions, they are nonetheless very serious.

Consistent with Fundamental Principles of Sentencing

[103] As emphasized in these reasons, denunciation and deterrence must be given recognition in this case, but it is my view that a custodial sentence is not the only sentence that respects these principles as discussed. I recognize that a conditional sentence can provide sufficient denunciation and deterrence, and as a general matter, the more serious the offence, the longer and more onerous the conditional sentence should be.

[104] In this specific case, having regard for the personal circumstances surrounding Mr. Gannon, and the offence, a lengthy conditional sentence order, a term of imprisonment, with onerous conditions, coupled with a substantial period of

probation, will be a suitable way in which to express society's condemnation of his conduct and will deter similarly minded individuals.

[105] It should be stressed that the objectives such as denunciation and deterrence are particularly pressing, therefore, a period of imprisonment is necessary in this case; notwithstanding that Mr. Gannon is a youthful first offender, who has accepted full responsibility, expressed genuine remorse, and feels the effect of public shame.

[106] As previously mentioned, in Mr. Brushett's sentencing decision, a custodial sentence was necessary because it is of significance that Mr. Brushett was serving a sentence, probation, for having committed a violent offence when he committed the more serious violence offence of assault causing bodily harm. This escalation of violence is an extremely aggravating factor as it demonstrates that he has the propensity to become actually violent; unlike Mr. Gannon, who is a first offender and has no previous convictions for violence or for breaching court orders.

The Appropriate Sentence

[107] Obviously, in these types of cases there is a real and pressing need to emphasize the need for deterrence and denunciation. Given the level of violence in this case, the harm inflicted on the victim, as described in his victim impact statement, the nature of Mr. Gannon's actions in conjunction with the other participants, the principles of denunciation, general deterrence, as well as the protection of the public must take priority in this sentencing.

[108] The sentence imposed by this court must adequately reflect society's abhorrence of such random, unprovoked, senseless vicious acts of violence, committed by a youthful first offender.

[109] This is achieved by the appropriate balancing of denunciation, deterrence, and rehabilitation.

[110] Crimes of violence must be strongly condemned and deterred. Mr. Gannon's moral culpability for the assault on Mr. Ward is high, notwithstanding he was intoxicated at the time he committed the offence. He committed a violent, unprovoked attack on a defenceless innocent person, who was acting as a Good Samaritan by breaking up a violent physical confrontation in a public parking lot.

[111] Having carefully considered and weighed all of the aggravating and mitigating factors as discussed in this case against the seriousness of the offences and the normal range of sentence for these specific offences and offender, I am of the view that period of imprisonment in the community is a fit and proper punishment for these offences and offender, Mr. Gannon, as it can address the separation of Mr. Gannon from society and the safety of the community by the impositions of stringent conditions, such as, imposition of house arrest and curfew conditions.

[112] This sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. And while it is often difficult to find a case that is truly "similar" to the circumstances of this offence and this offender, the following cases were helpful in trying to get sense of the appropriate range of sentences, such as, in the *Cormier* case, in which the Court of Appeal imposed a 6 month period of custody; notwithstanding the offender was a first offender, without a criminal record. However, it is noteworthy that the *Cormier* case was decided before the conditional sentence regime was an option.

[113] In *MacKenzie*, the offender also received a 6 month period of custody. He had

two prior, related convictions for crimes of involving violence which caused the judge to question whether anything other than a custodial sentence would deter the offender. Again, Mr. Gannon is a youthful first offender, without any previous criminal convictions for violence.

[114] Similarly, in *R. v. Metzler*, 2008 NSCA 26, which involved a charge of assault causing bodily harm, the offender and two other men met the victim outside a store where he was taking a break from work at 3 am and demanded cigarettes from him. The victim refused to offer cigarettes and one of the people with the offender "sucker punched" the victim twice. The offender then punched the victim with a closed fist on his jaw which caused severe injuries. The victim's jaw was broken and required surgery, and he had a permanent scar on his face. He also sustained damage to two teeth which required dental reconstruction. The trial judge ordered a period of 22 weeks imprisonment followed by 12 months on terms of probation.

