C.A.C. No. 130688

NOVA SCOTIA COURT OF APPEAL

Chipman, Matthews and Flinn, JJ.A.

Cite as: R. v. T.T.G., 1997 NSCA 58

BETWEEN:		
T. T. G.	Applicant	Alison P. Brown for the Appellant
- and -		
HER MAJESTY THE QUEEN	Respondent	Robert E. Lutes, Q.C. for the Respondent
		Appeal Heard: December 9, 1996
		Judgment Delivered: February 6, 1997

THE COURT: The application is dismissed as per reasons for judgment of Chipman, J.A.; Matthews and Flinn, JJ.A., concurring.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

CHIPMAN, J.A.:

This is an application for a review of an order of a Youth Court judge transferring the applicant's trial on charges of first degree murder, theft and break enter and theft to ordinary court.

On the transfer application by the Crown the Youth Court judge was governed by ss. 3, 16(1), 16(1.1) and 16(2) of the **Young Offenders Act**:

> 3 (1) It is hereby recognized and declared that
>
> (a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;
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> (b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;
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> (c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;
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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;
>
> . . .
>
> (2) This Act shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out in subsection (1).
>
> 16 (1) At any time after an information is laid against a young person alleged to have, after attaining the age of fourteen years, committed an indictable offence other than an offence referred to in section 553 of the **Criminal Code** but prior to adjudication, a youth court shall, on application of the young person or the young person's counsel or the Attorney General or the Attorney General's agent, after affording both parties and the parents of the young person an opportunity to be heard, determine, in accordance with subsection (1.1), whether the young person should be proceeded against in ordinary court.

> 16 (1.1) In making the determination referred to in subsection (1), the youth court shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be reconciled by the youth remaining under the jurisdiction of the youth court, and if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall order that the young person be proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence.
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> (2) In considering an application under subsection (1) in respect of a young person, a youth court shall take into account
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> (a) the seriousness of the alleged offence and the circumstances in which it was allegedly committed;
>
> (b) the age, maturity, character and background of the young person and any record or summary of previous findings of delinquency under the **Juvenile Delinquents Act**, chapter J-3 of the Revised Statutes of Canada, 1970, or previous findings of guilt under this Act or any other Act of Parliament or any regulation made thereunder;
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> (c) the adequacy of this Act, and the adequacy of the **Criminal Code** or any other Act of Parliament that would apply in respect of the young person if an order were made under this section to meet the circumstances of the case;
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> (d) the availability of treatment or correctional resources;
>
> (e) any representations made to the court by or on behalf of the young person or by the Attorney General or his agent; and
>
> (f) any other factors that the court considers relevant.

It was agreed that the foregoing, being the law in effect on October 23, 1995, the date of the alleged offence, was applicable and that the amendments in 1995, Bill C-37, which came into effect on December 1, 1995 were substantive and therefore not applicable retrospectively to offences occurring before that date. On the application before the Youth Court judge, the Crown had the burden of proof which was referred to by the majority of the Supreme Court of Canada in **R. v. M.(S.H.)** (1989), 50 C.C.C. 503 as not being a heavy

onus. See pages 546-548.

On October 23, 1995, the body of C. L. S., a 39 year old mother of three was found in the bedroom of her home at *, * County. The victim had received multiple knife wounds and blunt trauma to the head. She was stabbed forcefully in the face and her throat cut twice. The knife was repeatedly plunged into her upper chest, breast and abdomen. Further stab wounds were found in the back and shoulder area. The evidence of the pathologist was that there were no defensive wounds on the arms or hands of the victim. The inference to be drawn is that the attack was initiated while the victim lay prone in her bed. It appears that she was then able to get up and stagger a short distance to her final resting place where she died from a massive loss of blood.

The evidence points to the applicant as the perpetrator of this crime. At the time his age was 16 years and 11 months. It appears that he entered the home by way of the kitchen. He was armed with two knives. Two telephone lines were cut, one in the kitchen and one by the bed stand where the victim was murdered.

The applicant was a neighbour of the victim. He had previously broken into her home and had been banned from the residence by her husband. The matter was not reported to the authorities. The applicant's mother described the victim as her best friend. The applicant knew that the victim was alone at the material time.

