Date: 19981218 Docket: C.A.C. 142953

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Tsyganov, 1998 NSCA 227

Glube, C.J.N.S.; Hallett, J.A. and Pugsley, J.A.

BETWEEN:

SERGEY TSYGANOV Donald C. Murray	)	
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Dana Giovannetti
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	December 4, 1998
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	)	Judgment Delivered:
	)	December 18, 1998
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THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Glube, C.J.N.S. and Pugsley, J.A. concurring.

HALLETT, J.A.:

The appellant was convicted of second degree murder. The jury did not make a recommendation respecting a period of imprisonment that the appellant must serve before being eligible for parole. Justice Goodfellow sentenced the appellant to life imprisonment and fixed the period of parole ineligibility at 19 years.

The appellant asserts that the trial judge erred: (i) in failing to consider time spent in custody pending sentence; and (ii) in failing to give the appropriate weight to the principles of sentencing and, as a result, over-emphasized the elements of denunciation and deterrence and under-emphasized the significance that the appellant was a first time offender.

We have reviewed the remarks of the trial judge in fixing the period of parole ineligibility and the submissions of counsel on appeal. It is correct that the trial judge did not make any reference in his sentencing remarks to the fact that the appellant was in custody prior to sentencing for a period of 18 months.

Section 719(3) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 gives a sentencing judge the discretion to take into account in determining sentence “any time spent in custody by the person as a result of the offence”. Subsection (3) is part of the provisions of the **Code** dealing with the purposes and principles of sentencing and follows the provisions of s. 719(1) which

provides that “a sentence commences when it is imposed, except where a relevant enactment otherwise provides.”

Section 746(a) of the **Code** creates a specific and mandatory direction that:

> **746.** In calculating the period of imprisonment served for the purposes of section 745, 745.1, 745.4, 745.5 or 745.6, there shall be included any time spent in custody between
>
> (a) in the case of a sentence of imprisonment for life imposed after July 25, 1976, the day on which the person was arrested and taken into custody in respect of the offence for which that person was sentenced to imprisonment for life and the day the sentence was imposed; or ...

Section 746 is a specific and explicit provision which mandates that, with respect to life sentences, the time in custody between arrest and sentencing date shall be included in calculating the period of imprisonment served for the purpose of s. 745.4.

Section 745 deals with sentences of life imprisonment. Section 745.4 deals specifically with ineligibility for parole and sets out the criteria a sentencing judge is to apply where an offender is convicted of second degree murder:

> 745.4 Subject to section 745.5, at the time of the sentencing under section 745 of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.2, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as the judge deems fit in the circumstances.

Considering the scheme of the **Code** and, in particular, the ordering of the sections dealing with sentencing (Part XXIII of the **Code**), s. 746 is applicable to parole proceedings. Section 746 provides that where an offender is sentenced to life imprisonment he or she shall be given credit as provided in the section when determining the date on which the ineligibility for parole period shall expire.

Counsel for the appellant seems to take the position that notwithstanding s. 746, the trial judge was required to consider time spent in custody in fixing the appropriate period of parole ineligibility.

In support of his position, the appellant's counsel relies on a decision of the Ontario Court of Appeal in **R. v. Rezaie** (1996), 112 C.C.C. (3d) 97. He submits:

> 8. The failure at the time of sentencing to consider time spent in custody prior to trial, conviction and sentence is an error in law and principle:

In my opinion the **Rezaie** decision must be distinguished. The offence in **Rezaie** was a sexual assault; the term of imprisonment five years. The sentencing judge refused to give credit for pre-sentence custody. In **Rezaie** the Ontario Court of Appeal did not go so far as counsel suggests. In discussing what was then s. 721(3) of the **Code** (a section essentially the same as s. 719(3)), Laskin, J.A., for the Court, stated at p. 104:

> Although this section is discretionary, not mandatory, in my view a sentencing judge should ordinarily give credit for pre-trial custody. At least a judge should not deny credit without good reason. To do so offends one's sense of fairness. Incarceration at any stage of the criminal process is a denial of an accused's liberty. Moreover, in two respects, pre-trial custody is even more onerous than post-sentencing custody. First, other than for a sentence of life imprisonment, legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before trial (or before sentencing).

It is clear from the aforesaid quotation that the Ontario Court of Appeal properly considered s. 721(3) to be discretionary. A review of the decision shows that the Court merely imposed on the sentencing judge a requirement that he give reasons if he was not going to give credit for pre-trial custody. Secondly, the Court clearly recognized that there were legislative provisions dealing with credits for time between the date of arrest and custody and the date of sentencing with respect to sentences of life imprisonment.