[115] The Court of Appeal dismissed Mr. Metzler's conviction and sentence appeal. Mr. Metzler was a 20-year-old high school graduate, with no criminal record and had received awards for bravery. The trial judge had rejected the Crown's recommendation of a conditional sentence order and also the Defence recommendation for a conditional discharge. The trial judge declined to order a conditional sentence order as he concluded that the offender posed danger to community safety because of the violent nature of his offence and that he had breached the terms of his release pending sentencing. The court held that the sentence was fit in the circumstances because it was "brutal, unprovoked and random assault" which had profound and lasting consequences for the victim.

[116] Again, unlike in the *Metzler* case, Mr. Gannon did not breach any terms of his

release pending sentence, which was obviously an aggravating factor in the *Metzler* case.

[117] In *R. v. Sutton*, 2012 NSPC 98, a decision of this Court, Judge Tax imposed a 90 day intermittent sentence on a first offender, without a criminal record for having committed an assault causing bodily harm in the context of a swarming. In that case, while intoxicated, the victim approached the accused and three other people outside of a bar to invite them to join him at his employer's home. When the victim approached the accused, who was also intoxicated, suddenly threw a punch and struck the victim in the face. The unprovoked assault knocked the victim to the ground and rendered him unconscious. While the victim was lying on the ground, he was further assaulted by the accused and the other three males. As a result of the incident, the victim suffered a concussion and injuries to his eye and teeth. The accused was 19 years of age at the time of the offence. He had no prior record. A pre-sentence report indicated that he had been diagnosed with ADD, but did not take medication due to side effects. He was employed full-time, but would likely lose his employment if he were incarcerated. In reaching the decision to impose a 90 day intermittent sentence, rather than a conditional sentence, Judge Tax held at para. 46:

Having considered all of the circumstances of the offence, this particular offender, the primary purposes and principles of sentencing at play in this case, the gravity of the offence and the offender's degree of responsibility as well as the mitigating and aggravating factors, I find that a conditional sentence order of imprisonment in the community would not satisfy the purposes of deterrence and denunciation of this unlawful conduct. At the same time, I am mindful of the principle of restraint and the fact that Mr. Sutton is a youthful, first time adult offender.

[118] In the *Metlzer* case, the accused's role in the assault was much more aggravating than Mr. Gannon's role in the case at bar. In the *Metlzer* case, Mr. Metlzer initiated the assault and continued to assault the victim with three others, while victim was unconscious on the ground.

[119] Notwithstanding all of the mitigating factors present in this case, this is a very serious violent crime that involves the use of a brutal violence, which requires an appropriate disposition that effectively emphasizes the principles of deterrence and denunciation while at the same time balances the need to ensure the rehabilitation of Mr. Gannon.

[120] Indeed, but for all of these mitigating factors, the sentence that I am about to impose would have been much higher.

[121] As previously stated, I have carefully considered that sentences for youthful offenders should be directed at rehabilitation and reformation, not only general deterrence. However, in cases of serious violence; such as the violence perpetrated by Mr. Gannon against a helpless and defenceless victim, requires a sentence that emphasizes denunciation and deterrence.

[122] Thus, given the gravity of the offence, and degree of Mr. Gannon's responsibility in such circumstances, deterrence and denunciation must be reflected in the sentence imposed.

[123] I wish to stress that in reaching this decision, I grappled with whether a custodial sentence was necessary. In other words, this decision was not reach lightly. I thought of imposing a short period of incarceration, as a means of expressing society's condemnation for the offence. However, after considering all of the

personal circumstances surrounding Mr. Gannon and the offence, and the law, I have concluded that rather than a short sharp period of incarceration a lengthy term of imprisonment in the community will address society's condemnation of the serious and gravity of the offence, and will also fulfill the objectives of rehabilitating, restoring and promoting a sense of responsibility in Mr. Gannon, as he is a youthful first offender.