As appears from a statement given to the Florida State Police, after the killing, the applicant, covered with the victim's blood, did not flee at once but took a shower in the victim's home, and then removed stereo equipment and compact disks of his choice. He told the police that when he left, the victim was still moaning and breathing. He located the keys of the victim's van which he stole. After returning to his home to change his clothes, he left for Florida where he ultimately turned himself in to the Florida State Police. The van was recovered in New York. Some other stolen items were recovered from the applicant.

Evidence at the transfer hearing consisted not only of that relating to the offence and to the applicant, but to the options for treatment of the applicant if convicted, both in the young offender system and in the ordinary court system.

There was evidence from Dr. John Bishop on behalf of the Crown about the applicant's essentially normal mental state and his surprising lack of emotion with respect to the offence. He concluded that it was impossible to determine the extent to which rehabilitation might be effective. The applicant remains a danger to the public, in his opinion.

The applicant's mother was reported in the predisposition report to have stated that she felt she had lost her son, as she found in him no evidence of having any conscience respecting the events in question. Other Crown witnesses testified respecting the applicant's lack of emotion.

The principal evidence on behalf of the applicant was from Dr. Joseph Gabriel who interpreted data from the psychological testing of the applicant. Dr. Gabriel spoke of a sensation-seeking impulsive characterization on the part of the appellant. He was of the view that the applicant suffered from low self-esteem, lack of confidence and self-alienation. The applicant's reaction was of panic when he found himself in the victim's home and he over reacted to what he perceived as threats of the victim in attempting to defend herself. Dr. Gabriel was optimistic that having identified the applicant's areas of deficiency, he could be treated with the programs available within the youth detention centre at Waterville, Nova Scotia. In short, he was of the view that the applicant was rehabilitative.

In his decision to order the applicant's transfer to ordinary court, the Youth Court judge referred to case authority, the Declaration of Principle set out in s. 3 of the **Young Offenders Act** and the provisions of s. 16 respecting transfer. The Youth Court judge considered the written briefs from the Crown and counsel for the applicant and having weighed and balanced the relevant factors he concluded:

. . . I am satisfied, and indeed, am convinced that the young person should be proceeded with in ordinary Court, in accordance with the law ordinarily applicable to an adult charged with such an offence. It's my opinion that the interest of society, which includes protection of the public and rehabilitation of the young person, cannot be reconciled by the young person remaining in this Court, and therefore protection of the public is paramount and must prevail. It is also my opinion that the needs of the young person are better addressed by such a transfer because of the longer term treatment which would be available. In coming to my opinion, I have taken into account that the offence in the circumstances in which it was committed were horrible, almost beyond imagination. I've taken into account the age of the young person which is nearly 17 at the time of the offence and nearly 18 now. I've taken into account the maturity, character and background of him. I . . . what could be characterized as immaturity, indications of lack of remorse or emotion and the absence of any prior involvement in the criminal justice system. Dr. Bishop, for example, is concerned about the young person's explosiveness and sensation seeking behaviour. I've taken into account the inadequacy of the Young Offenders Act to deal with so horrible a crime as here, including the inappropriate sentence should a finding of guilt result, and the more appropriate application of the Criminal Code. I've taken into account the availability of treatment or correctional resources. Particularly, I've concluded that it is likely that the young person has a problem which has no solution or a problem which only a long term solution is required to ensure that it is not repeated, and therefore, a youth facility would not be the appropriate setting for resolution, either physically or chronologically. I've taken into account, as well, the representation of both counsel, which I have carefully weighed and with the greatest respect to counsel, representations on behalf of the young person, I accept the views of the Crown in preference. I've taken into account the evidence adduced and I find that that evidence on behalf of the Crown outweighs that adduced on behalf of the young person, and I accept that of the Crown witnesses in case of conflict. I've taken into account the Pre-Disposition Report of Probation Officer Wharry, a senior and well respected Probation Officer, whose assessment concludes as follows:

> The writer is concerned about the mental health of the offender. The apparent lack of concern for the victim or her family, is a concern, as is the offender's inappropriate use of circumstances of the offence to try to impress peers. The offender's apparent lack of emotion and lack of expression or demonstration of remorse respecting the offence has been noted by the writer, Youth Centre Staff, the subject's mother

> and police. This concern may suggest that the offender continues to present risk. In light of this, the consideration of the protection of the community appears to present itself as the primary consideration.
>
> I adopt that paragraph of the Probation Officer in his Pre-Disposition in Court. I, therefore, am prepared to grant the Order of the Crown, transferring Mr. G. to ordinary Court . . .

