The appeal is therefore dismissed.

McLACHLIN J. concurs with CORY J.

Appeal dismissed.

Regina v. S.R.H. et al.

[Indexed as: R. v. H. (S.R.)]

Ontario Court of Appeal, Brooke, Tarnopolsky and Galligan JJ.A.
March 13, 1990.

Young offenders — Disposition — Secure custody — Principles — Court imposing secure rather than open custody entitled to take into account rehabilitation and deterrence — Court not limited to imposing secure custody in cases where disposition necessary to protect public — Young offenders convicted of manslaughter as result of brutal beating of elderly man while accused intoxicated — Factors of general deterrence and society's abhorrence for such offence requiring the imposition of lengthy period of secure custody — Appeal by Crown from disposition of one month secure custody and 29 months' open custody dismissed — While judge erred in principle in failing to impose long period of secure custody since imposition of disposition offenders doing well in open custody — To transfer offenders to secure custody would not be in public interest — Young Offenders Act, R.S.C. 1985, c. Y-1, ss. 20, 24, 24.1, 3.

Young offenders — Appeal — From disposition — Young offenders convicted of manslaughter sentenced to one month secure custody and 29 months' open custody — Attorney-General has right to appeal from disposition on basis that while length of disposition appropriate longer portion of term should have been in secure custody — Young Offenders Act, R.S.C. 1985, c. Y-1, s. 27.

The accused young offenders pleaded guilty to manslaughter and were sentenced to one month secure custody and 29 months' open custody. The offence involved the brutal beating of an elderly man by the two accused who were intoxicated at the time of the offence. Both accused were approximately 17 years of age at the time of the offence. The Crown appealed from the dispostion arguing that the portion of the 30-month sentence to be served in secure custody should have been longer in view of the gravity of the offence.

On appeal by the Crown from the disposition, **held**, the appeal should be allowed in part and a prohibition order under s. 100 of the *Criminal Code* imposed.

The Crown in appealing a disposition made under the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which includes a period of custody, may appeal not only against the length of the term but on the basis that the portion of the sentence to be served in secure custody was not sufficient. In determining the length of period of secure custody, a court is not limited to making such disposition where necessary solely for security reasons, that is to prevent the young person from escaping custody, perpetrating violence or committing other forms of misconduct. Rather when deciding whether a young person should be committed to open or secure custody, the court is required to consider a number of factors. While the first and most obvious factor would be whether or not secure custody is necessary to prevent escape, secure custody may also be imposed in order to effect rehabilitation of the young person. As well, bearing in mind their diminished importance in

Appeal dismissed.

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'sky and Galligan JJ.A.

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nder the *Young Offenders Act*, custody, may appeal not only it the portion of the sentence to letermining the length of period naking such disposition where prevent the young person from ting other forms of misconduct. hould be committed to open or a number of factors. While the not secure custody is necessary posed in order to effect rehabili- d their diminished importance in

the case of youthful offenders, the factors of general and specific deterrence and the expression of society's abhorrence of certain crimes are proper considerations in imposing a period of secure custody. If secure custody could be imposed only where the young offender was a security risk, the ability and flexibility to fashion an appropriate remedy in a particular case would be compromised. In this case, the disposition of one month secure custody followed by 29 months' open custody failed to reflect adequately the element of general deterrence and failed completely to reflect society's abhorrence of this brutal, unprovoked and senseless killing. In order to act as a sufficient general deterrent and to reflect society's abhorrence for this kind of violence, the accused should have been committed to secure custody for all or most of the period of custody imposed upon them. This offence called for imposition of the maximum period of custody, although a reduction of that period by six months as in this case did not constitute an error in principle. However, post-disposition reports concerning the accused showed that each of them was making good progress in the open custody facility and to take them out of those facilities and place them in secure custody may seriously prejudice their rehabilitation. The public interest does not require that such a risk be taken at this time. Accordingly, the appeal from disposition should be dismissed except that an order prohibiting the offenders from possessing any firearms or ammunition pursuant to s. 100 of the *Criminal Code* should be made against each offender.

