C.A.C. No. 02916

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Muise, 1994 NSCA 198
Hallett, Matthews and Roscoe, JJ.A.

BETWEEN:

DARREN RICHARD MUISE	)	Donald C. Murray
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Dana W. Giovannetti
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	September 27, 1994
	)	
	)	
	)	Judgment Delivered:
	)	November 1, 1994
	)	

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Roscoe, J.A. concurring; Matthews, J.A. dissenting on the ground that 20 years ineligibility for parole is not a fit sentence; the offence demanded a 25 year period of ineligibility to properly express society's repudiation of the crime.

E R R A T U M

P. 37 - second full paragraph - last sentence - should read "As Farris, C.J.B.C. said in Oliver, [1977] 5 W.W.R. 344:"

MATTHEWS, J.A.: (Dissenting)

The appellant stands convicted of the second degree murder of Neil Burroughs and robbery, both of which occurred at McDonald's Restaurant in Sydney River. Justice Kelly of the Supreme Court sentenced him to life imprisonment with no eligibility for parole for 20 years respecting the second degree murder offence and 9 years for the robbery. He was also prohibited from having in his possession any firearm, ammunition or explosive substance for a 10 year period after the time he is released from imprisonment.

It is from the sentence respecting second degree murder that he appealed and from which the Crown cross-appeals. The appellant, on September 26, 1994, abandoned his appeal. However, due to the fact that both counsel in their factums have referred to him as the appellant, I will do the same.

For ease in understanding the tragic events at McDonald's and those leading up and subsequent to them, the facts as set out in the Crown's factum are:

> 1. At about 1 a.m., May 7, 1992 taxi drivers discovered a bloody and tragic scene at McDonald's Restaurant, Sydney River.
>
> 2. James Fagan, age 27 years, employed as a night cleaner, was found lying face down in a pool of blood at the back door. He had been shot in the head at close range only moments after arriving by taxi early for work. He died that day in hospital.
>
> 3. Very shortly, police and ambulances arrived. Three other victims were found.
>
> 4. Donna Warren, age 22 years, was found in the main floor office containing the safe. She had been shot twice at close range in the head. She was dead. As night manager, she alone knew the safe combination. The safe had been opened by its combination and more than $2,000.00 and other property had been stolen.
>
> 5. Neil Burroughs, age 29 years, a night cleaner, was found in the kitchen area of the main floor. He was dead. He had been shot three times in the

head. One shot was a contact wound; the others were from close range. Also, his neck had been cut. The autopsy report described that injury as follows:

> There is an incised wound (a cut or wound produced by an instrument with a sharp edge such as a knife or other cutting instrument), on the left side of the neck, the blade of the cutting instrument situated at an acute angle, almost tangential to the skin surface while cutting, the cutting edge located inferiorly - the angle of the cut directed slightly internally and toward the base of the neck. The anterior aspect of the wound is 3 cm. long, the skin edges gaping to the width of 9 mm. The more lateral aspect of the wound (approximately 7 cm. in length) shows 2 components, one of which is incised, shallow, and downward to the base of the neck in the same acute angle as the more anterior incised wound; however the more posterior cut shows gaping edges to a width of 2 cms. The second component is a 4.5 cm. deep stab wound to the floor of the 7 cm. long incised wound which extends into soft connective and muscle tissue of the left lateral base of the neck. From the stabbing component of the wound, appearances suggest a knife as the instrument used, with a blade of at least 1 cm. in width; however, measurements of the instrument cannot be determined on the basis of the wounds present. Incised and stab components of the neck wounds do not involve larger blood vessels of the mid and anterior tissues of the neck, however, severance of smaller blood vessels is evident. The neck also shows, immediately anterior to the 3 cm. shallow incised wound, a V-shaped 5 mm. more superficial incised wound just to the left of the midline (police photo taken).

Also present above the incised and stab wounds on the left side of the neck are superficial very narrow abrasions which come together like the tines of a fork to a point located anteriorly, the abrasions being 4.5 cm. long inferiorly, 3.5 cms, long in the middle, and the most superior slightly curved abrasion being 2.5 cms. in length (police photo taken).

The conclusion was that one of the gunshot wounds principally caused death, but also that the neck wounds accelerated death and could have

alone caused death if untreated. Mr. Burroughs had also sustained blunt trauma to the face, consistent with blows from a shovel handle. Further, there was a 7 cm. long superficial abrasion on the left forearm.

6. Arleen MacNeil, age 20 years, also an employee, was found in the basement, near the door at the foot of the stairs. She had been shot in the head at close range. She has survived, but suffers permanent mental and physical disability.

7. There was nothing at the scene to suggest that the victims could or did fight back. All evidence supports the conclusion of execution-like killings. These victims did not have a chance.

8. An extensive police investigation and numerous court proceedings have conclusively determined that these egregious crimes were committed by three men acting together at the scene in furtherance of a planned robbery. These men are:

9. Darren Richard Muise (age 18 years at that time), the appellant herein, convicted of second degree murder of Neil Burroughs and robbery;

10. Freeman Daniel MacNeil (age 23 years), convicted of the first degree murder of Neil Burroughs, the second degree murder of James Fagan, the unlawful confinement of Donna Warren and robbery; and

11. Derek Anthony Wood (age 18 years), convicted of the first degree murders of Neil Burroughs and Donna Warren, the attempted murder of Arleen MacNeil, the unlawful confinement of Donna Warren, and robbery.

12. Within hours the police investigation, particularly forensic evidence, established the point of entry as the basement door leading to a cement porch and the interior of the basement. Suspicion fell on Wood. He was employed at the restaurant and worked that evening. His kit bag was found propping open the interior basement door. The exterior door was locked and could only be opened from the inside. Wood had called the police shortly after the robbery to report being outside the basement door, having a smoke, hearing shots and running in panic. As the investigation proceeded, his story became more suspect. But early in the investigation there was a false accusation against other men and determining their innocence delayed the investigation of Wood.

13. On May 13, 1992 the RCM Police contacted Muise, whose name had come up in an interview with MacNeil. He gave a detailed exculpatory statement, explaining falsely his movements and conversations with MacNeil and others during the evening and early morning hours of May 6-7. He expressed a willingness to consider polygraph testing. Later that evening he met with the police polygraphist. Despite being pressed, Muise, who was expressing a willingness to cooperate, refused to take the test that evening. Eventually he agreed to speak with another polygraph officer the next day.

14. On the evening of May 13th, Muise wrote a suicide note and made a suicide gesture by cutting his wrist. This superficial injury did not require medical treatment. The note, which was not found by the police until May 16th, was exculpatory and stated falsely that the responsible persons were in Halifax and that Muise was in danger. Earlier that day it had been publicized that the police had located a number of items of evidence where they had been dumped in a brook.

15. On May 14th Muise took the polygraph test. En route to the appointment he engaged a police officer in conversation concerning plea bargaining and the sentence for murder. (Ultimately he did plea bargain from first to second degree murder.)

16. Following testing, the polygraphist concluded that Muise's exculpatory statements were not true. Muise continued to maintain his innocence despite aggressive questioning. In the pre-test interview, Muise described anyone capable of committing these crimes as "someone without a conscience" (on the videotape at 15:51 hours).

17. That evening, while being driven home by an officer, Muise admitted that he knew something. He then told an entirely false story about overhearing strangers conspiring to rob McDonald's, embellished by detail that he was now fearful because he was being followed. He advised the officer of his suicide attempt.