The power of review of the Youth Court judge's decision is conferred on this Court by s. 16(9) of the **Young Offenders Act**:

> 16(9) An order made in respect of a young person under this section or a refusal to make such an order shall, on application of the young person or the young person's counsel or the Attorney General or the Attorney General's agent made within thirty days after the decision of the youth court, be reviewed by the court of appeal, and that court may, in its discretion, confirm or reverse the decision of the youth court.

Before us is the evidence given before the Youth Court judge, the exhibits, the submissions of counsel before him and his decision. The applicant's guilt of the crime of which he is charged must, of course, be established at his eventual trial by proof beyond a reasonable doubt. That said, the evidence is before us for the purpose of this motion and is to be taken at its face value. Indeed, it appears well established that on such an application where there is conflicting evidence, the court may proceed on the evidence most damaging to the young person. See **R. v. S.(G.)** (1991), 5 O.R. (3d) 97 (Ont. C.A.); **R. v. J.H.** (1994), D.C.J. No. 1988 (B.C.C.A.); and cases referred to therein.

This Court's powers on a review of a transfer order were previously reviewed by the Court in **R. v. M.J.M.** (1989), 89 N.S.R. (2d) 98. The Court said at p. 104:

> . . . Our discretion must be exercised upon the facts properly found and in accordance with the guiding principles set out in the **Young Offenders Act** which direct us to weigh the conflicting interest and other factors therein set out. We should also have regard to the opinions expressed in the decisions under review. Subject to these constraints, we do have the power to substitute our view for those of the court's below on the merits of a transfer. We do not have the power to conduct a hearing **de novo**.

Speaking with reference to the legislation as it existed at that time, the court continued at p. 105:

> Central to the entire process is that the court must be of the opinion that the transfer is in the interest of society. In so forming that opinion, the court must have regard to the needs of the young person. It must be kept in mind too that the interests of society also include the rehabilitation of the offender if at all possible and, in this sense, his interests and those of his family must be considered in determining what is in the interests of society. It is obvious that if a long incarceration will merely turn a malleable young person into a hardened criminal, the interests of society will not be well served. On the other hand, the interest of society also calls for society's protection and where the young offender is dangerous, and the maximum three year period of incarceration available in the youth process does not adequately protect society, this must weigh heavily in the balance.
>
> In having regard to the needs of the young person, it is noted that the word is "needs" and not "wishes". While in some instances the needs of the young person may call for avoiding long incarceration, in other circumstances such may be exactly what is needed from the offender's point of view, to protect him against the risk of recidivism and the danger to his person that that may entail.

The foregoing must be read in the light of the addition in 1992 to the legislation of s. 16(1.1) quoted above. This sets out the primary test to be applied by the court. This provision calls for a balancing of the protection of the public and the rehabilitation of the young person. If the protection of the public and the rehabilitation of the young person cannot be reconciled by the young person remaining under the jurisdiction of the Youth Court, the protection of the public shall be paramount and the court must order the transfer. See **R. v. C.(D.)** (1993), 85 C.C.C. (3d) 547 (Ont. C.A.); **R. v. B.(C.)** (1993), 86 C.C.C. (3d) 214 (Ont. C.A.).

An extensive discussion of the subject of transfer to ordinary court can be found in c. 14 of **Young Offender Law in Canada**, Second Edition, by Patricia Platt.

We must keep in mind that while we are free to exercise our discretion in confirming or reversing the decision below, we must accept the findings of fact made by the

trial court unless they have been shown to be erroneous having regard to the well-known principles that govern a review of such findings. See **R. v. M.(S.H.)** (1989), 50 C.C.C. (3d) 503 (S.C.C.) at pp. 548-9.

Turning to this case, the applicant has not shown that the Youth Court judge erred in reaching his conclusions of fact. The Youth Court judge has made an unequivocal finding that the evidence on behalf of the Crown outweighs that adduced on behalf of the young person and that he has accepted the evidence of the Crown witnesses where there is conflict between their testimony and that adduced on behalf of the applicant.