Cases referred to

R. v. C. (R.) (1988), 29 O.A.C. 377, 5 W.C.B. (2d) 377; *R. v. O.* (1986), 27 C.C.C. (3d) 376

Statutes referred to

Criminal Code, R.S.C. 1985, c. C-46, s. 100 [am. R.S.C. 1985, cc. 11 & 27 (1st Supp.), ss. 2 & 14; R.S.C. 1985, c. 27 (2nd Supp.), s. 10]

Young Offenders Act, R.S.C. 1985, c. Y-1, ss. 3, 20 [am. R.S.C. 1985, c. 27 (1st Supp.), s. 187; *idem*, c. 24 (2nd Supp.), s. 14; *idem*, c. 1 (4th Supp.), s. 38], 24 [rep. & sub. R.S.C. 1985, c. 24 (2nd Supp.), s. 17] 24.1 [enacted *idem*, 27 [am. *idem*, s. 20]

APPEAL by the Crown from a disposition made following the accused young offenders' conviction for manslaughter.

E. Siebenmorgen, for the Crown, appellant.
J.S. Fregueau, for respondent, S.R.H.
R.B. Lester, for respondent, R.C.M.

The judgment of the court was delivered by

GALLIGAN J.A.:— The Crown sought leave to appeal the dispositions committing the respondents to a term of one month secure custody followed by 29 months of open custody upon their plea of guilty to an offence of manslaughter. At the conclusion of the hearing the court dismissed the appeal and indicated that it would give reasons later.

At the time of the offence, the respondent H. was just under 17 years of age and M. had just turned 17. The offence involved the brutal, unprovoked and senseless attack upon and killing of a 70-

year-old man. The respondents were originally charged with murder. However, they were intoxicated at the time of the offence, raising a doubt about whether they had the requisite intent to sustain a charge of murder. Therefore, their plea of guilty to the lesser included offence of manslaughter was accepted. The circumstances called for a sentence that would act as a general deterrent and one that strongly denounced gratuitous violence.

In his argument before this court, counsel for the Crown contended that the three-year maximum period of custody under the *Young Offenders Act*, R.S.C. 1985, c. Y-1, was required. He very candidly conceded, however, that he was not pressing for an increase in the length of the period of custody because, even though 30 months was low, it did not demonstrate an error in principle justifying interference by this court. His argument was that a disposition of one month secure custody followed by 29 months' open custody did not reflect the gravity of the offence of which the respondents had been convicted. He said that the disposition should have been made up entirely or mostly of secure custody.

Counsel for the respondents advanced two novel arguments which I will now address. The first was that a reading of the *Young Offenders Act* as a whole indicates that closed custody may form part of a disposition only if it is shown that it is necessary for security reasons, that is, to prevent the young person from attempting escape, perpetrating violence or committing other forms of misconduct. They contended that secure custody may not be imposed as a more severe form of punishment or as a greater general deterrent. Their second argument was that no appeal lies from a trial judge's determination, pursuant to s. 24.1(2), as to whether the custody part of a disposition should be open or secure.

The essence of the respondents' first submission is that factors such as deterrence or the public's abhorrence of the particular conduct can be reflected only in the length of the custodial sentence but may not affect the determination of whether the custody should be secure rather than open. They contend that secure custody may be imposed only when a need for security is established. They say that this requirement was not established in this case. No authority in support of this argument was presented to the court.

The courts have never doubted that they had power to impose a period of secure custody to act as a deterrent or to reflect the

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community's abhorrence of a particular crime. For example, in *R. v. C. (R.)* (1988), 29 O.A.C. 377, 5 W.C.B. (2d) 377, this court varied a disposition of eight months' open custody plus probation for one year to two years' closed custody. At p. 379 Brooke J.A., who delivered the judgment of the court, said:

> The offence which the respondent committed was one of the most serious crimes in the *Criminal Code* and the disposition should mark the abhorrence of the community for such conduct. It does not do so. While the rehabilitation of the respondent is important, the punishment imposed must be sufficient to deter others and to deter this man from such conduct.

