C.A.C. No. 114296

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Matthews and Roscoe, JJ.A.

Cite as: R. v. R.J.S., 1995 NSCA 159

BETWEEN:

S. (R.J.) Appellant - and - HER MAJESTY THE QUEEN Respondent	Donald C. Murray for the Appellant Robert E. Lutes, Q.C. Peter G. MacKay for the Respondent Appeal Heard: May 10, 1995 Judgment Delivered: May 10, 1995

THE COURT: Application dismissed from decision of Judge of Youth Court ordering the transfer to ordinary court of a youth charged with first degree murder, per oral reasons for judgment of Clarke, C.J.N.S.; Matthews and Roscoe, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

R.J.S. is charged with the first degree murder of Troy Roderick Fraser, a gasoline station attendant at Central West River.

Mr. Fraser was killed on August 7, 1994 as a result of two shots fired from a handgun during an armed robbery. R.J.S. was then just a few months short of his eighteenth birthday. He, two other youths and one adult are alleged to have participated in Mr. Fraser's murder.

Pursuant to s. 16 of the **Young Offenders Act** the Crown applied to have the trial of R.J.S. transferred to ordinary court. After several days of hearing, His Honour Judge MacDougall, of the Youth Court, granted the application and transferred the matter to ordinary court.

R.J.S. has applied to this court for a review pursuant to s. 16(9) of the **Young Offenders Act**.

In **R. v. M.J.M.** (1989), 89 N.S.R. (2d) 98, Chipman, J.A. wrote at p. 104, para. 36:

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

To like effect is the decision of the Supreme Court of Canada in **R. v. M. (S.H.)** (1989), 50 C.C.C. (3d) 503 at p. 549 (McLachlin, J.):

> In summary, it is my conclusion that the review court must base its review on the facts found by the youth court judge and give due deference to the youth court judge's evaluation of the evidence. It must then proceed to apply the factors set out in s. 16(2) to that evidence. In applying these factors, the review court is not confined to asking whether the youth court judge has erred, but should make an independent evaluation on the basis of the facts found by the youth court judge. The result of that evaluation will be either to confirm or to reverse the youth court's decision.

After a thorough review of the record and consideration of the submissions of counsel, we are satisfied that Judge MacDougall did not err in his assessment of the evidence or in his application of the factors described in s. 16 of the **Act**. After evaluating the record as directed by McLachlin J. in **R. v. M.(S.H.)**, we confirm the conclusion of the judge of the Youth Court. Rather than reviewing in detail the judgment given by Judge MacDougall, we will append a copy of his decision to this decision and ask for the substitution of initials for names of the youths as required by s. 38(1) of the **Young Offenders Act**.

Counsel for the appellant submits that Judge MacDougall applied s. 16 in a manner by which he presumed the guilt of R.J.S. If so, and if that is an ingredient of s. 16, then Mr. Murray argues it offends either or both of s. 11(d) and s. 15 of the **Charter of Rights and Freedoms**. He asserts this Court should order a new transfer hearing because the presumption of innocence protected by s. 11(d) of the **Charter** was breached by the judge of the Youth Court.

The issue in a transfer hearing is not one of establishing the innocence or guilt of the youth. Instead it is to determine whether the Youth Court or ordinary court is the better forum for the resolution of such issues, having regard to the factors enunciated by the **Young Offenders Act**.

In our view the reasons of Judge MacDougall, read as a whole, do not fall into error in that respect. We find no breach of s. 11(d) of the **Charter**, nor any of s. 15. In respect of s. 15 we refer to the decisions of the Ontario Court of Appeal in **Re McDonald and The Queen** (1985), 51 O.R. (2d) 745, and the general comments of Morden, J.A. at pp. 763-768. Also, we refer to **R. v. H.(A.)** (1992), 10 O.R. (3d) 683 at pp. 693-694, confirmed on appeal (1993) 12 O.R. (3d) 634, and **Regina v. W.** (1985) 22 C.C.C. (3d) 269 (B.C.S.C.) at p. 276.

After consideration, we have concluded it is not necessary to grant the motion made by the Crown for the introduction of fresh evidence.

It is our unanimous opinion that the application for the review of the decision of the judge of the Youth Court is dismissed.

C.J.N.S.

Concurred In:

Matthews, J.A.

Roscoe, J.A.