The **Rezaie** decision did not involve a question of parole ineligibility and, therefore, is not particularly helpful nor supportive of the appellant's counsel's position.

Counsel for the appellant also relies on a decision of Associate Chief Justice Callahan of the High Court of Ontario rendered on the 17th day of November, 1988 (**R. v. Breen,** Nov. 17 1988 (Ont S.C.)). The offender was convicted of second degree murder. He had spent 19 months in jail pending sentencing. The sentencing judge took the time spent in custody into

consideration in fixing the period of ineligibility for parole. It would appear from a reading of Associate Chief Justice Callahan's remarks on sentencing that he did not consider s. 746 of the **Code**. Counsel are unaware of any other case in which a trial judge took pre-trial custody into consideration in fixing the period of parole ineligibility following the conviction of an offender for second degree murder.

Section 719(3) is discretionary. It is customary for a trial judge to take into consideration time spent in custody prior to sentencing in determining what is an appropriate period of imprisonment if the offence in question warrants imposition of a period of incarceration. There are no statutory guidelines for the exercise of this discretion but fairness in sentencing is the ruling criteria. It is obvious that fairness, as a general rule, dictates that credit be given when considering the period of incarceration to be imposed.

However, in sentencing a person convicted of second degree murder, a life sentence is mandated by the **Criminal Code**. Therefore, there is no s. 719(3) discretion to be exercised by the sentencing judge.

Where an offender has been convicted of second degree murder, the trial judge has a discretion to fix the period of parole ineligibility anywhere between 10 and 25 years by applying the criteria set forth in s. 745.4 of the

Code. There is nothing in s. 745.4 which expressly confers on a sentencing judge a discretion to take pre-sentence custody into consideration.

Section 746 mandates that any person sentenced for life imprisonment must be given credit for the time served between arrest and custody and the date sentence was imposed. Section 746 comes into play at the time of parole proceedings in calculating when the parole ineligibility period expires.

In my opinion, the sentencing judge has two separate and distinct functions following a conviction for second degree murder: (i) he or she imposes the mandatory life sentence. Accordingly, s. 719(3) is not relevant with respect to the term of imprisonment to be imposed; and (ii) he or she then fixes the period of parole ineligibility. Section 719(3) has no application in determining the period of parole ineligibility.

By enacting s. 746 Parliament has dealt with the issue of credit for pre-sentence custody when an offender is sentenced to life imprisonment. Therefore, the need for the sentencing judge in the interest of fairness to consider pre-sentence custody no longer exists.

In my opinion: (i) in the absence of any direction in s. 745.4 to consider time spent in custody in fixing the period of parole ineligibility; and (ii) considering that Parliament has made express provision dealing with pre-sentence custody

in s. 746, it was not an error in law for the sentencing judge to fail to consider the appellant's pre-sentence custody in fixing the period of parole ineligibility.

I will now deal with the appellant's second ground of appeal that the sentencing judge did not give appropriate weight to the principles of sentencing.

The role of an appeal court is circumscribed by the provisions of s. 687(1) of the **Code** and the decision of the Supreme Court of Canada in **R. v. Shropshire**, [1995] 4 S.C.R. 227; (1995), 102 C.C.C. (3d) 193. In **Shropshire** the Supreme Court held that s. 687(1) of the **Criminal Code** requires a Court of Appeal to consider the "fitness" of the sentence appealed from. The Appeal Court does not have free reign to modify a sentence simply because the Court felt a different order ought to have been made. A court of appeal should only vary a sentence if it is convinced that the sentence is not fit, that is, that the sentence under appeal was clearly unreasonable. The task of a Court of Appeal is to determine if the sentencing judge applied wrong principles or if the sentence was clearly excessive or inadequate. It is only if the sentence falls outside an acceptable range that it is considered to be unreasonable.

Following an offender's conviction for second degree murder, the sentencing judge, in determining whether to increase the period of parole

ineligibility beyond ten years, must consider the criteria set out in s. 745.4 of the **Code**.

In **Shropshire** the Supreme Court held:

(i) that denunciation and deterrence are relevant factors in fixing the period of parole ineligibility;

(ii) that as a general rule, the period should be 10 years but that can be ousted by a determination of the trial judge that according to the criteria set out in s. 745(4) the offender should wait a longer period before having his suitability to be released into the general public assessed; and

(iii) that the power to extend the period of ineligibility need not be used sparingly by the sentencing judge.

