C.A.C. No. 02845

NOVA SCOTIA COURT OF APPEAL

Jones, Freeman, and Pugsley, JJ.A.
Cite as: R. v. A.C.W., 1993 NSCA 60

BETWEEN:		
HER MAJESTY THE QUEEN		Robert E. Lutes, Q.C. for the Appellant
	Appellant	
- and -		
A. C. W.		John D. O'Neill and Robert McCleave for the Respondent
	Respondent	
		Appeal Heard: April 15, 1993
		Judgment Delivered: April 26, 1993

Editorial Notice

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

THE COURT: The appeal is dismissed as per reasons for judgment of Pugsley, J.A.; Jones and Freeman, JJ.A., concurring.

PUGSLEY, J.A.:

This is an application by the Crown to reverse the decision of the Youth Court judge who denied the Crown's motion to transfer the trial of the male young person (respondent) to ordinary court.

The respondent is charged with committing first degree murder contrary to s. 235(1) of the Code. He was born on January [...], 1975 and accordingly was approximately 17 1/2 years of age at the time of this incident.

FACTS

Glen Palmer, and his half brother, Ricky Riggs, at approximately 11:30 in the evening of August 11, 1992, drove their truck to Creighton Street in the north end of the City of Halifax to purchase drugs. Creighton Street was described as the inner city of Halifax. The Crown evidence reveals that drug dealers frequent the area and there are problems with groups of youths who, according to the police, from time to time get "out of hand".

Palmer was 21 years of age, weighed 182 pounds, was 5' 7" in height. Riggs was in his late 20's. Both had been drinking.

During the course of negotiations for the purchase of crack cocaine, a disagreement arose between Riggs, and one Beals. As a consequence, Riggs received a bloody nose. Palmer became agitated. Riggs, however, prevailed upon Palmer to leave the area. Either Palmer or Riggs made a comment that they would return with guns. This comment was heard by several witnesses.

Riggs and Palmer then drove several blocks north and stopped by a picket fence. Each tore a picket off the fence and returned to Creighton Street. They found Beals among a group of others, and Riggs and Palmer set chase.

Beals told Riggs to drop the picket he was carrying and they would fight. Riggs either dropped the picket or it was taken from him. It was picked up by a third person who hit Riggs on the side of the head. Riggs went down.

Palmer, swinging his picket, stood over the fallen Riggs and told the group to stay

away.

After Riggs recovered his feet, he and Palmer started chasing some of the group with whom they had their initial disagreement. Another 17 year old male youth (O.) may have been one of the group being chased.

Apparently the respondent and O. were in the general area and were spectators to the proceedings.

The respondent and O. ran into the house of a friend on Creighton Street. O. came out shortly thereafter armed with a 22 caliber revolver. Palmer threw his picket to the ground, put his hands up in the air, and said:

"Look I haven't got anything, come out and fight."

O. fired two shots at the ground in the vicinity of Palmer.

The respondent then exited the same residence, walked up to Palmer, opened his coat, removed a long-barrelled gun, and at a distance estimated to be approximately 10 1/2 feet discharged the contents of the gun into Palmer's chest.

Riggs rushed to Palmer's assistance and cradled him in his arms. O. then fired a further shot from the 22 caliber revolver at Riggs. None of the shots fired by O. struck Riggs or Palmer.

The respondent and O. ran into a nearby house, changed clothes and left the area. The weapons used by the respondent and O. have never been found.

Palmer died shortly thereafter from a shotgun wound to the chest. Fifty-six pellets were removed from his body.

CHARGES AGAINST O.

O. was charged with attempting to murder Riggs, contrary to s. 239 of the Code. He was also charged with intent to endanger the life of Riggs, contrary to s. 244 of the Code.

O. pled guilty to the s. 244 charge. The s. 239 charge was withdrawn.

On November 4, 1992, O. was sentenced to 12 months incarceration in open custody,

12 months consecutive probation on certain enumerated conditions, and was prohibited from possessing a firearm under s. 100 of the Code.

The sentence was imposed by the same Youth Court judge who decided the application concerning the respondent which is presently before this court.

BACKGROUND OF THE RESPONDENT

The respondent's parents separated when he was four. He has been raised by his mother who has been continuously employed as a building cleaner five evenings a week.

