NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Souvannarath*, 2019 NSCA 44

Date: 20190529
Docket: CAC 475753
Registry: Halifax

Between:

Lindsay Kanitha Souvannarath

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Anne S. Derrick

Appeal Heard: April 16, 2019, in Halifax, Nova Scotia

Subject: **Sentencing. Life imprisonment for conspiracy to commit murder. Use of terrorism sentencing cases. Lack of remorse. Parity. Whether sentence is demonstrably unfit. Deference.**

Summary: The appellant appealed her sentence of life imprisonment for conspiracy to commit murder. She pleaded guilty to conspiring online for over seven weeks with a co-conspirator to commit a mass murder at the Halifax Shopping Centre on Valentine's Day 2015. Her online co-conspirator had access to two guns and ammunition. The appellant, an American, flew from the United States to Halifax to meet up with him the night before the intended carnage. The conspiracy was thwarted, the appellant was arrested at the airport, and the co-conspirator killed himself. A third conspirator who declined an invitation to participate in the mass killing was sentenced on the basis of a joint recommendation to ten years imprisonment.

Issues: In the appellant's view, the sentencing judge's imposition of a life sentence was flawed by his reliance on terrorism sentencing cases as comparators, his treatment of her apparent lack of remorse, and his consideration of the parity principle. The appellant, aged 23 during the conspiracy, and with no criminal record, submits that a sentence of life imprisonment in her case is a demonstrably unfit sentence.

Result: Appeal dismissed. The sentencing judge was well aware he was not sentencing the appellant for a "terrorism" offence as defined by the *Criminal Code*. He made no error in finding the terrorism sentencing cases he cited to be closely comparable. Like the terrorism cases, the objective of the conspiracy to which the appellant pleaded guilty was the terrorizing and indiscriminate killing of multiple victims.

The sentencing judge made no error in how he dealt with the appellant's lack of remorse. He did not treat her lack of remorse as an aggravating factor. He found it was "a significant indicator" of her present and future dangerousness. He also noted that there was "an absence of evidence" regarding the appellant's rehabilitative prospects.

The sentencing judge identified the significant differences between the appellant and the co-conspirator who received a ten-year sentence. The disparity in their sentences was justifiable; their involvement in the conspiracy and their circumstances were distinguishable. There was no error in the sentencing judge's determination that the appellant should receive a significantly heavier sentence of imprisonment.

In sentencing the appellant, the sentencing judge weighed the many relevant factors applicable to her circumstances and the circumstances of the offence. He considered and applied the purpose and principles of sentence. His determination of the appropriate sentence is entitled to considerable deference. The sentence he imposed is not demonstrably unfit. Appellate interference is not justified.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 22 pages.

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Judges:	Bourgeois, Saunders and Derrick, JJ.A.
Appeal Heard:	April 16, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Derrick, J.A.; Bourgeois and Saunders, JJ.A. concurring.
Counsel:	Peter D. Planetta, for the appellant Timothy S. O'Leary, for the respondent

Reasons for judgment:

Introduction

[1] On February 13, 2015, the appellant, traveling on a one-way ticket, flew to Halifax from her home in Chicago, Illinois with a plan for committing a massacre. She not only had a plan, she had an accomplice, James Gamble, a co-conspirator with whom she had forged a murderous bond online. The intended carnage was planned for the next day, Valentine's Day, at the Halifax Shopping Centre.

[2] The massacre never happened but not because the would-be perpetrators abandoned the idea. Justice Peter Rosinski, who sentenced the appellant for conspiracy to commit murder, was satisfied "beyond a reasonable doubt" that, but for the quick response of police acting on an anonymous Crime Stoppers' tip, the plan would have been carried out.

[3] This appeal concerns the life sentence imposed on the appellant following her guilty plea to conspiracy to commit murder. She says the sentence is flawed by errors of law, and manifestly harsh and excessive. Specifically, she says the sentencing judge made three significant errors: by using sentences meted out for terrorism offences as a comparator, by treating the appellant's lack of remorse as an aggravating factor, and by failing to apply the parity principle and imposing a sentence that was grossly disproportionate to the sentence of Randall Shepherd, who also pleaded guilty to the conspiracy.

[4] For the reasons that follow, I do not agree that we should disturb the sentence. I would dismiss the appeal.

The Conspiracy to Commit Murder

[5] The essential facts that underpin this case are found in the 49 paragraph Agreed Statement of Facts referred to by the sentencing judge and appended to his decision (2018 NSSC 96). He was also informed by chat logs from Facebook conversations. I will borrow heavily from this documentation to describe the appellant and the conspiracy for which she was sentenced. The plan developed by the appellant and Gamble over the course of their online conversations was horrifying.

[6] The appellant was 23 years old during the conspiracy, and 26 at sentencing. She is an American citizen and lived in Chicago with her parents. She had graduated with a university degree in 2014 but was unemployed.

[7] The appellant's circumstances did not foreshadow an enthusiastic involvement in a mass murder plot. The sentencing judge described her family as stable and supportive. She was not openly rebellious and, according to her parents, would "obey rules to a fault sometimes" (para. 72). It is apparent the internet became a refuge for a young woman who was quite isolated and friendless. According to her parents, the appellant had always had difficulty relating to and interacting with other people. By the time of her sentencing, a psychiatric opinion suggested she might have Asperger Syndrome. She developed a belief that she was intellectually and morally superior. These features of her social experience and personality helped her forge a bond with James Gamble.

[8] The conspiracy started to take shape in December 2014. The appellant was active on various social media platforms, including Facebook. She styled herself as a neo-Nazi, frequently making explicitly racist postings and glorifying violence and death. She was obsessed with the 1999 Columbine High School massacre and revered those killers.