18. A major break in the investigation came on May 15th. Gregory Lawrence gave his statement to the police implicating Muise, MacNeil and Wood. According to his statement, on April 30th and again on May 1st they had solicited his participation in the robbery. Particulars of the plan were discussed. Muise was active in these discussions. Lawrence was to be stationed at the basement door, prepared to use a club to prevent

escape. He was shown a mask and a 22-calibre revolver. The revolver had been stolen by MacNeil from his girlfriend's stepfather and it was surreptitiously returned after the murders. The crime was originally scheduled for May 1st. Muise suggested they proceed as scheduled, but the date was delayed until Wood was scheduled to work nightshift. Lawrence declined their invitation, thereby foregoing a share in the anticipated $80,000.00 profit. It subsequently became known that Muise had, around that time, advised others that he was considering a "business venture" to net $20,000.00.

19. Muise was arrested at his residence at 1:30 a.m., May 16th. At about the same time, Wood and MacNeil were arrested. By 11:30 a.m. that day, the police had obtained a full confession from Wood and a partial confession from MacNeil. Muise was the last to confess.

20. Muise was advised of the charges and he was cautioned and advised of his **Charter** rights. At the detachment, he had a private telephone conversation with a lawyer. Subsequently on two occasions throughout that night and day he had the benefit of lengthy interviews with counsel. Intermittently he was questioned by the police and on any relevant matter he stood fast on his right to silence. Crown counsel in the Court below submitted that Muise's demeanour, captured to his knowledge on video-audiotape, was calm, cool and collected, that he appeared composed and in control, at times reacting with indifference or defiance, all of which is surprising behaviour for an 18 year old, with no criminal record, under arrest for these serious crimes. He was appropriately provided with washroom facilities, food and drink and cigarettes. At times he was re-advised of his rights.

21. Eventually Muise gave two written and signed inculpatory statements. In the first, recorded from 4:45 p.m. to 5:40 p.m., May 16th, he admitted that he agreed to participate in the robbery suggested to him by Wood. He denied that he wanted or intended to harm anyone. He expressed the view that the deaths were not his fault. He stated, "I knew that Derek [Wood] had a gun but never thought he would use it". He claimed not to remember if anyone had a knife. The statement revealed a few details, but it was bare bones because he claimed that "his mind went blank" after hearing shots.

22. In a follow-up exchange a few minutes later, the following was said:

Q. Did you ever see the gun before the shooting.

A. Yes.

Q. Where?

A. Freeman [MacNeil] showed it to me once.

And also:

Q. Did you stab someone that night with a knife?

A. I can't remember. It's all a blackout. I'm going to start exercising my Charter of Rights to remain silent.

23. More questioning by the same police officers did not elicit any further statement. Two other officers took over the questioning of Muise and they obtained a second, more detailed statement, recorded from 9:15 to 10:24 p.m. That statement in full is as follows:

Q. I'm investigating the robbery at McDonald's in Sydney River which occurred on 92-05-07 during the early morning hours. You and Derek Wood and Freeman MacNeil were involved. Can you tell me what happened that morning in McDonald's?

A. Freeman picked me up at Pocket's. We went towards Sydney River, King's Road way. We went to Tim Horton's because Derek said he was going to call the pay phone. We went down by the harbour and changed clothes and went back to Tim Horton's. We waited for Derek's phone call and didn't get it. He came down from McDonald's. He got in the car and we went to Sydney River toward Riverview Drive. We parked the car. I grabbed the ropes and we went over. We went in through the basement door. We met two managers and Derek shot one of them and went upstairs. We, actually I, watched the other one. I'm not really sure if it was me or me and Freeman. I heard a shot upstairs. Derek came down and he grabbed the other woman. He took her upstairs into the office. I saw a man bleeding on the floor over by the sink. He looked at me. He was shot

in the head very badly. The way he was looking at me, I don't know how to describe it. It felt like I had to help him some way. I knew he was going to die and I couldn't see him suffer so I stabbed him. He stopped moving so I thought he was dead and felt no more pain. Around this time I heard a shot coming from the office and I ran over to see what it was and I saw Derek in the safe and a woman laid up against the wall bleeding. Freeman yelled to me to bring the gun. Derek passed me the gun. I gave it to Freeman. Derek was yelling for me. I came over with a kit bag which I had the whole time and he started to put money into it. At this time I heard a shot. I really didn't know what to do. We went towards the back door to leave. We got outside and a man was standing there. I think Freeman still had the gun. I started to run away and I heard a shot again. We ran towards the car. I didn't look back. We crossed the highway and got to the car. Then we drove towards Sydney and passed by the front of McDonald's. We noticed a taxi cab there and Derek remembered that he left his kit bag there in the doorway. We dropped him off before the Keltic Bridge. He said he would run and call the cops, police. Me and Freeman continued out towards his place. We went to his house but stopped before we got there. He, Freeman, threw the shells and my kit bag with clothes and mask in it. He said he would burn them the next day. We went into his house and we counted some of the money. We hid it in his room and he took some and I took some. We left there and we went up towards Beechmont Road. He threw the shoes and he threw the cash box. He also threw the knives. We headed out towards North Sydney and threw some clothes in the harbour. We went on the highway towards Sydney. We stayed on the highway right to the George Street intersection bypass. He drove me down to the Sanitary Dairy where I knew Barry Moore would be. I played Mega-Doubles until about 6:00 a.m. then he drove me home. That is what happened.

Q. Was it your intention to hurt anybody at the store of McDonald's the morning of the robbery?

A. No, I never wanted to see anyone hurt.

Q. Do you know why Derek started shooting people?

A. I don't know. I thought about it later and I think it was because he didn't want any witnesses.

Q. Where did Freeman throw the shells from the gun?

A. It was up by his place on the road. It was on the left-hand side, the opposite side of his house.

Q. Did you at any time pull the trigger of the gun and shoot someone at McDonald's.

A. No.

Q. Where did you throw the clothes into the water?

A. It was off a bridge. We headed towards North Sydney along the Frenchvale Road. It was a steel bridge along that road.

Q. How do you feel now that you have told your side of that night in McDonald's?

A. I feel better that I told my side of that night. I will take the blame for the robbery part. I am glad that people will know I wasn't a shooter. In my mind I feel that I am not responsible for the shootings of these people. I couldn't stop Derek or Freeman. I was in such shock at the time.

Q. Do you know whose gun it was?

A. It was Freeman's girlfriend's stepfather's.

Q. I am showing you a picture of a knife. Was this the knife you had in your possession during the robbery at McDonald's?

A. Yes.

Q. Can you describe the other knife?

A. It was a small, with a black handle.

Q. Is everything accurate and truthful to the best of your knowledge in this statement?

A. Yes.

Q. Did you give this statement of your own free will?

A. Yes, I was not pressured in any way.

Q. Is there anything else you would like to add?

A. No.

24. There was evidence that in the days immediately following these murders Muise resumed his usual activities, principally playing pool and videogames, using the proceeds from the robbery. Within hours of the robbery, while he was at the convenience store known as Sanitary Dairy where Barry Moore advised him of the shootings at McDonald's, Muise expressed concern that he hoped that Wood had not been hurt. Later he said to Moore that, despite his black belt in tae kwon do, he was afraid to walk home because there were crazy people out there, "I can't dodge bullets". Over these days he was noted frequently at Pocket's pool hall, sometimes laughing and carrying on and at other times in conversation **sub rosa** with Wood.