In the evenings, he was supervised by his sister. He was required to keep a curfew of 10:30 p.m. on weekdays and 12:00 o'clock midnight on weekends.

He was not subject to any physical, emotional or sexual abuse during his childhood.

He visits his father regularly.

The family relationship is described in a predisposition report as being "close" and it is noted that the respondent is helpful to his family members.

On August 11, 1992 he resided with his mother, his sister, her child and his stepbrother.

While the Creighton Street area [...] is known as an area frequented by drug pushers and sellers, there is no evidence that the respondent was involved in the drug trade nor did the evidence suggest that he was involved in any of the groups that were known to cause disturbances in the area.

There is no evidence of any use of alcohol or drugs by the respondent.

The respondent repeated grade two. He repeated a grade nine social studies program in the summer of 1991. He failed a French program during the same summer.

The respondent enrolled in grade ten at a local high school in September, 1991. His tests results indicated that he had "below average abilities". He is described by his teachers as being very passive in class. His attendance during the fall term was sporadic. His absence from school after Christmas became more frequent. He was not rude or impolite to his teachers nor was he a

behavioral problem. He simply did not participate in class discussions.

Because of his absence from school, the vice-principal spoke to him in March 1992 and suggested that he drop out of school and seek employment. The vice-principal testified:

> "At this point, it was almost like a snap and he became very violent in the sense that he started cursing and swearing and left out the door."

The respondent made no threat of any kind to the vice-principal nor did the vice-principal have any apprehension of harm.

It had been reported to the school authorities that one female student did not attend school because she was afraid of the respondent.

The respondent had earlier appeared in Youth Court on July 3, 1992. He was sentenced to one year probation for assault of a female contrary to s. 226(b) of the Code.

A special condition of the probationary order required the respondent to seek counselling with respect to anger management.

The respondent kept the two appointments arranged with the probation officer in July and August prior to this incident of August 11th. The probation officer described the respondent as being cooperative and willing to accept direction. The respondent advised the probation officer that it was his intention to return to school at the beginning of the 1992 school year. The respondent told the probation officer that he had, in fact, registered at a local high school. Upon checking with the high schools in the area, the probation officer determined that the respondent was not registered for the September term.

EVIDENCE ON APPLICATION UNDER S. 16(1)

On November 3 and 25, 1992, the Youth Court judge heard viva voce evidence from Corporal Kenneth Kilby of the Criminal Investigation Division of the Halifax Police Department, William Lonar, Superintendent of the Nova Scotia Youth Centre at Waterville, John Stewart, Coordinator of Community Resources for Correctional Services Canada (who was familiar with the facilities and programs available in federal correctional facilities in Atlantic Canada), J.D., Vice-

Principal of [...] and M.C., a resource teacher at [...].

Also placed before the Youth Court judge was a predisposition report of A. A. Richardson, probation officer, prepared consequent upon the incident of August 11, 1992. An earlier report had been prepared by the same probation officer arising out of the conviction for assault in July, 1992. That report was not before the Youth Court judge and consequently not before us.

Mr. Richardson did not testify before the Youth Court judge.

DECISION OF THE YOUTH COURT JUDGE

On February 3, 1993, the Youth Court judge delivered a comprehensive and reasoned decision concluding that both the rehabilitation of the respondent and the protection of the public could be reconciled by the respondent remaining under the jurisdiction of the Youth Court.

The Youth Court judge considered, inter alia each of the matters detailed in s. 16(2) of the Young Offenders Act.

NATURE OF THE REVIEW BY THIS COURT

The review by this court proceeds in accordance with s. 16(9) wherein it is provided that:

> "16(9) The court, may, in its discretion, confirm or reverse the decision of the Youth Court."

Counsel were essentially in agreement on the review to be exercised by this court, submitting that it fell somewhere between an appeal and a trial de novo.