[9] In December 2014, the appellant began communicating on Facebook with Gamble, an unemployed 19-year-old living in Halifax with his parents. Their daily conversations, often for hours at a time, continued for 7.5 weeks, up to the time the appellant left Chicago for Halifax to embark upon the bloodbath she and Gamble had planned.

[10] Gamble had one close friend, Randall Shepherd, whom he knew from high school. Before connecting with the appellant, Gamble had been entertaining first suicidal and then homicidal thoughts. Obsessed with school shootings and other mass killings, he began thinking about staging a mass killing in Halifax. He discussed the idea with Shepherd who was resistant to his overtures. Shepherd drew the line at discussing the plan and being willing to provide some limited support.

[11] In the appellant, Gamble found what he was looking for: someone who shared his enthusiasm for perpetrating a deadly attack on hapless victims. The appellant also felt they were destined to be together, as killers, and in death.

[12] The extensive Facebook conversations between the appellant and Gamble revealed an intense and protracted interest in violence and death. Consistent themes, referenced at sentencing by the Crown, emerged from their discussions:

- They expressed feelings of having a deep, unique connection to each other. They felt they were fated to be together.

- They discovered they were both keen to commit a mass killing and forged an fervent partnership.

- They became explicitly sexual with each other, often exchanging intimate images while "sexting". They intended to have sex the night before the massacre, which would be the first time for both of them.

- They identified the appellant as more intelligent, more well-read, and better able to articulate her views and ideologies. They endorsed Nazism and viewed themselves, especially the appellant, as racially and intellectually superior.

- They idolized past mass/serial killers, especially the Columbine killers.

- They believed it was their destiny to commit mass murder.

- They expressed enthusiasm for the pain and death they were going to cause.

- They showed disdain for their intended victims.

- They expressed a mutual and deep desire to be infamous for the mass killing they were planning.

- They engaged in animated speculation about the shock, horror, terror, and confusion the mass killing would cause.

- They relished the thought that their families would suffer terrible pain and anguish upon learning what they had done.

- They hoped their massacre would serve as an inspiration to other would-be killers.

- They both indicated a desire to die and planned to commit suicide together at the scene of the massacre. They savoured the thought of ending their lives after inflicting terrible carnage.

[13] The Agreed Statement of Facts describes the appellant's motivations as "many and various":

> …[The appellant] expressed her belief that she is a sex goddess with superior intellect who is entitled to cull the inferior. She also commented that she is a warrior in a world in which racial and ethnic realities must be righted through violence. She commented that committing a mass killing would punish the popular and hurt those who never understood her. She expressed the desire to be infamous.

[14] The sentencing judge referenced the "epitaph" authored by the appellant on February 11, 2015 which was queued for release on February 15:

> Der Untergang
>
> Perhaps you have already heard the news of a mass shooting in Halifax…It has always been my greatest dream to die in battle. But I do so not as a soldier, but as a murderer…modern world…has forced me to bury these heroic longings deep beneath my surfaces where they have since festered at my core and metamorphosed into hate.
>
> **Hate**. It's a strong word, but I'd rather let a strong word define me than a weak one. "Love", for example, is a weak word, for one who loves is not nearly as strong as one who hates…Hate is the drive to exterminate all weakness…Hate sharpens the mind to where it becomes a weapon against all others…Free from empathy, free from manipulation, the isolated man sees the world for what it truly is. The result, of course, is hatred.
>
> My hate is beyond good and evil…I do not consider myself evil, not even for committing murder. Murder makes no difference. All living creatures die. There is no such thing as dying "before one's time".
>
> [para. 66]

[15] The sentencing judge also had before him the details of the intended massacre, laid out in the extensive Facebook conversations and the Agreed Statement of Facts:

- The appellant and Gamble settled on February 14, "Valentine's Day", for the mass killing. They chose the ultimate site – the food court at the Halifax

Shopping Centre, a local mall, because they felt it would result in "mass panic".

- Other sites were briefly discussed: a hospital, a church, and Halifax's new Central Library. The target they settled on, the Halifax Shopping Centre, was described by the sentencing judge:

> [67] … This three-level mall, with upwards of 100 retailers, sits in the midst of a heavily populated Halifax Peninsula. On a typical Saturday, such as February 14, 2015, it is teeming with people.

- The appellant was to fly to Halifax to meet with Gamble on February 13. By the time she arrived, Gamble would have killed both his parents by shooting them.

- Randall Shepherd, who was experiencing a protracted depression, had asked Gamble to shoot and kill him on the night before the massacre. The appellant had no involvement in this plan.

- Gamble and the appellant would spend the night of February 13 together at the Gamble residence and consummate their relationship.

- The mall massacre would be perpetrated the next day, first with the appellant and Gamble throwing Molotov cocktails, followed by shooting.

- Gamble intended to use his father's lever-action hunting rifle. The appellant would use Gamble's father's single-action 16-gauge shotgun. The plan was to shoot as many people as possible with the ammunition they had. (A photograph taken by Gamble and included in the Facebook conversations showed that he had 13 .308 calibre rifle cartridges and 23 shotgun shells.) Gamble intended to finish off wounded survivors using a hunting knife.

- They hoped to kill at least as many people – 13 – as the Columbine killers.

- The appellant and Gamble planned to save the last bullets for themselves. They intended to face each other and pull the triggers on the count of three.

- They planned to have queued social media posts on Tumblr, scheduled to go live on February 15, boasting about a "mass shooting in Halifax".

The Involvement in the Conspiracy of Randall Shepherd

[16] Randall Shepherd's involvement was also before the sentencing judge. Shepherd pleaded guilty to the conspiracy in November 2016 before a different judge and was sentenced to 10 years in prison on the basis of a joint recommendation by counsel. Justice Rosinski noted these details and the reported decision of the Shepherd sentencing (2016 NSSC 329).