25. On June 26, 1993, Justice Kelly sentenced Muise to 9 years' imprisonment for the robbery and life imprisonment with parole ineligibility for 20 years for the murder of Neil Burroughs. His reasoning is now reported at 124 N.S.R. (2d) 105. (It should be noted that on November 12, 1993, Justice Gruchy imposed a 25 year parole ineligibility period on MacNeil for the [second degree] murder of James Fagan: ... Gruchy J. had the benefit, denied Kelly, J., of trial evidence and the jury's 25 year recommendation.)

26. Before imposing sentence, Justice Kelly had the benefit of substantial submissions by Crown and defence counsel, lengthy written exhibits, a pre-sentence report, victim impact statements, and a statement from

Muise.

As mentioned, the decision of Kelly, J. is reported. His recitation of the facts is indeed helpful in understanding the events upon which his sentence is based. He notes that the robbery was planned; Muise carried two knives; MacNeil a shovel handle and Wood a stolen handgun. Muise also carried ropes to tie employees who were expected to be encountered. Muise was masked but the other two were not.

Pursuant to s. 742 of the **Code** anyone who commits first or second degree murder shall be sentenced to imprisonment for life. S. 742(6) provides that a person convicted of second degree murder shall:

> ...be sentenced to imprisonment for life without eligibility for parole until he has served at least ten years of his sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 744.

The portions of s. 744 relevant to this appeal provide that the sentencing judge, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission may substitute for 10 years a number of years imprisonment, being more than 10 years but no more than 25 without eligibility for parole, as the judge deems fit in the circumstances.

The issue then becomes the appropriate period of ineligibility for parole to be pronounced here.

However, it must be born in mind that should a person be sentenced for second degree murder without eligibility for parole for a number of years in excess of 15, then after serving 15

years he may apply to the Chief Justice in the province in which the conviction took place for a reduction in his number of years of imprisonment without eligibility for parole: s. 745(1)(b). It is not an automatic release. This procedure prevents a sentence, which is considered to be appropriate in respect to the factors set out in s. 744 of the **Code**, when imposed, from becoming unduly punitive should genuine rehabilitation occur.

Where a jury finds an accused guilty of second degree murder the presiding judge shall, before discharging them, ask if they wish to make any recommendation with respect to the number of years that the accused must serve before being eligible for parole: s. 743. Those provisions do not apply here for, after two days of trial before a jury the appellant, who had been charged with the first degree murder of Mr. Burroughs, pled guilty to second degree murder.

The judge trying MacNeil had the benefit of the recommendation of the jury in respect to the second degree murder charges before him.

It is of importance to understand that whatever period of parole ineligibility is pronounced, it does not mean that the appellant must be released after that time has been served. Subject to s. 745(1)(b) it means that the appellant cannot apply for parole before that period has expired. He cannot be released unless a Parole Board determines that it would be appropriate to release him on parole.

The sentencing judge took all of this into consideration.

The issues before this Court are narrowed to those urged by the respondent, the appellant in the cross-appeal:

1. THAT the order for parole eligibility made under s.

> 744 of the **Criminal Code** is inadequate having regard to the character of the appellant, the nature of the offence committed, and the circumstances surrounding the commission of the offence.
>
> 2. THAT the order for parole eligibility made under s. 744 of the **Criminal Code** inadequately reflects the element of deterrence.

The Crown's cross-appeal is pursuant to s. 676(4) of the **Code:**

> (4) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal in respect of a conviction for second degree murder, against the number of years of imprisonment without eligibility for parole, being less than twenty-five, that has been imposed as a result of that conviction.

The Crown requested that the sentencing judge impose a period of 25 years parole ineligibility. It takes the same position before us urging that a 20 year period is not a fit disposition.

The Crown alleges that the sentencing judge imposed the 20 year period as a result of two principal errors:

> 1. Failure to take into consideration adequately the circumstances of the offence as required by s. 744 of the **Code**.
>
> 2. A related error-failure "to impose a parole ineligibility period which adequately reflects the need for general deterrence and denunciation under all of the circumstances of this offence".

The leading case in Nova Scotia considering the provisions of the **Code** dealing with parole ineligibility is **R. v. Mitchell** (1988), 81 N.S.R. (2d) 57 (C.A.). This Court has

consistently followed the principles there enunciated. See for example, **R. v. Laidlaw** (1990), 93 N.S.R. (2d) 333; **R. v. Doyle** (1992), 108 N.S.R. (2d) 1; **R. v. Baillie** (1992), 107 N.S.R. (2d) 256; and **R. v. Fadelle** (1994), 127 N.S.R. (2d) 277.

In **Fadelle**, after referring to the provisions of s. 744, the Court referred to **Mitchell**:

> ...There Hart, J.A., began his analysis of the duty of a trial judge in imposing such a sentence in this fashion at pp. 73-74:
>
> > "It must be kept in mind that the sentence for murder is a mandatory minimum sentence and not one which requires the trial judge to exercise his discretion in accordance with normal principles of sentencing. That privilege or responsibility, depending upon how one views it, has been taken away from the trial judge by Parliament. The trial judge has, however, been given a new responsibility and that is to determine under s. 671, whether, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, the minimum period of ineligibility for parole in the case of conviction for second degree murder should be increased beyond the ten year period to as much as twenty-five years. Parliament must have considered that there were ways of committing second degree murder that would be equally serious to first degree murder and that the court should be free to ensure that the perpetrator remained in prison for an appropriate number of years."
>
> He continued at p. 81:
>
> > ..."These guidelines are slightly different than those which would apply in the

> ordinary case of a sentencing and in the majority of cases have little to do with the rehabilitation of the accused. The judge must be the representative of the public in expressing the view that people who commit horrendous crimes not be permitted back into society for a prolonged period of time. It is hoped that this type of decision will deter others from committing similar acts and ultimately result in a greater protection of the public. Thus deterrence of the type of crime committed must be the main emphasis of the sentence."

[12] Hart, J.A., then discussed the proper approach to be taken by an appellate court on an appeal from an order under s. 744 at pp. 81-82:

> "An appellate court, when reviewing the exercise of such discretion, is no more limited than it would be in reviewing the fitness of any sentence imposed by a court. There is an appeal as of right from such determination and, for this to have meaning, the appeal court must be free to follow the principles which govern appeals generally from sentences. If the discretion of the trial judge has not been exercised in such a manner as to result in a fit sentence then it is the responsibility of the appeal court to vary the sentence within the limits prescribed by law. The approach of the appeal court, however, should be cautious, and, in my opinion, the principles governing such a decision were correctly stated by Chief Justice Nemetz of the British Columbia Court of Appeal as set forth in the last paragraph of the extract quoted above from the decision in **R. v. Walford,** supra."

[13] The paragraph from **R. v. Walford** (1984), 12 C.C.C.