What we have before us is the apparent commission of a brutal murder by a youth who was 16 years and 11 months of age at the time. The motive was apparently to cover up his identity as a robber. He came prepared with two knives to assure that end, if necessary. All of the circumstances indicate a premeditated, callous and calculated execution of the crimes.

The applicant's character emerges from the evidence. He appears to be without remorse for his actions and shows little or any emotion. He is a loner who is socially withdrawn, but his mental status is essentially within normal limits. He has no other criminal record.

In the young offender system, the maximum penalty for first degree murder is five years less a day, made up of a maximum of three years custody, to be followed by two years less a day of conditional supervision, which can be converted to custody in certain circumstances.

Under the young offender regime, incarceration would be in a young offender facility, open or secure, with possible transfer to a provincial correctional facility for adults upon reaching the age of 18.

In the ordinary court system, a sentence of life imprisonment for murder committed by a person under the age of 18 years carries ineligibility for parole for such

period between five and ten years as is specified by the trial judge.

This Court canvassed with counsel the sentencing options available to the ordinary courts in sentencing a young person convicted of murder. Such options are relevant in taking into account, as we must, "the availability of treatment or correctional resources" (s. 16(2)(d) **ante**).

Section 16.2 of the **Act**, applicable to this transfer, provided:

> 16.2 (1) Notwithstanding anything in this or in any Act of Parliament, where a young person who is proceeded against in ordinary court as the result of an order made under section 16 is convicted and sentenced to imprisonment, the court shall, after affording the young person, the parents of the young person, the Attorney General, the provincial director and representatives of the provincial and federal correctional systems an opportunity to be heard, order that the young person serve any portion of the imprisonment in
>
> (a) a place of custody for young persons separate and apart from any adult who is detained or held in custody;
>
> (b) a provincial correctional facility for adults; or
>
> (c) where the sentence is for two years or more, a penitentiary.
>
> (2) In making an order under subsection (1), the court shall take into account
>
> (a) the safety of the young person;
>
> (b) the safety of the public;
>
> (c) the young person's accessibility to family;
>
> (d) the safety of other young persons if the young person were to be held in custody in a place of custody for young persons;
>
> (e) whether the young person would have a detrimental influence on other young persons if the young person were to be held in custody in a place of custody for young persons;
>
> (f) the young person's level of maturity;

(g) the availability and suitability of treatment, educational and other resources that would be provided to the young person in a place of custody for young persons and in a place of custody for adults;

(h) the young person's prior experiences and behaviour while in detention or custody;

(i) the recommendations of the provincial director and representatives of the provincial and federal correctional facilities; and

(j) any other factor the court considers relevant.

(3) Prior to making an order under subsection (1), the court shall require that a report be prepared for the purpose of assisting the court.

(4) On application, the court shall review the placement of a young person in detention pursuant to this section and, if satisfied that the circumstances that resulted in the initial order have changed materially, and after having afforded the young person, the provincial director and the representatives of the provincial and federal correctional systems an opportunity to be heard, the court may order that the young person be placed in

(a) a place of custody for young persons separate and apart from any adult who is detained or held in custody;

(b) a provincial correctional facility for adults, or

(c) where the sentence is for two years or more, a penitentiary.

(5) An application referred to in this section may be made by the young person, the young person's parents, the provincial director, a representative of the provincial and federal correctional systems and the Attorney General.

(6) Where an application referred to in this section is made, the applicant shall cause a notice of the application to be given

(a) where the applicant is the young person or one of the young person's parents, to the provincial director, to representatives

> of the provincial and federal correction systems and to the Attorney General;
>
> (b) where the applicant is the Attorney General or the Attorney General's agent, to the young person, the young person's parents and the provincial director and representatives of the provincial and federal correction systems; and\
>
> (c) where an applicant is the provincial director, to the young person, the parents of the young person, the Attorney General and representatives of the provincial and federal correction systems.

Counsel for the applicant referred to the decision of the Manitoba Court of Appeal in **R. v. Godlewski** (1994), 3 W.W.R. 153; 92 Man. R. (2d) 117 to support the proposition that this section does not apply to an accused who, by the time of conviction is, as the applicant would be, 18 years of age or over. He would then, it is submitted, no longer be a "young person".