[17] Shepherd's role in the conspiracy and his sentencing are relevant to the issue of parity, which I will be addressing later in these reasons, as the appellant has contrasted his sentence to the life sentence she received.

[18] The Agreed Statement of Facts explains Shepherd's role in the conspiracy:

> [25] Shepherd was kept informed of the evolving plan between [the appellant] and Gamble. He encouraged it. In February 2015, Shepherd and Gamble went to the Halifax Shopping Centre and filmed videos of where the attack was to occur.
>
> [26] These videos were noted by the pair to be "basement tapes", a reference to the preparatory video recordings made by the two Columbine shooters designed to memorialize the planning of the attack and enhance its notoriety.
>
> [27] While Shepherd was not agreeable to raising a weapon alongside Gamble and [the appellant], he did purchase a hacksaw and materials needed to make Molotov cocktails for use in the massacre. Additionally, he offered to pick-up [the appellant] from the airport.

[19] Shepherd went by bus to the airport on February 13 to collect the appellant as arranged. They never connected. A Crime Stoppers tip had led to the appellant's arrest by police while she was in secondary inspections at the airport after a Canadian Border Services agent had become suspicious. Shepherd was then arrested as well.

The Suicide of James Gamble

[20] The police investigation that night zeroed in on Gamble whose name had been supplied by the anonymous tipster. Police surrounded his residence and contacted him by telephone, asking that he come out and speak to them. Their efforts were met with tragedy. Gamble, alone in the house, never emerged, and instead committed suicide by shooting himself in the head with his father's hunting rifle.

The Appellant's Guilty Plea to Conspiracy to Commit Murder

[21] The appellant pleaded guilty on April 11, 2017 to conspiring with James Gamble between December 21, 2014 and February 14, 2015 "to murder unnamed members of the public" contrary to section 465(1)(a) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. Her guilty plea immediately followed a failed attempt to have Justice Rosinski exclude the Facebook conversations (2017 NSSC 107).

The Positions of the Crown and Defence at Sentencing

[22] The Crown submitted the sentencing range for the appellant's offence was a prison term from 20 years to life imprisonment. The Crown recommendation was for a life sentence. The Defence argued that the sentence should be between 12 to 14 years in prison with a remand credit of 57 months (1.5 days for each day in custody since arrest).

The Sentencing Judge's Decision

[23] As I have noted, the appellant's sentencing proceeded on the basis of an Agreed Statement of Facts. The entirety of the Facebook chat logs and other related evidence were tendered as exhibits. The sentencing judge also had the appellant's pre-sentence report, and letters written in support of her by her parents and grandparents.

[24] Justice Rosinski imposed a life sentence on the appellant after reviewing the facts underlying the conspiracy and considering the sentencing ranges discussed by the parties, the nature of the offence, the fundamental principles of sentencing under the *Criminal Code*, the circumstances of the offence and of the appellant, the aggravating and mitigating factors, and the rehabilitative prospects for the appellant.

[25] Justice Rosinski agreed with the Crown that the "terrorism" cases, discussed by Duncan, J. in *Shepherd*, were instructive. He recited Duncan, J.'s observations that, although the intended Valentine's Day mall massacre did not fall within the definition under the *Criminal Code* of a "terrorism offence", "the consequences to the victims are the same, and to society as well" (para. 50, quoting from *Shepherd*, para. 28).

[26] In determining sentence, Justice Rosinski applied the "paramount sentencing considerations" of denunciation, specific and general deterrence, and separation of the appellant from society:

> [107] … These considerations will inform what is a "just sanction" specifically in relation to [the appellant's] role in the creation, planning and intended execution of the murders of random members of the public present at the Halifax Shopping Centre on February 14, 2015.
>
> [108] Had the plan not been interrupted, I am satisfied that Mr. Gamble and [the appellant] would have carried it out. Coming upon unsuspecting members of the public at the mall that day, what carnage would they have inflicted with a 16 gauge shotgun with 23 shells; a .308 calibre lever action rifle with 13 shells; and a knife to finish off the wounded? One can readily infer multiple serious casualties would follow.

[27] He dismissed the appellant's argument that Randall Shepherd's sentence of 10 years imprisonment provided any guidance. Imposing a life sentence as "the appropriate and just sanction", Justice Rosinski concluded that the appellant:

- had the intention to kill more than the 13 people murdered in the Columbine High School massacre;
- was at the time of sentencing, and would remain, "an ongoing threat to public safety" requiring her to be separated from society "until that concern can be satisfactorily addressed";
- required a sentence that denounced "this most serious criminal behaviour", deterred her specifically, as well as others who were similarly inclined (paras. 117 – 120).

The Issues

[28] I earlier summarized the issues in this appeal. I will be examining whether the sentencing judge erred in:

- relying on terrorism cases as comparators;
- his treatment of the appellant's apparent lack of remorse;
- his consideration of the parity principle;
- imposing a demonstrably unfit sentence.

[29] The appellant has not appealed the ancillary orders imposed (the DNA order, pursuant to section 487.051(1) of the *Criminal Code*, the weapons prohibition order, pursuant to section 109, and the forfeiture order, pursuant to section 490.1).

She has also not appealed the order pursuant to section 743.6 that she serve 10 years in prison before being eligible to apply for parole.