(3d) 257, at p. 259, approved by Hart, J.A., in **Mitchell**, supra, reads at p. 81:

> "That is not to say that the decision arrived at by the trial judge is to be taken lightly. In my opinion, his or her decision is an important element to be taken into consideration by us. But, in the last analysis, it is for this court to determine what is fit having regard to the facts the trial judge had before him and any relevant new facts before this court which were not before the judge. An appellate court, in my view, has the jurisdiction to vary a sentence either upwards or downwards despite the trial judges' advantage in seeing and hearing an accused where the appellate court concludes that the sentence imposed was not fit. To do otherwise would be to import artificially a civil rule into a criminal sentence appeal where Parliament has clearly set out a wide, unfettered discretion."

The approach to be taken by an appellate court as expressed in the above quotations is not in accord with the more restrictive approach enunciated by Bull, J.A. in **R. v. Gourgon** (1981), 58 C.C.C. (2d) 193 (B.C.C.A.) and was so recognized in **Mitchell and Walford**. The approach in **Gourgon** is urged upon us by the appellant. That expressed in **Mitchell** and **Walford** is preferred.

Section 687 of the **Code** places a duty upon an appellate court on an appeal against sentence to consider the fitness of the sentence appealed against.

In **R. v. Cormier** (1974), 9 N.S.R. (2d) Macdonald, J.A. speaking for this Court at pages 694-5 gave definition to the words in s. 687 in this fashion:

> Thus it will be seen that this Court is required to consider the "fitness" of the sentence imposed, but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles a sentence should be varied only if the Court is satisfied that it is clearly excessive or inadequate in relation to the offence proven or to the record of the accused.

Although Justice Hart at p. 81, para. 47, of **Mitchell** comments in general that an appeal court "must be free to follow the principles which govern appeals generally from sentences", he does not refer to those particular principles mentioned in **Cormier**. Rather, specifically he adopts the approach stated in **Walford**, which he cites in the same paragraph.

It is significant that **Doyle**, supra, **Fadelle**, supra, **R. v. Baillie**, supra, **R. v. Laidlaw**, supra, and **R. v. Young** (1993), 117 N.S.R. (2d) 166 (N.S.C.A.) all adopt **Mitchell** directly or by inference and most refer to **Walford**, I can find no case from this Court which applies the definition of "fitness" enunciated in **Cormier** when considering the provisions of s. 744 in respect to the period of parole ineligibility for second degree murder.

In **R. v. Carrigan** (1982), 53 N.S.R. (2d) 143 (pre **Mitchell**) at p. 145 the Court referred to the restrictive test in **R. v. Gourgon**, supra, as to the exercise of the discretion of a trial judge. That test was, in effect, rejected in **Walford** and by inference, **Mitchell**.

Mitchell and **Walford** are authority for the proposition that, although the decision of the trial judge is an important element to be taken into consideration, in the final analysis, it is for

the appellate court to determine what is a fit period of parole ineligibility, having regard to all of the relevant facts and the three factors set out in s. 744.

It is usual, when considering the period of parole ineligibility, to compare one case with another. Such an exercise has only limited usefulness, for crimes of this nature vary substantially upon their facts. See the comments of Chipman, J.A. in **Doyle,** supra, at p. 11:

> ... Comparisons with other cases is a difficult exercise. Attempts to seek similarities with or differences from other murders committed by other people can be very frustrating and counter productive. We are not dealing with an exercise of reviewing "comparables" such as is done in a property appraisal. In exercising the discretion under s. 744 of the **Code**, other cases are not more than a rough guide for the sentencing judge in identifying the types of aggravating or mitigating circumstances that other courts have relied on as relevant in applying the guidelines.

If comparisons were the only guide then it could be argued that a period of parole ineligibility of 25 years should be reserved for those found guilty of the more serious offence, first degree murder, but that is not the case. It is of importance to emphasize Hart, J.A.'s caution in **Mitchell** at p. 74:

> ...**Parliament must have considered that there were ways of committing second degree murder that would be equally serious to first degree murder** and that the court should be free to ensure that the perpetrator remained in prison for an appropriate number of years. [emphasis added]

He also quoted extensively from Bayda, C.J.S. in **R. v. Wenarchuk** (1982), 67 C.C.C. (2d) 169 (Sask. C.A.) at pp. 74-5:

> There can be no serious question about the trial judge's

function when he exercises this power. **It is a sentencing, not a parole function**. The learned trial judge referred to the right given to him by this section as a "duty to recommend" an extension or otherwise of the parole noneligibility period. In my respectful view, the section does not impose a duty but vests a power. The product of the judge's exercise of that power is not a recommendation but an order. A phrase more appropriate than "duty to recommend" is "discretionary power to order". Once that discretion is exercised, the additional period prescribed by the order is not a recommendation but a judicial order having the same mandatory force as the original statutory prescription of 10 years' imprisonment, subject only to the provisions for a judicial review contained in s. 672 of the **Code**.

The object of the provision in s. 671 is not to take away from the Parole Board, or in some way diminish, the Board's function to determine whether the accused is sufficiently rehabilitated (from the stand-point of risk to and the protection of society) to permit his release into society. Nor is the object to supply the needs of the accused as an individual. The object, rather, is to give back to the judge some of the discretion he normally has in the matter of sentencing - discretion that the statute took away from his when it provided for a life sentence - **so that the judge may do justice, not retributive or punitive justice, but justice to reflect the accused's culpability and to better express society's repudiation for the particular crime committed by the particular accused** (with that repudiation's attendant beneficial consequences for society, including its protection through individual and general deterrence and, where necessary, segregation from society), and further, that the judge exercise that retrieved discretion by an order directing the postponement for a period of up to 15 additional years of the Parole Board's exercise of its function. **The emphasis clearly is not the protection of society through an assessment of the accused's future rehabilitative needs, or the likely progress of his rehabilitation - a field better left to the Parole Board who will be in a much superior position to assess the**

> **rehabilitative needs and progress of the accused 10 or more years in the future than the court on the date of sentencing - but on the protection of society through its expression of repudiation for the particular crime by the particular accused, along with that repudiation's concomitants of individual and general deterrence**.
>
> The question, then, the trial judge ought to ask is not: Having regard to the three factors enumerated in s. 671, will the accused be ready, from the standpoint of rehabilitation, to be released into society in 10 years' time or some longer time? Were he to ask that question he would be impinging upon the parole function. The questions, he, as sentencer, should ask are: Having regard to the three factors, does society's expression of **repudiation for the particular crime by the particular accused, along with that repudiation's concomitants of individual and general deterrence, require that the accused serve a mandatory period of imprisonment not greater than 10 years, or must that period be greater than 10 years? If greater, then how much greater?** (emphasis added)

He then continued his comments in respect to these guidelines as previously set out herein. Society's "repudiation for the particular crime and the particular accused" is graphically and eloquently demonstrated in the victim's impact statement filed on sentencing by Mr. Burrough's widow.

Considering all of these principles did Justice Kelly impose a fit period of parole ineligibility upon the appellant? In setting that period did he err?

When rejecting the Crown's submission that "the accused should receive the same period of parole ineligibility as Mr. Wood (convicted of first degree murder) that is, 25 years", he remarked that:

> The degree of culpability of the two, that is Mr. Wood and Mr. Muise, is obviously different. Mr. Wood used his gun in the deliberate attempt to kill three people and he succeeded in two instances. He appears to have been the initiator of the brutal and shocking chain of violent deaths and acting in a deliberate and remorseless manner.