[124] In my view, in the context of sentencing youthful, first offenders, such as, Mr. Gannon, requires careful consideration of their unique and individual characteristics as the protection of the public in the long term are best served by the imposition of a sentence that promotes the fundamental purpose of sentencing and appropriately balances all of the principles of sentencing, while emphasizing the principles of deterrence and denunciation, but not to the detriment of rehabilitation. In other words, rehabilitation should not be abandon.

[125] Thus, the imposition of a conditional sentence of imprisonment in the community for 12 months, coupled with an 18 month period of probation, strikes a just proportion between the offence and the offender. The 12 month conditional sentence will impose stringent conditions that will restrict Mr. Gannon's liberty for an extended period of time, and will appropriately achieve the principles of denunciation and deterrence.

[126] Furthermore, a significant period of probation will provide Mr. Gannon the opportunity to further rehabilitate himself, and with the imposition of carefully crafted conditions, such as terms and conditions that require Mr. Gannon to speak to other young people at risk of reoffending about the serious consequences of their violent behavior, will promote a sense of responsibility in Mr. Gannon, and will

acknowledge the harm done to the victim, Mr. Ward, and to the community.

[127] The conditional sentence order will be longer than what would have been imposed had Mr. Gannon received a custodial sentence.

[128] In reaching this decision, I am of the view, that a reasonable person, a thoughtful person, not one who is prone to emotional reactions, who is properly informed about the purposes and principles of sentencing, would be confident that the protection of the public in the long term is best served by sentences that emphasize the principles of denunciation and deterrence, coupled with consideration of rehabilitation of a youthful first offender.

[129] Please stand Mr. Gannon. Mr. Gannon, the Court sentences you to imprisonment for 12 months and is satisfied that serving this sentencing in the community will not endanger its safety and is consistent with the fundamental purposes and principles of sentencing. You shall serve this sentence in the community under the following conditions:

- a) Keep the peace and be of good behaviour;
- b) Appear before the Court when required to do so by the Court;
- c) Report to a supervisor at 277 Pleasant St., Suite 112, Dartmouth on or before September 25th, 2015 and as required and in the manner directed by the supervisor or someone acting in his/her stead;
- d) Remain within the Province of Nova Scotia unless written permission to go outside the Province is obtained from the Court or the supervisor;

and

- e) Notify promptly the Court or the supervisor in advance of any change of name or address, and promptly notify the Court or the supervisor of any change of employment or occupation;

[130] And in addition, you shall:

- a) Reside at 3392 Federal Avenue, Halifax, Nova Scotia unless permission to reside elsewhere is obtained from the Court;
- b) Not to possess, use or consume alcohol or other intoxicating substances;
- c) Not to possess, take or consume a controlled substance as defined in the Controlled Drugs and Substances Act, except in accordance with a physician's prescription for you or legal authorization;
- d) Not to have in your possession firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance;
- e) You are to complete 50 hours of community service work by July 31, 2016 as directed by your supervisor;
- f) You are to attend for assessment and counselling in anger management as directed by your supervisor;
- g) Attend for assessment, counselling or program as directed by your

supervisor;

- h) You are to participate and cooperate with any assessment, counselling or program directed by your supervisor;
- i) You are to have no direct or indirect contact or communication with Garrett Ward;
- j) You must make reasonable efforts to locate and maintain employment or an educational program as directed by your supervisor;
- k) You are to remain in your residence at all times for the first nine months of this Conditional Sentence Order commencing on today's date at 8:00 p.m.;
- l) After the nine months of the Conditional Sentence Order, you are going to remain in your residence from 10:00 pm to 6:00 am the following day, seven days a week for the remaining three months.
- m) There are exceptions, and they are as follows:
 - i. When at regularly scheduled employment, which your supervisor knows about, and travelling to and from that employment by a direct route;
 - ii. When attending a regularly scheduled education program which your supervisor knows about, or a school or educational activity supervised by a principal or teacher and travelling to and from by a direct route;