Standard of Review

[30] It is has been firmly established that the standard of review in sentence appeals is a deferential one. This has been most recently reiterated by this Court in *R. v. Chase*, 2019 NSCA 36 where Saunders, J.A. said:

> [16] The standard of appellate review on a sentence appeal is a deferential one. A trial judge "enjoys considerable discretion because of the individualized nature of the process" (*R. v. L.M.*, 2008 SCC 31 at ¶17). It is settled law that our role on appeal is not to substitute our discretion for that of the sentencing judge; nor set aside the sentence simply because we would have imposed a different one.
>
> [17] A sentencing judge's decision will not be disturbed lightly. We will only intervene in cases where the sentencing judge erred in principle, failed to consider a relevant factor, or over-emphasized a relevant factor in a way that influenced the sentence, or where the sentence is demonstrably unfit (*R. v. Lacasse*, 2015 SCC 64 at ¶11; see also *R. v. Oickle*, 2015 NSCA 87 at ¶21 and the cases cited therein).

[31] Before disturbing a sentence for demonstrable unfitness, the appellate court must be "convinced" the sentence is "clearly unreasonable" (*R. v. J.J.W.*, 2012 NSCA 96, per Oland, J.A., para. 14). To describe a sentence as "clearly unreasonable" is the same as saying it is "demonstrably unfit" (*R. v. W.(G.)*, [1999] 3 S.C.R. 597, para. 19).

[32] Deference prevails as long as the sentencing judge has made no consequential legal errors. A sentencing judge,

> [36] … must correctly identify and apply the relevant legal principles in arriving at sentence. An appellate court is free to substitute its views of the correct legal principles. Furthermore, if a trial judge errs in law or principle, deference dissipates in relation to the discretionary decision as to sentence. The appellate court is free to arrive at the appropriate sentence…
>
> [37] But, as the Supreme Court of Canada recently emphasized in *R. v. Lacasse*, 2015 SCC 64, the legal error must have been one that impacted sentence. [citations omitted].

(*R. v. Landry*, 2016 NSCA 53, per Beveridge, J.A.)

Issue #1 Use of Terrorism Cases as Comparators

[33] The sentencing judge was well aware he was not sentencing the appellant for a terrorism offence. He agreed with Duncan, J.'s statement in *Shepherd* that the mall massacre conspiracy did not constitute a "terrorism" offence as defined in the *Criminal Code* (para. 50, quoting from Duncan, J., para. 28). And like Duncan, J., Justice Rosinski viewed the terrorism sentencing cases as most closely comparable to the nature of the conspiracy to commit murder to which the appellant had pleaded guilty. He observed that there is "no specific offence in the Criminal Code of Canada for planning to commit the simultaneous killing of multiple people" (para. 22). And while he appreciated that the appellant's offence was different from the terrorism offences described in the *Criminal Code*, he saw the need for significant consequences:

> [51] In my opinion, while this conspiracy to commit murders at the Halifax Shopping Centre does not have the precise motivations and specific intentions associated with "terrorist activity" [a term with a specific definition in the Criminal Code], this crime similarly requires that the court send a clear message that those who choose to pursue planned multiple killings should pay a heavy price.

[34] Justice Rosinski identified three of the terrorism cases relied on by the Crown as the most comparable: *R. v. Gaya*, 2010 ONCA 860; *R. v. Khalid*, 2010 ONCA 861; and *R. v. Esseghaier*, 2015 ONSC 5855. Gaya, and Khalid, aged 18 and 19 respectively at the time of the offences, had their sentences increased by the Ontario Court of Appeal – from 12 to 18 years for Gaya and from 14 to 20 years for Khalid. Esseghaier was sentenced in the Ontario Superior Court of Justice to life imprisonment.

[35] Gaya and Khalid pleaded guilty to a terrorist bomb plot to blow up targeted sites in Toronto – the Toronto Stock Exchange Tower, the CSIS headquarters, and an unspecified military base east of the city – during the morning rush hour. They were found to have known that, if successful, the bombings would cause death and serious injury. On appeal, each of their sentences was increased on the basis that they had been significantly involved (although not in senior leadership roles) "in a scheme which, if implemented, could have killed countless people and left the entire country changed very much for the worse" (*Gaya*, para. 19 cited by Rosinski, J., at para. 115; *Khalid*, para. 33). In both cases, the Ontario Court of Appeal found the sentencing judge had placed undue emphasis on mitigating factors which included Gaya and Khalid's status as youthful first offenders, their genuine remorse, and family support (*Gaya*, para. 20; *Khalid*, para. 42).

[36] Justice Rosinski, echoing a point made by the Ontario Court of Appeal in *Khalid*, observed that had the appellant and Gamble implemented their plan but succeeded in only killing two people, she would have been guilty of two counts of first degree murder. He said, "[p]resumptively, on each she would have had no chance of parole for 25 years, being sentenced to the minimum sentence of life imprisonment" (para. 116).

[37] *Esseghaier* was the third terrorism case the sentencing judge found to be comparable. Esseghaier was convicted at trial of terrorism-related offences that involved a plan to derail a VIA Rail train with the ultimate objective of killing all the passengers. Justice Rosinski quoted from Code, J.'s decision:

> [105] … like *Khawaja*, he is remorseless and dangerous and continues to hold the same views that led to the present offences…Finally, [he] bears no resemblance to *Khalid* or *Gaya*, as noted previously. In these circumstances, life imprisonment is the presumptively appropriate sentence.
>
> [*Esseghaier*]

[38] It can be presumed that Justice Rosinski also noted Code, J.'s reference in the immediately preceding paragraph to the "gravity of terrorist crimes that have 'indiscriminate killing' as their object" (*Esseghaier*, para. 104). As the Agreed Statement of Facts establish, the objective of the conspiracy to which the appellant pleaded guilty was indiscriminate killing.

[39] The cases relied on by the appellant at her sentencing and before this Court, are distinctly different. They did not involve indiscriminate killing of multiple victims like the terrorism cases. Two Nova Scotia cases – *R. v. LeBlanc*, 2011 NSSC 412 and *R. v. Marriott*, 2014 NSCA 28 – each dealt with the attempted murder of a targeted victim. LeBlanc received a 10 year sentence to be served concurrently with a 16 year sentence imposed previously for the attempted murder of a different target. Marriott was sentenced to 15 years on the basis of a joint recommendation. Justice Rosinski appropriately saw these cases as "quite distinguishable" (para. 55).