With deference, in my opinion, such a comparison is not in accord with the principles earlier discussed. All three: Messrs. Wood, MacNeil and Muise willingly and purposely participated in horrendous, repulsive crimes. Each must be sentenced accordingly. There comes a time when a threshold is met and although it may be said that the acts of one or more are more repugnant than another, each requires the imposition of the maximum period of parole ineligibility. Parliament did consider that there are ways of committing second degree murder which requires such a sentence.

All sentences for first degree murder require a period of parole ineligibility of 25 years. It is axiomatic that although all must be condemned, some are more repugnant than others. Similarly, I suggest when considering sentencing for second degree murder, that when the threshold is met, when the acts of the offender are "equally serious to first degree murder", the maximum period should be imposed, even though it may be demonstrated that there may be second degree murders which are more offensive.

Kelly, J. characterized the events in this manner:

> As I review the circumstances of the crime, it is difficult for me not to conclude that this series of shootings is close to the most severe of circumstances that come before a court for this type of sentence. The killings at the McDonald robbery are heinous crimes that have shocked and outraged the community. They obviously have had a most

> significant effect on the families of the victims and all close to them. The serious wounding of Ms. MacNeil and the killing of the three other young employees will scar the memories of all members of this community for many decades.

He continued:

> As the sentencing judge, I must act as the representative of all of the community in denouncing the murder of Mr. Burroughs. Mr. Muise's callous role in this killing must be denounced by shutting him away from society for a prolonged period of time. It is hoped that such action will deter others from committing such acts. It is also hoped that a prolonged period of incarceration will also deter Mr. Muise from repeating such acts.

Justice Kelly did not overemphasize the extent of the evil acts perpetrated by the appellant: his are not overstatements.

Having done so, he then said immediately before imposing sentence:

> Mr. Muise is not being sentenced for participation in all of the killings that occurred at McDonald's. He has pleaded guilty to one charge and I must sentence him in relation to that charge only. I can consider the other aspects of his involvement in assessing his character and the circumstances of the event, **but I cannot consider his participation in the other killings, if any, in sentencing him.** (Emphasis added)

In so stating the Crown alleges that he erred. In fairness, before us, Crown counsel agreed that the paragraph is ambiguous. When the decision is viewed in its entirety it is difficult to accept that the sentencing judge literally meant what he said in the last portion of that paragraph. If he did so, in my opinion, he erred. Expressing the issue in the fashion he did may explain in part his mind set when imposing the period of parole ineligibility. However, in my

opinion it is not necessary to brand the impugned statement as an error in law in determining this appeal. It rests on other grounds: those in the Crown's cross-appeal, previously set out herein.

When the sentencing judge considered the circumstances and nature of the offence he noted that in **Mitchell**:

> ...the Court reviewed the circumstances of the offence **in increasing the ineligibility period from 15 to 21 years.** The circumstances in that case including the fact that Mr. Mitchell was in a position of trust over a two-year old victim, that he severely abused the victim before the child's death, and that he had psychiatric and substance abuse problems. (Emphasis added)

While it is true to say that the "compounding factors" differ when considering the appellant nonetheless they are present and indeed terrifying. In that respect the sentencing judge said:

> ...Here we do not have such compounding factors but we can speculate in this sentencing process on the possible terror of the victim as he lay helpless and dying only to be attacked by Mr. Muise. The killing of Mr. Burroughs was brutal to the extreme, although it did not involve intentional torture as the **Mitchell** case did.

He continued with his review of the circumstances of the offence:

> Mr. Muise undertook this robbery expecting violence and prepared to do violence. The death of Mr. Burroughs occurred during that robbery and it is a circumstance that Mr. Muise must live with. He must live with this result even if he did not believe his associates had lethal intent in planning the robbery.
>
> I have reviewed the character of the accused, the nature of the offence, and the circumstances of its commission. I cannot leave these considerations without noting that Mr.

> Muise's conduct after the killings did not disclose a person overly hobbled by conscience. He continued to associate with his friends including the participants in the robbery. He frequented his old haunts and spent money taken from the robbery, his share of the two thousand dollars stolen. He stated that he did attempt suicide when the police became suspicious of his involvement, cutting his wrists and leaving a "suicide note". In this note he blamed unnamed persons from Halifax as the perpetrators of the killings and the robbery.

This Court has stated on innumerable occasions that, on sentencing, a judge must take into consideration not only the offence itself but the offender. In second degree murder, s. 744 dictates that this be done.

When considering the appellant's character the sentencing judge remarked:

> Mr. Muise's character as disclosed by his involvement in the planning and the execution of the McDonald's incident is indeed another matter. The planning, execution, and the actions after the robbery displayed a high degree of criminality. Mr. Muise joined in the planning, he urged his associates to try the robbery a week before it actually occurred, and he actively participated in hiding the evidence of their involvement after the incident.
>
> The most dramatic indication of his character, however, is his conduct during the robbery. If indeed he had not expected lethal force to be used, when Mr. Wood took the first shot at Arleen MacNeil, Mr. Muise did not act to stop Mr. Wood from further shooting or even to escape himself to get help for the very severely wounded woman. Mr. Wood left immediately to go upstairs and Mr. Muise could have tried to let Ms. Warren escape what then must have appeared to him to be an almost certain death.
>
> The most dramatic indicator of his character is using his knife to cut the neck of Mr. Burroughs in what he says in his statement is an attempt to cause a quicker death. In the

> circumstances that rationale is simply not credible.
>
> His role of giving the gun to the third associate is also reflective of his calculating and brutal character. It is difficult to conclude that Mr. Muise would not be aware of the use his associate would make of that gun at that time.

The offence for which the appellant pled guilty was the murder of Mr. Burroughs. The "circumstances surrounding its commission" are not only the horrifying acts of the appellant in cutting Mr. Burroughs' throat, reprehensible though these are. His participation in the planning, his assistance rendered to his companions which permitted the other murders all must be considered. They are inextricably intermixed with the act of his admitted second degree murder of Mr. Burroughs.

Mr. Fagan arrived for work at McDonald's moments before these offenders left the building. He evidently surprised them. Also, apparently he recognized them for he said "Hi, guys". Mr. MacNeil then shot Mr. Fagan at very close range. He died as a result of that wound.

Justice Gruchy when sentencing Mr. MacNeil for the second degree murder of Mr. Fagan (C.R. No. 13149, November 12, 1993) commented at p. 11:

> ...The jury must have concluded that the murder of Mr. Fagan was committed on the spur of the moment while the accused and his accomplices were making their escape. The jury must have concluded that the accused had not planned and deliberated on the murder of Mr. Fagan.

At p. 9 he took into consideration as a relevant fact:

> it was accompanied by other murders committed by the accused and his accomplices;

And at p. 10:

> The nature of the offence and the circumstances surrounding its commission, including the murder and wounding of three other people, constitutes one of the most senseless, brutal crimes in Nova Scotia's history. I do not pretend to understand the dynamics of the personalities of these three individuals which led to the commission of these offences. The details of the crimes were horrifying in the extreme and I need not repeat them except to say that I am deeply conscious of them. The accused had many opportunities to withdraw from the commission of the offences and chose not to do so. He actively participated in all the surrounding events of the crimes including planning and preparation, and participated actively in the robbery. His conduct, like that of the others was shocking, abhorrent and heartless. He showed no regard for his victims whatever.

The same must be said of Mr. Muise.