In **Godlewski, supra**, Scott, C.J.M. on behalf of the court referred to s. 16.2 and the definition of a young person in s. 2(1) of the **Act**:

> 2. In this Act,
>
> . . .
>
> "young person" means a person who is or, in the absence of evidence to the contrary, appears to be twelve years of age or more, but under eighteen years of age and, where the context requires, includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act;

Scott, C.J.M. then referred to **R. v. Z.(D.A.)**, [1992] 2 S.C.R. 1025 where the Supreme Court of Canada held that the strict requirements of s. 56(2) of the **Act** did not apply to a person who had become an adult at the time of his arrest. Lamer, C.J.C. explained the rationale for this interpretation at p. 1045:

> Moreover, the interpretation proposed by the appellant would render "where the context requires" superfluous. If Parliament had intended to define "young person" in the

> manner suggested by the appellant [that is to say to a person over the age of 18 at the time of the interview], there would have been no need for Parliament to have inserted the words "where the context requires" to effect this result.

Scott, C.J.M. concluded at p. 170:

> In examining the new section in light of these authorities, I have concluded that it is directed to "concerns arising out of the fact that the accused is still a youth"; see **R. v. Z. (D.A.)** at p. 1049. This is made abundantly clear by an examination of the criteria the court is mandated to take into account by s. 16.2(2). The factors listed appear to be primarily directed to the special needs and circumstances of a person who is not an adult under the Act, but who, nonetheless, due to the seriousness of the offence and other circumstances has been dealt with and convicted in adult court. Little purpose would be served in going through the process set forth in the new section for a person who had been convicted of an "adult offence" and who had long since passed the age of 18.

The applicant adopts this argument. The factors set forth in s. 16.2(2) specifically refer to the special needs of a young person. It is submitted that such factors are obviously not applicable to a person who has attained the age of 18 years at the time of sentence. The applicant further refers to s. 16.1:

> 16.1 (1) Notwithstanding anything in this or any other Act of Parliament, where
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> (a) an order is made under section 16 that a young person who is under the age of eighteen be proceeded against in ordinary court, and
>
> (b) the young person is to be in custody pending the proceedings in that court, the young person shall be held separate and apart from any adult who is detained or held in custody unless the youth court judge is satisfied, on application at the time of the making of the order, that the young person, having regard to the best interests of the young person and the safety of others, cannot be detained in a place of detention for young persons.
>
> (2) Notwithstanding anything in this or any other Act of Parliament, where

> (a) an order is made under section 16 that a young person who is over the age of eighteen be proceeded against in ordinary court, and
>
> (b) the young person is to be in custody pending the proceedings in that court, the young person shall be held in a place of detention for adults unless the youth court judge is satisfied, on application at the time of the making of the order, that the young person, having regard to the best interests of the young person and the safety of others, should be detained in a place of custody for young persons.

The applicant says it would appear incongruous to interpret s. 16.2 so as to allow a person who has already attained the age of 18 years to serve a portion of the sentence in a youth facility when s. 16.1(2) provides that **prima facie** a person of such age is, pending proceedings in ordinary court, to be detained in an adult facility. I would point out that s. 16.1 deals with interim custody only, and should not be assigned great weight in determining what Parliament intended to be the options available to an ordinary court in imposing sentence upon a person who has been transferred from youth court.

The applicant's arguments must be balanced against the submissions of the respondent.

The respondent acknowledges that **Godlewski, supra**, is authority for the position that s. 16.2 would not apply here, but urges that as this Court is not bound by that decision, we should not follow it. The respondent points out that the Supreme Court of Canada recognized that in the **Act** Parliament left the courts with a judicial discretion to determine whether the context in which the term "young person" is used requires that it be interpreted to include an accused over the age of 18. Lamer, C.J.C. said at p. 1045:

> . . . Parliament has expressly left it with the courts to consider whether the context in which the term "young person" is used requires that it be interpreted to include an accused over the age of 18.