[40] Justice Rosinski noted the appellant also relied on *R. v. Van Buskirk*, 2007 BCSC 1925. *Van Buskirk* was again relied on by the appellant before us in support of her submission that her life sentence fell far outside the normal range of sentences imposed for conspiracy to commit murder. Although Rosinski, J. was not bound by it, because of its facts, the case merits examination.

[41] *Van Buskirk* involved a conspiracy to commit murder with a plan for mass, indiscriminate killing. Van Buskirk, aged 18, entered into an agreement with Abu-Sharife to murder people who were Abu-Sharife's competitors in the drug trade. Van Buskirk was to obtain a supply of C4, a powerful plastic explosive, and detonate it in a nightclub. The expectation was for a number of people to be killed, including those being targeted (para. 3).

[42] The explosive was never procured as the prospective C4 supplier failed to deliver. The plan did not progress beyond the agreement and the attempt to obtain the explosives (para. 4). However, the conspiracy was deemed to be very serious with the judge finding that:

> [6] … It is apparent that the parties were intent on committing the murder, and I have no doubt that had Mr. Van Buskirk obtained the C4 he was seeking, then, assuming he had the technical ability to detonate it as planned, which he seems to have had, many people would have died. The callous conversations that the two [Abu-Sharife and Van Buskirk] had are very disturbing. It is evident that Mr. Van Buskirk in particular was unconcerned not only about killing his target or targets, but also killing anybody else who happened to be in the nightclub. Indeed, it is evident that he preferred a scenario involving many deaths rather than one that only involved the intended victims.

[43] Van Buskirk was also being sentenced for a separate conspiracy to commit murder that was found to have withered on the vine at a very early stage. Its details are not germane. The nightclub bombing conspiracy bears more resemblance to the appellant's case.

[44] The Crown sought nine years for each conspiracy, to be served consecutively. The Defence proposed a sentence of eight years for the Abu-Sharife conspiracy. Although Crown and Defence agreed that Van Buskirk's conspiracy to murder sentences should be concurrent to a recently imposed youth sentence of six years in custody for first degree murder, that joint position was ultimately rejected by the judge (para. 27). (Van Buskirk had been hired by Abu-Sharife to commit the murder. He received the maximum youth sentence of 10 years – six years in custody and four years under community supervision).

[45] Van Buskirk was sentenced to eight years for the Abu-Sharife conspiracy, his youth and parity with Abu-Sharife's effective sentence of eight years being the most influential factors. Although found to be "marginally less" culpable than Abu-Sharife, his "formidable criminal background" (the murder conviction), his lack of concrete efforts at rehabilitation, the doubtful nature of his remorse, and his

"failure as yet to fully come to terms with the severity of the crimes he has committed" satisfied the judge an eight year sentence was appropriate (paras. 19 and 23). Factoring in totality and remand credit, the judge concluded that Van Buskirk should receive seven years for the Abu-Sharife conspiracy and five years concurrent for the other murder conspiracy, a sentence he described as,

> [31] … not unduly harsh and not of a crushing nature. The totality is, to be sure, lengthy, but no more lengthy than is necessary in the circumstances to satisfy the purposes and objectives of sentencing.

[46] Van Buskirk appealed, unsuccessfully. His sentences, and how the judge structured them to fit together, were upheld (2013 BCCA 452). The British Columbia Court of Appeal focused on the effective length of the sentences, which is not relevant here. However, I note the Court referenced a point made by the *Van Buskirk* Crown that the sentence of eight years for the Abu-Sharife "conspiracy 'may be seen as a modest one', having regard to *R. v. Khawaja*, 2012 SCC 69", a terrorism case decided since Van Buskirk's original sentencing (para. 34).

[47] This is an accurate statement considering the cases decided since Van Buskirk's sentencing in 2007 – *Gaya, Khalid, Esseghaier*, and *Khawaja*. I have already discussed the sentences of Gaya, Khalid, and Esseghaier. Khawaja's life sentence imposed by the Ontario Court of Appeal for terrorism offences that would have involved indiscriminate mass killing was upheld by the Supreme Court of Canada (*Khawaja*, para. 131). In the words of McLachlin, C.J.C. for the Court, Khawaja's original sentence of 10.5 years "does not approach an adequate sentence" for acts that included attempting to build bomb detonators that "would have killed many civilians had his plan succeeded" (para. 128).

[48] In light of these more recent cases, it cannot be said Justice Rosinski was in error when he found *Van Buskirk* offered him no guidance.

[49] Contrary to the appellant's submission, Justice Rosinski did not "effectively" sentence her for an offence for which she was not convicted. Her offence is not comparable to the conspiracy to commit murder cases like *LeBlanc* and *Marriott*, or *R. v. Scarcella*, [2006] O.J. No. 1555 (Ont. Sup. Ct), where an 11 year sentence was imposed for a targeted shooting at a restaurant that left an innocent bystander paralyzed.

[50] The sentencing judge made no error in concluding that the conspiracy to commit murder terrorism cases were more comparable to the conspiracy the

appellant pleaded guilty to and offered him some assistance in determining the appropriate sentence for her.

Issue #2 The Appellant's Lack of Remorse

[51] The appellant does not submit there is evidence she is remorseful that the sentencing judge failed to consider. She says the sentencing judge required her to demonstrate remorse and penalized her for failing to do so. She submits the sentencing judge treated her lack of expressed remorse as an aggravating factor. I find this not to have been the case.