He continued at p. 11:

> Public support of the courts and the legal system is of vital importance in our society. I refer to **R. v. Oliver**, [1977] 5 W.W.R. 344, a western case, where Chief Justice Farris of the British Columbia Supreme Court said:
>
> > Courts do not impose sentences in response to public clamour, nor in a spirit of revenge. On the other hand, justice is not administered in a vacuum. Sentences imposed by courts for criminal conduct by and large must have the support of concerned and thinking citizens. If they do not have such support, the system will fail. There are cases, as Lord Denning has said, where the punishment inflicted for grave crimes should reflect the revulsion felt by the majority of citizens for them. In his view, the objects of punishment are not

> simply deterrent or reformative. The ultimate justification of punishment is the emphatic denunciation by the community of a crime.

And added at p. 12:

> I consider that the nature and circumstances of the commission of this offence justify a lengthier banishment from society than the more ordinary types of second degree murder.

Again, the same must be said of Mr. Muise.

Gruchy, J. reiterated the requirement of taking into consideration all of the circumstances in reaching his conclusion to sentence Mr. MacNeil for the second degree murder of Mr. Fagan to life imprisonment with no eligibility for parole for 25 years, at p. 13:

> The circumstances of this crime lead me to conclude that these shootings were close to the most severe of circumstances that come before our Court for this type of sentence. These crimes have shocked and outraged the entire community. They have had a profound effect, not only on the community, but especially on the families of the victims and all close to them. The killing of these three young people and the serious wounding of Ms. MacNeil, in the words of Mr. Justice Kelly, "will scar the memories of all members of this community for many decades".

Although it was argued that the appellant, at the planning stage, may not have originally intended as physical harm to the employees at McDonald's for he carried ropes with which to tie them, he had to realize that much more than that was in fact to take place. He was armed with two knives. He knew that MacNeil carried a shovel handle and Wood a stolen handgun. Although he wore a mask, each of the others did not. They made no attempt to

conceal their identifies. They were readily recognizable by the employees and in particular Mr. Wood, who was also an employee of McDonald's. The appellant must have known that the intention was to murder any employee with whom they came in contact to avoid identification. If there was any doubt, that immediately dissipated upon the shooting of Arlene MacNeil as soon as the three entered the building. He could have left at this stage but he guarded Donna Warren and prevented her escape. He should have known from the shooting of Miss MacNeil that Wood would kill Ms. Warren after obtaining the combination of the safe from her. Wood's identity was then known to her. He handed the gun to Freeman MacNeil in order that MacNeil shoot Mr. Burroughs.

In addition, the acts subsequent to the offence: the coolness of the appellant, his participation in the destruction of evidence; his manner in spending some of the stolen money; his attempt to implicate others; are "circumstances surrounding its commission". In my opinion, all of these surrounding circumstances must be considered when crafting the fit sentence.

Section 744 of the **Code** dictates that the three factors: (1) the character of the offender, (2) the nature of the offence and (3) the circumstances surrounding its commission all must be considered when determining the parole ineligibility period.

The sentencing judge and both counsel have referred to a number of cases concerning parole ineligibility sentencing. In particular the Crown has analyzed the range of sentences from various courts in Canada. As Hart, J.A. remarked in **R. v. E.A.F.** (1994), 127 N.S.R. (2d) 239 (N.S.C.A.) at p. 240:

> Although the range of sentences for similar offences is

> often a valuable guide it is never binding on the sentencing judge.

I again refer to the words of this Court in **R. v. Doyle** at p. 11.

The Crown after analysis of the case law made this perceptive comment:

> It is therefore submitted that the 20 year sentence under appeal in the case at Bar falls within the range typically imposed or upheld by this Honourable Court, and yet the circumstances of the offence are far more serious than the average or typical case. Consider for example how rare it is for the surrounding circumstances to involve two other murdered victims and a third victim who has been seriously and permanently disabled.

As the Crown has pointed out, a study of the law in Nova Scotia respecting parole ineligibility cases demonstrates that the absence of a prior criminal record or one of some insignificance has not resulted in lower sentences. Nor is a guilty plea considered a significant mitigating factor. Nor does a combination of both. See **Young** (1993), 117 N.S.R. (2d) 166 (N.S.C.A.); **Baillie** (1992), 107 N.S.R. (2d) 256 (N.S.C.A.); **Doyle** (1992), 108 N.S.R. (2d) (N.S.C.A.); **Mitchell** (1988), 81 N.S.R. (2d) 57 (N.S.C.A.)**; Picco** (1987), 79 N..S.R. (2d) 139 (N.S.C.A.); **King** S.C.C. No. 01055 Feb.15/85 unreported, C.A.; **Martin** (1982), 49 N.S.R. (2d) 361 (N.S.C.A.); **Laidlaw** (1990), 93 N.S.R. (2d) 333 (N.S.C.A.); **Carrigan** (1983), 53 N.S.R. (2d) 142 (N.S.C.A.) Relative youth did not result in a reduction in sentence in **King** and **Laidlaw**. Understandably, the more horrible and reprehensible the facts, the longer the length of parole ineligibility.

It is difficult to disagree with the Crown's contention that:

> The principal circumstances of this offence and the

circumstances surrounding it are as follows:

(1) The robbery was planned over a period of weeks in conjunction with two other people. This was neither spur of the moment, nor poorly thought out. There was an attempt to involve a fourth person.

(2) It was anticipated that employees would be present and that violence would be used if necessary.

(3) The three accused were young men. Muise is a black belt and MacNeil had extensive training in judo. Each was lethally armed. They were prepared to crush any and all opposition, however weak, and they did. This was like a commando raid.

(4) Muise wore a mask, but Wood and MacNeil did not. Wood was a current employee and MacNeil was a former employee. Therefore, all three must have known of the substantial risk that one or more of them would be readily identifiable, creating the need, if that is the appropriate word, to kill witnesses. Indeed, the appellant's final confession contains the following:

> Q. Do you know why Derek started shooting people?
>
> A. I don't know. I thought about it later and I think it was because he didn't want any witnesses.

(5) Shooting began immediately upon encountering two female employees. Significantly, Donna Warren was left unharmed physically until she opened the safe.

(6) Muise guarded Warren after seeing Wood shoot Arleen MacNeil in the head, thereby sealing her fate by preventing her possible escape. While not convicted on the confinement offence, it is noteworthy that in **R. v. Luxton**, cited supra at p. 17, Chief Justice Lamer stated at p. 722:

> The added element of forcible confinement in the context of the commission of a murder, markedly enhances the moral blameworthiness of an offender.

(7) Muise cut Burroughs' throat, thereby accelerating death, an act which could by itself have caused death if untreated. As can be seen from the autopsy report, this was not a single cut. There was additionally a stabbing component. He did not sever a major blood vessel, but he worked at it. His claim that he acted out of mercy is outrageous. That claim speaks volumes concerning Muise's character.

(8) Muise delivered the gun to MacNeil, knowing with certainty that MacNeil would kill and he did.

(9) Unlike many murder cases, there is here no suggestion of intoxication or provocation or self-defence. Muise's killing of Neil Burroughs is, in the context of all the facts, at least as serious as many first degree murder cases. The three accused were sober, acting with purpose and intention, and they brutally eliminated the witnesses. Not a scintilla of compassion was extended.

(10) Unlike most murder cases, the circumstances involved the deaths of three people and the permanent disability of a fourth. All were in their twenties. They were decent people, cruelly executed. As employees of an establishment open late at night, they were easy targets. Muise knew that Wood was violating a trust.