- iii. When dealing with a medical emergency or medical appointment involving you or a member of your household and travelling to and from it by a direct route;
- iv. When attending a scheduled appointment with your lawyer, supervisor or probation officer and travelling to and from the appointment by a direct route;
- v. When attending court at a scheduled appearance or under subpoena and travelling to and from court by a direct route;
- vi. When attending a counselling appointment, a treatment program a meeting of alcoholics anonymous or narcotics anonymous at the direction of or with the permission of your supervisor and travelling to and from it by a direct route;
- vii. For not more than four hours per week, approved in advance by your supervisor for the purpose of attending to personal needs;
- viii. When performing community service work arranged with your supervisor and travelling to and from the location by a direct route;
- ix. You must prove compliance with the house arrest and/or curfew condition by presenting yourself at the entrance of your residence should your supervisor and/or a peace officer attend there to check compliance.

[131] As I said, given the nature of the offence here, I am satisfied that it would be in the administration of justice's best interest to impose the prohibition order under section 110 of the *Criminal Code* for a period of five years.

[132] Mr. Gannon, you will be placed on probation for a period of 18 months that will commence upon the expiration of the conditional sentence order and Ms. McCarthy will explain to you, Mr. Gannon, the process under section 732, which provides that you can return to Court make an application to terminate the Order, or request a variation one or more of the terms or conditions of the probation order.

[133] Upon the expiration of your conditional sentence order, you will be placed on probation for a period of 18 months, with the following conditions:

- a) Keep the peace and be of good behaviour;
- b) Appear before the Court when required to do so by the Court;
- c) Notify promptly the Court or your probation officer in advance of any change of name or address, and promptly notify the Court or the supervisor of any change of employment or occupation;
- d) You will report to a probation officer at 277 Pleasant Street, Suite 112, Dartmouth, Nova Scotia within two days of the date of expiration of your conditional sentence order and thereafter as directed by your probation officer or supervisor;
- e) You will remain within the Province of Nova Scotia unless you receive written permission from your probation officer;

- f) Not to possess, use or consume alcohol or other intoxicating substances;
- g) Not to possess, take or consume a controlled substance as defined in the *Controlled Drugs and Substances Act*, except in accordance with a physician's prescription for you or legal authorization;
- h) Not to have in your possession firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance;
- i) You are to complete 50 hours of community service work as directed by your probation officer by September 24, 2017;
- j) You are to have no direct or indirect contact or communication with Garrett Ward;
- k) You are to make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer;
- l) You are to attend for mental health assessment and counselling as directed by your probation officer;
- m) You are to attend for substance abuse assessment and counselling as directed by your probation officer;
- n) You are to attend for assessment and counselling in anger management as directed by your supervisor;

- o) Attend for assessment, counselling or program as directed by your supervisor;
- p) You are to participate and cooperate with any assessment, counselling or program directed by your supervisor; and
- q) You are to reside at 3392 Federal Avenue, Halifax, Nova Scotia unless permission to reside elsewhere is obtained from the Court.

[134] In total, I have imposed 100 hours of community service hours. The purpose of this is to promote a sense of responsibility in you for what you have done. I have accepted your expression of remorse and I hope that you share your experiences with other young persons in an effort to discourage them from engaging in random gratuitous violence.

[135] Mr. Gannon, you will report back to this Court after twelve months of probation for a status update. I want to see how you are doing.

[136] This, in my view, is a serious matter, because you committed a very serious offence.

[137] There will be a victim surcharge of \$100.00, which is payable on or before September 22, 2017.

[138] There is also a mandatory *DNA* order as I am satisfied that it is in the best interest of the administration of justice to make this order having regard to all of the circumstances surrounding this case, including, your personal circumstances, the seriousness of the violent offence and your privacy and security interest.

[139] That is the sentence of the Court.

Hoskins, J.P.C.