This court's opinion was that both the length of the custodial term and the manner in which it must be served are appropriate to reflect general and specific deterrence as well as society's abhorrence of particular crimes.

Counsel for the respondents argued that when read together, ss. 20, 24 and 24.1 of the *Young Offenders Act* demonstrate an intention to restrict the imposition of secure custody to those young persons who, for the protection of the public, are required to be restrained or securely confined. I am unable to find anything in those provisions which requires such a conclusion. Section 24.1(2) requires the youth court to specify whether a disposition of custody made under s. 20(1)(*k*) is to be "open custody or secure custody". It does not, nor does any other provision in the Act, lay down any guidelines about how the court should exercise that discretion. In my opinion, therefore, the determination under s. 24.1(2) must be made in accordance with the general principles enunciated in s. 3(1)(*f*) of the Act, which reads as follows:

> 3(1) It is hereby recognized and declared that
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> . . . . .
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> (*f*) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families . . .

That provision has been interpreted by this court to require a consideration of general deterrence when deciding upon an appropriate disposition under the *Young Offenders Act*. In *R. v. O.* (1986), 27 C.C.C. (3d) 376 (Ont.C.A.), a young offender appealed a disposition of secure custody arguing that the trial judge had wrongly taken into account principles of specific and general deterrence and the need to protect the community when he imposed a term of secure custody. At p. 377 Brooke J.A., speaking for the court, said:

> The principles under s. 3 of the *Young Offenders Act*, 1980-81-82-83 (Can.), c.

> 110, do not sweep away the principle of general deterrence. The principles under that section enshrine the principle of the protection of society and this subsumes general and specific deterrence. It is perhaps sufficient to say that in our opinion the principle of general deterrence must be considered but it has diminished importance in determining the appropriate disposition in the case of a youthful offender.

The "protection of society" must also subsume society's abhorrence of certain crimes.

Because, in my opinion, the discretion conferred by s. 24.1(2) must be exercised in accordance with the principles enshrined in s. 3(1)(*f*), the youth court, when deciding whether a young person should be committed to open or secure custody, is required to consider a number of factors. Without intending to compose an exhaustive list, some of those factors would be the following. The first and most obvious factor would be whether or not secure custody is necessary to prevent escape, further misconduct or violence by the young person. The next factor would be the effect upon the rehabilitation of the young person. The next, keeping in mind the caveat expressed in *R. v. O., supra,* of their diminished importance in the case of youthful offenders, would be the factors of general and specific deterrence and the expression of society's abhorrence of certain crimes.

It seems to me that the purpose of the *Young Offenders Act* is to give the youth court the flexibility necessary to tailor dispositions to fit the needs of individual youthful offenders, keeping in mind the need for the "protection of society". Care should be taken not to restrict unduly the ability of the courts to do so by interpretations of the Act which could impair the ability of the courts to blend different types of dispositions to meet individual cases. If the interpretation suggested by the respondents is correct, it would prevent the use of a short, sharp period of secure custody as a deterrent to a particular young person who was becoming a recidivist but who was not a security risk. In such a case, a youth court may think that the only way in which the youthful offender can be brought to his senses is by the imposition of a short period of secure custody. If secure custody cannot be imposed unless the young offender is a security risk, the ability and flexibility to fashion an appropriate remedy in a particular case would be compromised.

It is my opinion that the interpretation of the Act suggested by the respondents is inconsistent both with the provisions of the *Young Offenders Act* and with its spirit. The factors of general and specific deterrence and the abhorrence of society of certain crimes must be taken into account by the youth court both when

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deciding whether there should be a period of custody and when deciding whether that custody should be open or secure or a combination of both.

The second argument of the respondents can be dealt with briefly. While s. 27(1) of the Act does not specifically speak of dispositions, it has the effect of incorporating Part XXI of the *Criminal Code* "with such modifications as the circumstances require". That Part provides for sentence appeals. Since dispositions are the equivalent of sentences for adults, the incorporation of Part XXI provides for appeals from dispositions. Because a disposition can include both the length of the custodial period and whether it is to be open or secure, I am of the opinion that the right to appeal a disposition includes all aspects of it.