The respondent says that while the Supreme Court of Canada has exercised

the discretion for all courts with respect to s. 56, the discretion remains with respect to other sections including s. 16.2. In **Z.(D.A.), supra**, Lamer, C.J.C. said at p. 1049:

> In making the above comments I do not mean to suggest that only those provisions governing the dispositions available to an accused will continue to apply to an adult accused and not to the other special protections afforded under the **Act**.

The respondent submits that the inference to be taken from this quotation is that disposition and sentencing provisions would continue to apply after the young person had attained the age of 18. For one thing there is no doubt that an accused proceeded against in youth court would have the disposition imposed pursuant to s. 20 of the **Act** no matter what their age. Indeed, except for the application of s. 741.1 of the **Code**, once dispositions are imposed under the **Act** they remain young offender dispositions. The respondent submits therefore that in the context of s. 16.2, that of sentencing and accountability, the sentencing court should be in a position to access all three placement options. It is submitted that this argument is fortified by the fact that s. 16.2 has built into it a discretion for the court to exercise. The respondent points to the recent amendments for presumptive transfer for 16 and 17 year olds who commit one of five enumerated offences (s. 16(1.01)). Many of these persons will obviously have reached the age of 18 by the time of sentencing, and should Parliament have intended them to be precluded from the application of s. 16.2, it surely would have said so. It is submitted, therefore, that if the ordinary court on sentencing is of the opinion that placement in "a place of custody for young persons" or in a "provincial corrections facility for adults" is appropriate, then "the context requires" that the transferred offender is "a young person", irrespective of his age at the time of sentencing.

The respondent refers to a number of cases which support its position:

1. **R. v. Lord** [B.C.J. No. 1884 (B.C.S.C.) August 10, 1992]. In this case the young person was over 18 and the Court applied s. 16.2. (B. of A., TAB 2)

2. **R. v. H.(A.)** [1992] O.J. No. 2114 (Ont. Ct. (Gen. Div.)) October 9,

1992]. The Court in this case made comments regarding the application of s. 16.2. (B. of A., TAB 3)

3. **R. v. M.T.** [Y.J. No. 107 (Y.T.C.A.) May 19 & 20, 1993]. The Court in this case did not transfer the young person to adult court but did indicate that s. 16.2 could be used for persons 18 years or older. (B. of A., TAB 4)

4. **R. v. Heckman** [1994 A.J. No. 1077 (Alta. Q.B.) January 11, 1994]. The Court in this case applied s. 16.2 (B. of A., TAB 5)

5. **R. v. C.G.W.** [1996 B.C.J. No. 598 (B.C.C.A.) March 20, 1996]. The young person in this case was 18 and s. 16.2 was considered in upholding the transfer. (B. of A., TAB 6)

6. **R. v. D.O.** [1996 O.J. No. 2703 (Ont. Ct. of Jus. (Prov. Div.)) July 31, 1996]. In this case the young person was 16 but the court endorsed the application of s. 16.2 where young persons had attained the age of 18 through the citing of a previous case from the general division. (B. of A., TAB 7)

Cases supporting the opposite conclusion are **Godlewski, supra**, and **R. v. Crooks**, [1996 O.J. No. 3965 (Ont.C.J.) October 29, 1996].

I find the respondent's argument persuasive and in accord with what I consider Parliament intended in crafting the young offender scheme. A young offender transferred to ordinary court on a murder charge is not for sentencing purposes treated the same as an adult. This further supports the respondent's position. I would also add that it is obvious that in many, if not most cases of a transfer to ordinary court, the person transferred would, by the time of conviction and sentence, have probably attained the age of 18 years. It seems unlikely that Parliament would not have recognized this and would have clearly specified that such a person was not entitled to the sentencing options provided in s. 16.2 if that was what it intended.

Under the ordinary court regime as I have interpreted it, the sentencing judge has much greater flexibility and better sentencing options. This is of particular significance here where the Youth Court judge had before him Dr. Bishop's assessment that until the

reason for the offence was known, it was not possible to construct a rehabilitation program.

Even if s. 16.2 was not available to provide additional sentencing options to the judge of the ordinary court, I am satisfied from a review of the evidence that there are compelling reasons why the applicant must be tried in a system where the sentencing judge will be able to impose much longer term controls than are available under the young offender system.