[52] Justice Rosinski linked the appellant's lack of remorse to her future dangerousness. An absence of remorse can mean an offender remains a serious threat. A failure to take this into account in determining the appropriate sentence may constitute an error of law (*R. v. Khawaja*, 2010 ONCA 862, para. 239).

[53] Justice Rosinski correctly stated that the appellant "has not expressed remorse for her involvement in this conspiracy to murder multiple persons" (para. 78). He first noted the issue when, in reviewing the appellant's circumstances, he referenced her pre-sentence report:

> [75] [The appellant] advised the probation officer that she accepted full responsibility for her actions, but did not express remorse for her actions saying she had "ideological reasons" for making the plan, which were too "complicated" to explain further. She did, however, express remorse that Mr. Gamble died.

[54] He then embarked upon an examination of the appellant's rehabilitative prospects, and drew the following conclusions:

- The appellant had "been hardened by social rejection and inspired by an internet echo chamber for the disaffected, which glorified violence and death". She was not the same daughter and granddaughter her family had known (para. 76).

- There was "insufficient expert evidence" from which to form "any reliable conclusions" about the appellant's "psychiatric status" (para. 77). (Indeed, the only psychiatric opinion was contained in the appellant's pre-sentence report and came from a psychiatrist who had been treating her in custody for a pre-existing severe depression (para. 73).

- The "Facebook communications, other materials and evidence, including [the appellant's] refusal to renounce the so-called 'ideological" motivations' for the conspiracy supported the "reasonable inference" that it was more likely than not that she still viewed her intended actions as justifiable (para. 78).

- The appellant's prospects for rehabilitation were "very guarded" due to her "ongoing dangerousness, present and reasonably expected to persist for an indefinite period" (para. 80).

[55] The appellant's lack of remorse does not feature in the sentencing judge's enumeration of the aggravating factors. In his discussion of the mitigating factors he considered her guilty plea and the evidence he had on the issue of remorse. He observed that three years had passed since the appellant's arrest and she had not "renounced her purported justifications or enthusiasm for the plan to simultaneously kill multiple random members of the public…" (para. 93). He put the appellant's guilty plea and her lack of remorse in the context of her rehabilitation:

> [95] Typically, a guilty plea is seen to be an expression of the acceptance of responsibility, and beyond that, remorse for the commission of the offence, which in turn is seen as a positive indicator for rehabilitation. That is not the case here.

[56] The sentencing judge did not fall into error when he treated the appellant's lack of remorse as "a significant indicator" of her present and future dangerousness (*Khawaja*, para. 200 (ONCA)). He found there was "compelling evidence of ongoing dangerousness" and nothing that would permit him to "reasonably conclude" that dangerousness would dissipate. (para. 101)

[57] A genuine expression of remorse may have offered Justice Rosinski some reassurance the appellant was ready to participate in reducing the risk she posed. All the judge had before him was a lack of remorse, and, as he noted, "the absence of evidence regarding [the appellant's] rehabilitation prospects" (para. 101). When examining the extent to which the appellant should be separated from society, Justice Rosinski made no error in the use he made of what he did not have.

Issue #3 The Principle of Parity

[58] The appellant submits the life sentence she received cannot be upheld without violating the principle of parity under section 718.2(b) of the *Criminal Code* which requires that "a sentence should be similar to sentences imposed on

similar offenders for similar offences committed in similar circumstances". The appellant acknowledges her greater role in the conspiracy would justify a longer sentence than Randall Shepherd's sentence of 10 years' imprisonment, but that by imposing a life sentence, the sentencing judge failed to honour parity.

[59] As this Court noted very recently: "[w]hat the parity principle requires is that the difference in sentences be understandable" (*Chase, supra*, para. 41). Here the sentencing judge amply satisfied this imperative.

[60] The sentencing judge addressed Randall Shepherd's 10 year sentence and the differences between his involvement in the conspiracy and that of the appellant:

- Shepherd had "a very much less significant role" whereas the appellant was "essential to the conspiracy to commit multiple murders on February 14, 2015" (para. 111).

- Shepherd had declined Gamble's invitation to be his partner in the planned mass killing (para. 112).

- The appellant "enthusiastically" embraced the plan and "reinforced Mr. Gamble's violent tendencies and antisocial rationalizations…" (para. 112).

[61] Justice Rosinski also noted that Shepherd was sentenced on the basis of a joint recommendation by counsel (para. 111). He had other information from Duncan, J.'s sentencing decision. He would have known that Duncan, J. found there was "no sound reason" for departing from the joint recommendation (*Shepherd*, para. 39). He would also have known that Shepherd cooperated with police when arrested, instructed counsel at an early stage to enter into discussion with the Crown that led to his guilty plea, expressed remorse and regret, and had been receiving treatment during his remand for his mental health issues (*Shepherd*, para. 12). In addition, Duncan, J. had the benefit of a psychiatric opinion from Dr. Hy Bloom, a highly qualified forensic psychiatrist, who indicated it was "unlikely that the factors which contributed collectively to Mr. Shepherd's participation in this conspiracy would intersect again in such a way so as to cause Mr. Shepherd to be a risk to others" (*Shepherd*, para. 22).

[62] In the appellant's case, the sentencing judge had no such opinion. He found there was "insufficient expert evidence" to support any reliable conclusions about the appellant's "psychiatric status" (para. 77). (He was referring to the pre-sentence

report containing a psychiatric opinion that the appellant was experiencing a severe depression that pre-existed the conspiracy and might have Asperger Syndrome (para. 73).) As I previously discussed, Justice Rosinski reasonably inferred from the evidence that the appellant remains dangerous.

[63] The appellant and Randall Shepherd simply cannot be described as "similar offenders" who committed "similar offences" in "similar circumstances". The disparity in their sentences was justifiable. The sentencing judge made no error in imposing on the appellant a significantly heavier sentence of imprisonment.