I am satisfied from a review of the reasons given by the trial judge for fixing 19 years as the period of ineligibility for parole that the trial judge considered the character of the offender. The trial judge stated in his reasons that he found the appellant's evidence that the victim had made improper sexual advances towards him was a revolting suggestion that was totally lacking in credibility. The trial judge further commented on the character of the offender when he stated

> This has been a particularly brutal murder. It is incomprehensible to me how you could kill somebody, probably enjoy a cigarette afterwards, wash, set a fire and carry on with the theft of things from a man's home. It is a brutal murder in the sanctity of his own home.

In his remarks on sentencing the trial judge also commented on what I would perceive to be his views on the lack of remorse of the appellant. The trial judge stated:

> I thought the attempt at an apology by Mr. Tsyganov when he was on the stand was rather hollow.

The trial judge was well aware that the appellant was a first offender as he made specific reference to it. Although the trial judge referred to the appellant as being a "young person" the record shows that he was in his 30th year when he committed the murder.

It is likewise clear from his reasons that the trial judge considered the nature of the offence as he specifically commented on the brutality of the murder. A review of the evidence supports the trial judge's finding that the murder was, indeed, brutal.

The sentencing judge considered the circumstances surrounding the commission of the offence when he commented in his reasons: (i) that the murder would never have happened if the victim had not been generous enough to permit the appellant to reside with him back in 1991; and (ii) that were it not for this fact the appellant would never have come in contact with his victim.

The sentencing judge had sat through many days of trial testimony.

He was well aware of the circumstances of the offence and made specific reference to the fact that the crime was committed in the victim's home; that the victim had been generous to the appellant and that the murder was brutal.

The trial judge made specific reference to being familiar with the **Shropshire** case and **R. v. Muise** (1994), 94 C.C.C. (3d) 119 (N.S.C.A.) as well as the principles respecting the fixing of the period of parole ineligibility as recited to him by the appellant's counsel.

Counsel for the appellant submits that a 14 year period of parole ineligibility would be fit as being more in line with decisions he relied on from several other provinces

In **R. v. M.(C.A.)**, [1996] 1 S.C.R. 500; (1996), 105 C.C.C. (3d) 327, Chief Justice Lamer, for the Court commented at p. 375 (C.C.C.(3d)) respecting disparity of sentences:

> Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada: see, *e.g., R. v. Knife* (1982), 16 Sask. R. 40 (C.A.) at p. 43; *R. v. Wood* (1979), 21 C.L.Q. 423 (Ont. C.A.) at p. 424; *R. v. Mellstrom* (1975), 22 C.C.C. (2d) 472 at p. 485, 29 C.R.N.S. 327, [1975] 3 W.W.R. 385 (Alta. C.A.); *R. v. Morrissette* (1970), 1 C.C.C. (2d) 307 at pp. 311-12, 12 C.R.N.S. 392, 75 W.W.R. 644 (Sask. C.A.); *R. v. Baldhead* [1966] 4 C.C.C. 183 at p. 187, 48 C.R. 228, 55 W.W.R. 757 (Sask. C.A.). But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime: see *Mellstrom*, *Morrissette* and *Baldhead*. Sentencing is an inherently individualized process, and the search for a single appropriate

> sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons, consistent with the general standard of review we articulated in *Shropshire*, I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

The Court recognized that sentences for a particular offence should be expected to vary to some degree across various communities and regions of the country.

The Supreme Court commented (at p. 360) that Parliament, in imposing mandatory minimum periods of parole ineligibility, was undoubtedly animated by the full range of sentencing principles and that in setting the threshold period of ineligibility, Parliament appears to have been principally motivated by the sentencing goals of deterrence and denunciation.

I am satisfied that the sentencing judge did not over-emphasize denunciation and deterrence in fixing the period of ineligibility for parole in the circumstances of this murder. The sentencing judge considered the criteria set out in s. 745.4 of the **Code** and, therefore, did not apply the wrong principles in arriving at the 19 year period of ineligibility that he fixed.

Considering the periods of parole ineligibility fixed in other second

degree murder cases considered by this Court, I am satisfied that the period of 19 years as fixed by the sentencing judge is within an acceptable range and is not unreasonable. The sentence is, therefore, fit. I would dismiss the appeal.

Hallett, J.A.

Concurred in:

Glube, C.J.N.S.

Pugsley, J.A.

C.A.C. No. 142953

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

SERGEY TSYGANOV

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.