On its merits the appeal is a troubling one. The disposition of one month secure custody followed by 29 months of open custody failed to reflect adequately the element of general deterrence and it failed completely to reflect society's abhorrence of this brutal, unprovoked and senseless killing. Society is entitled to be protected from gratuitous violence. The perpetrators of it, whether young persons or adults, must be given exemplary sentences in order to bring home to everyone that such conduct will not be tolerated. For that reason, the dispositions imposed upon these young offenders demonstrated an error in principle. In order to act as a sufficient general deterrent and to reflect society's abhorrence of this kind of violence, the respondents should have been committed to secure custody for all or most of the period of custody imposed upon them. With respect to the period of custody, I agree with counsel for the Crown that this offence called for the imposition of the maximum period of custody but that the reduction of that period by six months did not constitute an error in principle.

The error in principle to which I have referred would normally require that the appeal succeed. However, the post-determination reports concerning the respondents, which the court received, show that each of them is making good progress in his respective facility. Those reports demonstrate that the dispositions, in so far as they relate to the rehabilitation of the respondents, are working well. To take them out of the facilities in which they are presently resident and place them in secure custody may seriously prejudice their rehabilitation. It was the opinion of the court when it heard this appeal that the public interest did not require that such a risk be taken at this time. For that reason it dismissed the appeal from the dispositions.

The trial judge did not make an order under s. 100 of the *Criminal Code*. This court was of the opinion that one ought to have been made and, therefore, the court made an order under that section against each respondent for a period of five years.

The application for leave to appeal was granted. The appeal was allowed to the extent that an order under s. 100 of the *Criminal Code* was made. In other respects the appeal from the dispositions was dismissed.

I think it should be added that the Crown acted very responsibly in having this court review these dispositions. They cried out for review.

Appeal allowed in part.

Regina v. MacIntyre et al.

[Indexed as: R. v. MacIntyre]

Alberta Provincial Court, Ketchum Prov. Ct. J. *March 7, 1990.*

Courts — Jurisdiction — Adjournment — Changing place of remand pending preliminary inquiry — Accused serving sentence at penitentiary — Date for preliminary inquiry set several months hence — Accused refusing to consent to remand to date of preliminary inquiry — Interim eight-day remands may be made in penitentiary before justice of the peace — Justice of the Peace Act, R.S.A. 1980, c. J-3, s. 4 — Cr. Code, ss. 535, 536, 537, 539, 540.

Preliminary inquiry — Procedure — Adjournment — Changing place of remand pending preliminary inquiry — Accused serving sentence at penitentiary — Date for preliminary inquiry set several months hence — Accused refusing to consent to remand to date of preliminary inquiry — Interim eight-day remands may be made in penitentiary before justice of the peace — Justice of the Peace Act, R.S.A. 1980, c. J-3, s. 4 — Cr. Code, ss. 535, 536, 537, 539, 540.

The accused were charged with several offences arising out of forcible confinement of guards at a penitentiary. The accused were to be tried by judge and jury but the preliminary inquiry was not to commence for several months. The accused, however, refused to consent to being remanded directly to that date. For reasons of cost efficiency and security the Crown sought an order changing the place of the eight-day remands to the penitentiary where the accused was serving sentence.

Held, the application should be granted in part and the venue of the next interim eight-day remand before a justice of the peace be changed.

While by virtue of s. 4(2) of the *Justice of the Peace Act*, R.S.A. 1980, c. J-3, a justice of the peace has no power to hold a preliminary inquiry there is a distinction between the accused's election as to mode of trial and all matters preliminary to the taking of evidence of witnesses and the actual taking of evidence of witnesses at the preliminary inquiry. The clear intent of the provincial legislation was to prevent justices of the peace from holding the preliminary inquiry in the sense of