Issue #4 Is the Appellant's Life Sentence Demonstrably Unfit?

[64] Although I am satisfied the sentencing judge did not make the errors the appellant has complained about, I still must examine whether the life sentence he imposed is demonstrably unfit or, in other words, "clearly unreasonable" (*R. v. W.(G.), supra*, para. 19). For the reasons that follow, I find it is not.

[65] It was the sentencing judge's conclusion that this case warranted the imposition of a life sentence:

> [118] [The appellant] is presently, and will remain an ongoing threat to public safety. It is therefore important that she be separated from society until that concern can be satisfactorily addressed.
>
> [119] In my opinion, nothing less than the following sentence will address the primary sentencing objectives here: denunciation of this most serious criminal behaviour; deterrence of [the appellant] specifically, and others who become inclined to such criminal behaviour; and separating her from society.
>
> [120] A life sentence is the appropriate and just sanction to address the unique circumstances of this offence and offender.

[66] The Crown's recommendation for a life sentence, the maximum sentence available for conspiracy to commit murder, necessitated Justice Rosinski's examination of the jurisprudence on maximum sentences, notably the discussion in *R. v. L.M.*, 2008 SCC 31. He quoted the Supreme Court of Canada in *L.M.*:

> In *R. v. Cheddesingh*, [2004] 1 S.C.R. 433, 2004 SCC 16, *the Court acknowledged the exceptional nature of the maximum sentence, but firmly rejected the argument that it must be reserved for the worst crimes committed in the worst circumstances.* Instead, all the relevant factors provided for in the *Criminal Code* must be considered on a case-by-case basis, and if the

> circumstances warrant imposing the maximum sentence, the judge must impose it and must, in so doing, avoid drawing comparisons with hypothetical cases.
>
> [Decision, para. 38, citing *L.M.* at para. 20; Rosinski, J.'s emphasis]

[67] The approach *L.M.* describes to determine if a life sentence is warranted is the approach that was undertaken by the sentencing judge. He drew comparisons not with hypotheticals but between the appellant's crime and the terrorism cases I discussed previously. He committed no error by doing so. He imposed a life sentence following a review of all the relevant factors in the *Criminal Code*.

[68] Justice Rosinski paid careful attention to the purpose and principles of sentencing codified in section 718 of the *Criminal Code*. He noted that the "fundamental purpose of sentencing is to protect society" and reiterated the objectives of sentencing sanctions that include: denunciation and deterrence, separation of offenders from society where necessary, and rehabilitation, all of which he discussed in the context of the appellant's offence. He recognized the requirement that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender (*Criminal Code*, s. 718.1).

[69] Proportionality is "the cardinal principle that must guide appellate courts in considering the fitness of a sentence…" (*R. v. Lacasse*, 2015 SCC 64, para. 12). As I have already discussed, Justice Rosinski had before him, and took care to consider, the evidence that established the seriousness of the conspiracy to commit murder and the significant role the appellant played in it.

[70] Sentencing is highly individualized and, as my colleague, Saunders, J.A. observed in *R. v. Chase*: " *Lacasse* also reminds us of the significant deference owed by appellate courts when considering the weight a trial judge chooses to give to relevant factors in the delicate balancing process that sentencing requires" (*Chase*, para. 57).

[71] I have already discussed aspects of Justice Rosinski's analysis – his use of the terrorism cases, and how he addressed the issue of remorse, the appellant's prospects for rehabilitation, and the parity principle. He also took into account a broad range of other considerations: aggravating and mitigating factors, the appellant's circumstances and her guilty plea. He did not fail to examine any relevant factors in determining what he viewed as the appropriate sentence.

[72] Justice Rosinski saw this conspiracy to commit murder as replete with aggravating factors. His view was supported by the evidence. As he noted, the

appellant and Gamble intended to stage a bloody, terrifying, notorious event, one that would "inspire other mass killings in pursuit of a new world order", "create mass panic, and thereby undermine the sense of security and peace of mind" in the community, maximize the "dead and wounded casualties", and be characterized by "mocking, callous and brutal" treatment of the potential victims (paras. 83, 84, 86, and 88). He also found it aggravating that the appellant, an American resident and citizen, had travelled to Canada "exclusively for the reason to commit a serious crime" (para. 87).

[73] Justice Rosinski appropriately considered what could constitute mitigating factors – the appellant's relative youth, and the fact that she had "no previous criminal record, or demonstrated antisocial behavior" (para. 74). He noted she had pleaded guilty, which he acknowledged "is generally seen to be a mitigating factor on sentence" (para. 97). But he found these factors to have a limited influence. The appellant was "youthful" but "her decisions were not the result of impulsiveness or immaturity – they were taken after much time and deliberation". He observed that the appellant had flown here to commit mass murder and was "dedicated to dying here" (para. 92). The appellant's guilty plea was "largely attenuated by the arguable inevitability of her being found guilty" once Justice Rosinski had ruled the Facebook communications were admissible evidence against her (para. 97).

[74] In this Court, the appellant's actions were described by Mr. Planetta as "amateurish". A similar argument was made before the Ontario Court of Appeal in *Khawaja* where the evidence indicated the detonator for the bombs may have required some modifications to be functional. The court found this fact to be irrelevant on sentencing:

> [229] … Terrorists who are caught in the preparatory stage may often appear to be amateurish; in those cases where the same plans have been carried out, they appear to be anything but amateurish. The characterization "amateurish" does not lessen the threat.