(11) There are no mitigating circumstances. The facts cannot be explained by an uncontrolled human frailty so often seen in murder cases. Here, the facts do not provide a principled basis for extending compassion and leniency. A sentence 20% below that permitted is unduly lenient. [Actually, as mentioned by Crown counsel on appeal, the correct percentage is 33 1/3% when consideration is given to the permitted period, that is, between 10 and 25 years.]

(12) While not first degree murder, the circumstances

contain elements of planning and deliberation and forcible confinement. This is a case falling within the description of this Honourable Court by Hart, J.A. in **Mitchell** (quoted supra at p. 19) as follows:

> Parliament must have considered that there were ways of committing second degree murder that would be equally serious to first degree murder...

And as well:

Consider the following facts:

(1) Muise assisted in getting rid of the evidence;

(2) Muise spent some of the money stolen, starting as early as 2:30 a.m. the morning of the murders;

(3) Muise did not come forward when three innocent persons were arrested for the robbery and murders;

(4) Muise carried on with his life as if nothing had happened;

(5) Muise had a right to silence, but when he spoke to the police he lied continuously, modifying his story as he saw fit from time to time;

(6) In the so-called suicide note, Muise professed remorse and sympathy, but he introduced a lie about people from Halifax having committed the robbery;

(7) In his attitude to the police, he was often cocky and indifferent.

In the pre-sentence report the appellant described himself as "a compulsive liar". Before admitting to the offence, he described anyone capable of committing these crimes as "someone without a conscience", a designation also used by the sentencing judge and one which, unfortunately, aptly describes Mr. Muise.

Considering the appellant's participation in the three murders and the maiming of Ms. MacNeil; all of the circumstances surrounding the commission of his act of violence upon Mr. Burroughs; and his character as categorized by the sentencing judge; the conclusion which must be reached renders the distinction between the acts of the three offenders irrelevant when determining the period of parole ineligibility. Each must be assessed individually. Those of Mr. Muise are so abhorrent that they attract the maximum period.

Human ingenuity being what it is, it is always possible to think of a worse case, with the result that the maximum penalty would never be imposed should comparisons be the governing factor. The crime committed by the appellant viewed with the totality of the circumstances is too vile, too reprehensible, to permit the imposition of any period other than the maximum. The otherwise mitigating factors of youth and lack of criminal record do not permit a lesser period. Protection of society, general deterrence and denunciation of the actions of the appellant must be the determinative factors. The time to consider rehabilitation is when the application to determine whether his number of years of imprisonment without eligibility for parole is made in 15 years time, in accord with s. 745(1)(b) of the **Code**.

Even if the words in **Cormier**, supra, were adopted, the period of parole ineligibility imposed is clearly inadequate to reflect society's revulsion for this cause. The period of parole

ineligibility is from 10 to 25 years. An increase from 20 to 25 years, that is, five years, is 33 1/3% of the total, well within the range of variations this Court has considered when applying **Cormier**.

It is difficult to express in suitable words the revulsion of the heinous acts perpetrated in the circumstances surrounding the second degree murder of Mr. Burroughs. Adjectives may be employed but they are incapable of adequately describing the horror of this series of senseless acts. The actions of the appellant acting individually and in concert must be condemned in the strongest terms.

As previously mentioned, although the decision of the sentencing judge is not to be taken lightly, it is for this Court, on appeal, to determine what is fit, applying the appropriate principles. As stated by Nemetz, C.J.B.C. in **Walford**, supra, "...it is for this court to determine what is fit...".

It is clear from the comments of both Kelly and Gruchy, JJ. that the majority of citizens, knowing all of the facts would be repelled and revulsed by this crime. As Lord Denning said in **Oliver**, (supra):

> The ultimate justification of punishment is the emphatic denunciation by the community of a crime.

Indeed, as the sentencing judge remarked these events "will scar the memories of this community for decades".

The appellant has betrayed the core behavioral values of his community. Respect for those values and for the law can only be achieved by increasing the period imposed.

Having regard to the character of Mr. Muise, the nature of the offence with which he is charged and the circumstances surrounding its commission (s. 744), the need to protect society through individual and general deterrence, a period of parole ineligibility for 25 years aptly expresses society's repudiation of the crime committed by Mr. Muise. Anything less is not fit. As the sentencing judge wrote:

> It was a cold, calculated, and extremely brutal act that disclosed a person who is either without conscience or who is out of touch with reality. In either case it reflects a person who is a serious danger to society.

I would allow the appeal and vary the sentence to one of life imprisonment with no eligibility for parole for twenty-five years. In all other respects, the sentence imposed stands.

Matthews, J.A.

HALLETT, J.A.

I have read Mr. Justice Matthews' reasons for allowing this Crown appeal increasing Mr. Muise's period of parole ineligibility from 20 years to 25 years. I have also read the reasons of the learned trial judge which are reported in 124 N.S.R. (2d) 105. With respect, I find myself in disagreement with my learned friend and colleague Mr. Justice Matthews.

The most recent decisions of this Court on the scope of the court's power of review on an appeal from a trial judge's determination of the period of ineligibility for parole following a conviction for second degree murder are **R. v. Mitchell** (1987), 81 N.S.R. (2d) 57 and **R. v. Doyle** (1991), 108 N.S.R. (2d) 1.

In **Mitchell** Hart J.A. reviewed the authorities in Canada on this subject and concluded at p. 169:

> " An appellate court, when reviewing the exercise of such discretion, is no more limited than it would be in reviewing the fitness of any sentence imposed by a court. There is an appeal as of right from such determination and, for this to have meaning, the appeal court must be free to follow the principles which govern appeals generally from sentences. If the discretion of the trial judge has not been exercised in such a manner as to result in a fit sentence then it is the responsibility of the appeal court to vary the sentence within the limits prescribed by law. The approach of the appeal court, however, should be cautious and, in my opinion, the principles governing such a decision were correctly stated by Chief Justice Nemetz of the British Columbia Court of Appeal as set forth in the last paragraph of the extract quoted above from the decision in *R. v. Walford, supra*."

It is abundantly clear from the words of **s. 687** of the **Code**, R.S.C. 1985, c. C-46 that

when an appeal is taken against sentence the court of appeal shall consider the fitness of the sentence and may vary the sentence within the limits prescribed by law or dismiss the appeal. An appeal from a trial judge's determination as to the appropriate period of ineligibility for parole following a conviction for second degree murder is a sentence appeal.

The function of this Court on an appeal of this nature, as stated in **Mitchell** and confirmed in **Doyle**, is to consider the fitness of the period of ineligibility for parole as imposed by the trial judge applying the principles which govern sentence appeals generally. It goes without saying that the trial judge in determining the period of ineligibility must comply with the provisions of **s. 744** of the **Code** and the principles established by the courts under that section which include a requirement that the sentencing judge put the main emphasis of the sentence upon deterrence of the commission of the type of crime committed by the accused and that the sentence must reflect the shock and outrage of the community to the offence.

In considering the fitness of a sentence imposed by a trial judge this Court has consistently held that it will not interfere unless the sentence imposed is clearly excessive or inadequate. Twenty years ago Macdonald J.A. in **R. v. Cormier** (1974), 9 N.S.R. (2d) 687, after setting out what was then **s. 614(1)** of the **Code** [now **s. 687(1)**], stated at p. 649:

> " Thus it will be seen that this Court is required to consider the "fitness" of the sentence imposed, but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles a sentence should be varied only if the Court is satisfied that it is clearly excessive or inadequate in relation to the offence proven or to the record of the accused."