In R. v. M. (S.H.), [1989] 2 S.C.R. 446, McLachlin, J. on behalf of the majority, stated at p. 465-6:

> "Section 16(9) and (10), by conferring on the reviewing court the 'discretion' to confirm or reverse, establish different rules for the review than normally applies on appeals, where the court is limited to correction of error. The reviewing body's function must be to 'review' the decision, and then, 'in its discretion', confirm or reverse it. This involves evaluation, not only of whether the court below made an error of law or jurisdiction, but whether its conclusions are correct based on the factors set out in the **Act**. In short, the reviewing tribunal can go into the merits of the application. If this review leads

> to the conclusion that the decision below was wrong for any of these reasons, the reviewing court in the exercise of its discretion may substitute its own view for that of the judge below.
>
> There is, however, an important limit on the power of the review tribunal. Because it has not heard the evidence, it must accept the Youth Court's findings of fact and defer to it in matters involving the credibility of witnesses. Parliament has conferred on the review court a discretion to confirm or reverse the Youth Court judge's decision, but it has left the task of hearing and evaluating the evidence entirely to the Youth Court judge. As Laycraft, C.J.A. pointed out, it is a fundamental rule that review tribunals which have not had the advantage of hearing and seeing the witnesses should defer to the trial judge who has had this advantage. Nothing in the Act suggests that Parliament intended to abridge this long-standing and eminently reasonable principle."

Mr. Justice Chipman, on behalf of this court, put it this way (R. v. M.J.M. (1989), 89 N.S.R. (2d) 98 at 104:

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

BURDEN OF PROOF

Both counsel were in agreement that prior to the amendments of the Young Offenders Act and the Criminal Code effective May 15, 1992 that the onus was not a heavy one.

McLachlin, J. stated in R. v. M.(S.H.), supra, at 462:

> "I share the view that application of the concepts of burden and onus to the transfer provisions of the Young Offenders Act may not be helpful. The question is basically one of statutory interpretation. Parliament has declared that unless otherwise ordered, young offenders will be tried in Youth Court. That is the status quo. The party seeking transfer to ordinary court must persuade the court that, having regard to the factors set out in s. 16(2) and (3) of the Act, the case should be transferred. In this sense there is a burden on the party seeking transfer.
>
> What then is the standard of proof which the applicant must meet? The Court of Appeal rejected the view of the judge below that there was a 'heavy onus' on the party seeking transfer. I agree that it would be wrong as a matter of law to say that the applicant must meet a

> heavy onus. That term carries with it the connotation that only in exceptional or very clear cases should an order for transfer be made. But Parliament did not say that. Parliament set out in detail the factors which must be weighed and balanced, and stipulated that if after considering them the court was satisfied that it was in the interests of society and the needs of the young person that he or she should be transferred, the order should be made."

The Crown submits that R. v. M.(S.H.), supra, was decided prior to the recent amendments of May 15, 1992, and that those amendments reduced an onus that was not "heavy" to begin with, to one of lesser weight.

THE AMENDMENTS OF MAY 15, 1992

Under the new amendments to the Young Offenders Act, a young offender convicted of first degree murder is subject to a maximum sentence of five years less one day (s. 20(4)) of which a maximum three years (subject to s. 26.(1)(i)) may be served in either secure or open custody, followed by two years less one day of conditional supervision. This is an increase in the sentence from a maximum of three years that existed prior to May 15, 1992.

Section 26(1)(i) provides for an application to extend the terms of incarceration to the balance of the sentence on specific grounds, (ie. the young offender is likely to commit an offence which would cause death or serious harm).

In adult court on the other hand, murder is punished by life imprisonment (s. 235 of the Criminal Code).

The Code has also been amended to permit young offenders convicted of first degree murder under the adult system to be eligible for parole after serving five to ten years of their sentence. Subject to a 15 year possible review, an adult is not eligible for parole for 25 years.

A new section (16(1.1)) was introduced which provides:

> "16.1.1 In making the determination referred to in subsection (1), the Youth Court shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be reconciled by the youth remaining under the jurisdiction of the Youth Court, and if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall order that the young person be

> proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence."

In my opinion, the injunction that the protection of the public is paramount is only to be followed if the Youth Court judge has reached the conclusion that the twin objectives of affording protection to the public and rehabilitation of the young person, cannot be reconciled by the youth remaining under the jurisdiction of the Youth Court.

The Youth Court judge in this case concluded that the twin objectives were, in fact, reconciled on the evidence that was adduced before him. In my opinion, he was justified in so doing.

Notwithstanding the amendments of May 15, 1992, the Youth Court judge is not called upon simply to balance the different factors listed in s. 16(2). There remains a burden on the party, arguing for a transfer, to persuade the court that transfer should be made.