[75] Substitute "prospective mass killers" for "terrorists" in the statement in *Khawaja*, and the amateur nature of the appellant's plan does not appear any less menacing. In fact, the sentencing judge viewed the appellant as having moved beyond the preparatory stage:

> [105] … [the appellant's] travel from the United States to Halifax, is properly characterized as passing beyond planning or "mere preparation" to commit murder, and constitutes the beginning of an "attempt murder". The plan had been

> set in motion. Within 36 hours of her arrival at 12:10 a.m. on February 13, 2015, she intended to go on a killing spree, as planned.

[76] Justice Rosinski took note of what Gamble and the appellant said in their last Facebook conversation. Gamble had the guns ready. The appellant's arrival in Halifax was imminent. They were motivated and poised to strike as planned:

> [65] …
>
> Mr. Gamble: I'm sitting here with the shotgun in my lap and three shells in my pocket…It makes me think about how fragile life really is…I have in my lap the power to end somebody's life instantly…I loaded it…Waiting to be unleashed…I feel amazing…How are you feeling?
>
> [The appellant]: Eager…I'm about to get on my last flight.
>
> [pp. 1196-1204]

[77] And, being thwarted, as the appellant was here, does not lessen the gravity of her crime or diminish the degree of her culpability (*Khalid*, para. 36).

[78] I find no fault in the sentencing judge's perspective on what, in different circumstances, are often influential mitigating factors – an offender's relative youth and acceptance of responsibility by way of a guilty plea. As I noted earlier, how he weighed the many relevant factors he considered in determining the appellant's sentence is to be given considerable deference. I have found no basis in law or principle that would justify appellate interference.

Three Discrete Issues – Motive, Treatment Availability in Prison, and General Deterrence

[79] Before concluding these reasons, I will comment on three narrow aspects of the sentencing judge's decision.

Motive as an Aggravating Factor

[80] The sentencing judge commenced his discussion of the aggravating factors in this case by stating:

> [82] [The appellant's] counsel argued that it should not be an aggravating factor that [the appellant] has Nazi sympathies, racist beliefs, or callous views regarding the value of the lives of other humans. He says her motivations should not be considered as aggravating factors on sentencing. I agree that her

> motivations are not aggravating factors *per se*, unless they can also be said to be her intentions in carrying out the plan.

[81] To clarify, motive can be a relevant aggravating (or, potentially, mitigating) factor in sentencing. For example, motivation by greed or financial gain can be an aggravating factor in a sentencing for fraud (*R. v. Abdulle*, 2018 ONCA 643, para. 5), and possession of cannabis resin for the purpose of trafficking (*R. v. Wheatley*, 1997 NSCA 94, para. 11). A pre-calculated decision to inflict permanently disabling injuries on a victim so she could no longer care for her children is another instance where motive has been treated as an aggravating factor (*R. v. Smardon*, [2001] O.J. No. 3437 (C.A.)).

[82] In the appellant's case, as I have noted, the sentencing judge identified a comprehensive list of aggravating factors, many of which reflected the appellant's motivations. Notwithstanding his statement that "her motivations are not aggravating factors *per se*", he effectively took them into account.

The Availability of "Intensive Treatment" in Prison

[83] In his reasons, the sentencing judge considered the suggestion that the appellant might have Asperger Syndrome. He said there was no basis that would link this possibility and a predisposition by the appellant to participate in the conspiracy. And no such basis existed in the record before him. He went on to say:

> [100] Nevertheless, I must recognize that the availability of intensive treatment and therapy during her incarceration, may have significant rehabilitative potential.

[84] It can certainly be hoped that the appellant's rehabilitation will be robustly supported while she is incarcerated. The sentencing judge, indicating his expectation that the appellant's "psychiatric status" would be investigated while she was serving her sentence, did not "rule out the possibility that effective treatments or therapy may significantly improve her rehabilitative prospects" (para. 77). He appropriately included a recommendation in the Warrant of Committal for the appellant to receive "intensive psychological and psychiatric counselling and treatment" (para. 122).

[85] However, there was no evidence to enable the sentencing judge to "recognize", as he did, "the availability of intensive treatment and therapy" in the federal prison system. It should not be assumed by judges that "intensive treatment and therapy" is available. The doctrine of judicial notice cannot be applied to avoid the need for evidence on this issue, where relevant. That said, the recommendation

the sentencing judge included in the Warrant of Committal is broad enough to encompass whatever psychological and psychiatric services the Correctional Service offers to women in the federal prison system.

General Deterrence

[86] The sentencing judge mentioned but did not discuss the principle of general deterrence in the context of this case. He referenced it as one of the sentencing objectives that applied: "deterrence of [the appellant] specifically, and others who become inclined to such criminal behaviour…" (para. 119). I will simply caution against much reliance on general deterrence in cases where the would-be perpetrators intend to die, particularly with a fixed ideology as a driving force. When dying is the goal, life imprisonment in the service of general deterrence becomes meaningless.

Conclusion

[87] In concluding these reasons I wish to thank both counsel for their very helpful written and oral submissions.

[88] It is impossible to know with complete certainty if the appellant and Gamble would have made it to the mall with the guns and Molotov cocktails. Speculation about whether they could have launched their murderous plan – transporting the guns on a bus or in a taxi – is an inappropriate exercise in the context of this appeal. The sentencing judge was entitled to determine the gravity of the conspiracy. He was required to decide what sentence would protect the public. That made it necessary for him to assess the appellant's ongoing dangerousness. He did so. He was satisfied beyond a reasonable doubt by the evidence that had the plan not been interrupted, the appellant and Gamble would have carried it out (paras. 69 and 108). He found no evidence that by the time of her sentencing, the appellant had abandoned or was reconsidering her deadly beliefs. After considering and weighing a broad range of relevant factors, he decided the maximum sentence of life imprisonment should be imposed. There is nothing to justify appellate intervention. I would dismiss the appeal.

Derrick, J.A.

Concurred in:

Bourgeois, J.A.

Saunders, J.A.