As recently as last year in **R. v. Leger** (1993), 125 N.S.R. (2d) 154 the Chief Justice

of Nova Scotia stated with respect to a sentence appeal by an offender as follows:

> " The function of this court in dealing with this issue was aptly described by Matthews, J.A., in **R. v. Pepin** (1990), 98 N.S.R. (2d) 238; 263 A.P.R. 238, at p. 251:
>
> > "By virtue of s. 687 of the **Code** we are empowered to 'consider the fitness of the sentence appealed against'. This court has said on numerous occasions, that, in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles or that the sentence is clearly or manifestly excessive. See among others, **R. v. Cormier** (1974), 9 N.S.R. (2d) 687; **R. v. Wilson** (1974), 10 N.S.R. (2d) 629; 2 A.P.R. 629."

After reviewing the issues raised in the **Leger** appeal the Chief Justice concluded that the appeal should be dismissed because the sentence both in its totality and its parts was neither manifestly excessive nor unfit having regard to all the circumstances.

The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts. If it is a fit sentence an appeal court cannot interfer. My view, that this is the correct approach for an appeal court, is not based on the notion that a trial judge has had the advantage of seeing and hearing the witnesses. This reason is expressed in some of the older cases as being the underlying reason for non-interference; that rationale clearly does not apply to a guilty plea. My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion that is

the true basis upon which courts of appeal review sentences when the only issue is whether the sentence is inadequate or excessive. In reviewing a period of ineligibility for parole as determined by a sentencing judge an appeal court should consider if the period is clearly inadequate or too long.

One might ask the question how does a trial judge, or for that matter an appeal court, measure with absolute accuracy the degree of horrendousness of a second degree murder for the purpose of imposing a period of ineligibility for parole that would be the only period that could be considered fit in the circumstances?

In **Mitchell** Hart J.A. in increasing the period of ineligibility from 15 years to 21 years stated at p. 82:

> " I find it difficult to believe that there could be a more brutal, painful and prolonged murder of a defenceless child accompanied by the horrifying evidence of sexual abuse."

In **Doyle** Chipman J.A. increased the period of ineligibility from 10 to 17 years. He stated at paragraph 46:

> " I have come to the conclusion that this was a most repugnant and indefensible crime, committed in cold blood by an offender from whom society deserves protection. The only circumstances favourable to the respondent are the findings by the trial judge that the killing was the product of a disturbed mind, that the respondent was suffering acute anxiety, was depressed and troubled about his marriage, and the possibility of his wife leaving him."

Clearly the periods imposed by the trial judges in these cases were too short being 15

and 10 years respectively. But can it be determined with any accuracy what should be the exact number of years of parole ineligibility that should be imposed. All murders are serious. The degree to which a murder shocks the community and requires denunciation depends on the facts.

A review of Kelly J.'s decision shows that he considered and applied the correct principles. He made reference to the tests set out in **Mitchell** and **Doyle**. He considered the character of the offender and the circumstances and nature of the offence. He reviewed numerous relevant cases submitted to him by counsel including **Mitchell** and **Doyle**. He clearly recognized that he had a duty to the community where he stated at p. 376:

> " [64] As I review the circumstances of the crime, it is difficult for me not to conclude that this series of shootings is close to the most severe of circumstances that come before a court for this type of sentence. The killings at the McDonald robbery are heinous crimes that have shocked and outraged the community. They obviously have had a most significant effect on the families of the victims and all close to them. The serious wounding of Ms. MacNeil and the killing of the three other young employees will scar the memories of all members of this community for many decades.
>
> [65] As the sentencing judge, I must act as the representative of all of the community in denouncing the murder of Mr. Burroughs. Mr. Muise's callous role in this killing must be denounced by shutting him away from society for a prolonged period of time. It is hoped that such action will deter others from committing such acts. It is also hoped that a prolonged period of incarceration will also deter Mr. Muise from repeating such acts."

The Crown has argued that the learned trial judge erred in law when he stated that he could not consider Muise's participation in the other killings in sentencing him. The paragraph in which the error is alleged to have occurred states as follows:

> " [66] Mr. Muise is not being sentenced for participation in all of the killings that occurred at McDonald's. He has pleaded guilty to one charge and I must sentence him in relation to that charge only. I can consider the other aspects of his involvement in assessing his character and the circumstances of the event, but I cannot consider his participation in the other killings, if any, in sentencing him."

The decision, read as a whole, satisfies me that, in sentencing Mr. Muise for the murder to which he pleaded guilty, Mr. Justice Kelly did take into account Mr. Muise's involvement in all the crimes committed that morning from the planning stage to the disposition of incriminating evidence following the murders and the robbery. Taken in the context of the paragraph in which the impugned sentence appears the trial judge was simply stating that he was not sentencing Mr. Muise for the other murders; he was sentencing him in relation to his guilty plea to the second degree murder of Mr. Burroughs. With respect, I do not accept the Crown's argument that Kelly J. committed the error alleged; such a conclusion would be totally inconsistent with his decision read as a whole.

Parliament, in enacting **s. 744** of the **Code**, empowered a trial judge to increase the minimum of 10 years parole ineligibility following a conviction for second degree murder by any number of years up to 25 as the "judge deems fit in the circumstances". While other cases are mere guides to the sentencing judge it is customary for a sentencing judge to look at other cases to determine what might be considered fit in the case before him.

The learned trial judge rendered a thorough and considered decision. He was very aware that Mr. Muise's actions were those of a callous killer. Justice Kelly did not apply incorrect principles. He concluded after reviewing the facts, the case law on the issue of parole ineligibility

and the appropriate legal tests that a 20 year period of ineligibility would be fit in the circumstances. It must be remembered that Mr. Muise was sentenced to life imprisonment as mandated by the **Criminal Code**. He is entitled, pursuant to **s. 745** of the **Code**, to a review of his period of ineligibility for parole after 15 years of his sentence has been served irrespective of the period of parole ineligibility imposed by the trial judge.

Summary

In my opinion it cannot be said that the 20 year period of ineligibility for parole as ordered by the trial judge is so clearly inadequate as not to be a fit sentence. Had the sentencing judge chosen 25 years as the appropriate period his decision could not have been successfully challenged by Mr. Muise. This Court's function is to determine if the sentence imposed by the learned trial judge is fit considering all the relevant factors. Neither a sentencing judge nor this Court can be expected to do more than impose a period of parole ineligibility that is within an acceptable range. One might say that the low range for the period of ineligibility for second degree murder would be somewhere between 10 and 15 years, the mid range 15 to 20 and the high range 20 to 25 years. This case clearly falls within the high range. As previously stated, this Court has adopted and consistently followed a policy that it will not interfere with the sentence on a Crown appeal which simply alleges the period of incarceration is too short unless the sentence is clearly inadequate. This policy should apply to sentence appeals involving the period of ineligibility for parole as imposed by the sentencing judge (**Mitchell**, supra). It is important that justice be administered on a consistent application of principles. I would dismiss

the appeal in keeping with this principle.

Hallett, J.A.

Concurred in:

Roscoe, J.A.