It will be recalled that the youth court judge specifically found that the evidence on behalf of the Crown outweighed that adduced on behalf of the young person and he accepted that of the Crown witnesses in case of conflict.

One of the key Crown witnesses was Dr. John S. Bishop, a clinical psychologist, who has been in practice since 1958. Dr. Bishop examined the applicant and prepared a report which was before the youth court judge. The report contains the following conclusions:

> The results of the interview with this young offender are essentially within normal limits and reveal no indication of significant impairment in his basic thought processes. Although his affect was somewhat flat, his mood was essentially appropriate to the situation. No impairment in his memory, orientation or capacity for concentration was noted. Psychological test results yielded many contradictory findings, on the one hand indicating an acting-out, risk-taking and sensation-seeking type of behaviour, but on the other hand also indicating a socially isolated, withdrawn and introverted orientation to his surroundings. The most consistent finding in both the testing and the interview results focused on his shyness, socially avoidance behaviour and his interpersonal difficulties. The combined assessment through the interview and testing yielded insufficient information to permit a definitive diagnosis.
>
> It is emphasized that, on the advice of his attorney (Alison Brown) with whom I spoke directly, this young offender declined to discuss any of the circumstances that related to the charge of first-degree murder which has been brought against him. While this is a position which may well have validity from the defendant's viewpoint, it is also a position which represents a marked impediment to any attempts to assess the psychological factors which may have been involved in this young offender's behaviour at the time of the alleged crime.

> This also makes it virtually impossible to determine the extent to which rehabilitation might be effective with this young offender.

Dr. Bishop cannot, at this time, resolve the inconsistency revealed in the psychological testing between tendencies which appear to be impulse oriented and sensation seeking and findings that the applicant is very inhibited and introversive. This causes him a great deal of concern. He is unable to make a diagnosis at this point. Without a diagnosis, he cannot recommend a specific treatment plan. The applicant presents as a loner. Dr. Bishop is not able to speak of the likelihood of the applicant repeating his criminal behaviour. One could never have predicted from his first 16 years of life that he would be charged with the offence with which he has now been charged. Dr. Bishop just does not have any basis at this time on which to reach any conclusions. The massive injuries inflicted upon the victim were consistent with the impulsive sensation seeking aspect of the applicant's personality. It indicates a major, very severe problem in terms of functioning.

Dr. Bishop cannot guarantee that the causes of the applicant's behaviour will not cause him to repeat such acts. He is simply unable at this time to give a long term prognosis. The problem has not yet even been identified. Thus the applicant would remain a danger to the public indefinitely.

An extensive cross-examination by counsel on behalf of the applicant did not weaken the thrust of Dr. Bishop's evidence which is that the problem has not even been identified, let alone the treatment options. It is clearly a serious long term situation.

In his testimony, the probation officer, John Wharry, spoke of the applicant. He was of the view that he was confronted with a very complex young man, and that at the moment there was very little that could be done for him. He was unable to give any guarantee that he could be adequately dealt with within the regime set up under the **Young Offenders Act**.

Even Dr. Gabriel, who testified on behalf of the applicant, conceded that he was reluctant to say whether the applicant's problems could be addressed within a three year period because he said he was not the one establishing the program based upon the goals that are set forth.

In the absence of a known problem for which the program can be constructed, the issue is one of long term placement. The options available in the ordinary court system provide the most flexibility and support the position of the Crown on the initial application before the Youth Court judge.

The heinous nature of the offence, the nature of the offender, his special needs, and the various sentencing options in the event of a finding of guilt were all before the Youth Court judge. I reject the applicant's submission that the Youth Court judge's conclusions were inconsistent with the factors set out in the **Act**. Not only am I satisfied that he made no error in reaching the conclusion that he did, I am satisfied on review of the materials before us that his was the correct decision.

Upon the application of the primary test provided for by s. 16(1.1), I am satisfied that the objectives of affording protection to the public and rehabilitation of the applicant cannot be reconciled by the applicant remaining under the jurisdiction of the youth court. The protection of the public is paramount and the applicant should be tried in ordinary court.

I would therefore exercise my discretion to affirm the decision that the applicant be transferred to the ordinary courts to be tried on the charges against him.

The application is dismissed.

Chipman, J.A.

Concurred in:

Matthews, J.A.

Flinn, J.A.