The test expressed by McLachlin, J. in 1989 in R. v. M. (S.H.), supra, is still apposite:

> "The question rather is whether one is satisfied, after weighing and balancing all the relevant considerations, that the case should be transferred to ordinary court."

That language, in my opinion, is clear and easily understood.

THE CROWN'S SUBMISSIONS

The Crown argues that the seriousness of the alleged offence mitigates against the respondent being tried in Youth Court. The police had sworn an information under oath that there were "reasonable grounds to believe that the respondent had committed the offence of first degree murder".

In R. v. M.J.M., supra, Mr. Justice Chipman stated:

> "It is clear from the authorities that there is no automatic transfer for murder. However, murder is the most likely of all charges to be persuasive in favour of transfer."

The Crown further submits that the age of the respondent is a persuasive factor in favour of transfer citing the comments of Mr. Justice Goodman in R. v. S.(G.) (1992), 5 O.R. (3d) 97 at 109:

> "It is reasonable to assume that it was the intention of Parliament, that

> other things being equal, the older the person is, the heavier the age factor weighs in favour of making a transfer ordered. That would seem to be a matter of pure common sense."

In the light of these considerations, the Crown argues that the failure of the respondent to advance any reason or explanation for the brutal slaying of Palmer is critical. Palmer was unarmed. His hands were raised above his head. The respondent was not demonstrated as being a participant in the earlier scuffling but calmly, with premeditation, walked up to Palmer, and when approximately 10 feet from him, produced a shotgun and shot him.

The Crown's submission may be summarized as follows:

> How could the Youth Court judge conclude that the respondent can be rehabilitated when there is no evidence that he possesses a character defect that will benefit from rehabilitation?
>
> In the circumstances of this case, there was an obligation on the respondent to adduce evidence to satisfy the second branch of the test of s. 16(1.1).
>
> The only evidence adduced bearing on the "interests of society" is evidence leading to the inescapable conclusion that the public requires protection from the respondent. Protection can only be ensured if the respondent is tried in ordinary court where the sentence imposed could be longer than that imposed by Youth Court and where the options of institutional imprisonment are available.

The Crown relies on the comments of Goodman, J.A. in R. v. S.(G.), supra:

> "Counsel for the young person submitted that, since the prosecution had failed to adduce evidence that the young person could not be rehabilitated in three years, the only possible inference from the lack of such evidence is that the youth could be rehabilitated in that time frame. In my view, the fact that the maximum period of secure custody which may be imposed under the Act for any offence is limited to three years does not cast an onus on the Crown to show that the offender cannot be rehabilitated within the three year period before a transfer order can be made, nor does a failure of the Crown to lead evidence to indicate that the offender cannot be rehabilitated

> in that time frame necessarily lead to the inference that he can be rehabilitated within a three year period. It seems to me that in a case such as the one under consideration, where the facts disclose a brutal killing, the offender should ensure that evidence that the offender is likely to be rehabilitated in a three year period (if such is or can be made available), be made available to the court is one of the factors to be taken into account under s. 16(2) of the Act."

DECISION

It is important to keep in mind the evidence that was before the Youth Court judge in R. v. S.(G.), supra.

Goodman, J.A. states at p. 108:

> "In the present case, as stated previously, the only evidence before the Youth Court judge was that the applicant with premeditation intended to stab the victim into an unconscious state with a knife in order to effect a robbery and did, in fact, stab him in the back ten times."

The Crown's submission, in my opinion, ignores evidence relating to the circumstances of the offence, from which inferences may be drawn, and as well, direct evidence concerning the maturity, character and background of the respondent, all of which were factors taken into account by the Youth Court judge.

The Act should be construed in the light of the guidelines set out in s. 3. In this case, the provisions of s. 3(1)(c) are of particular applicability:

> "3(1) It is recognized and declared that
>
> . . .
>
> (c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance."

The "circumstances" in which the offence was committed reveal the following:

(1) Palmer and Riggs were both engaged in aggressive encounters on Creighton Street. They were both impaired. Palmer, of husky build, was in his early 20's, and Riggs in his late 20's. Shortly before midnight they left Creighton Street, warning they would be back with guns.

(2) They returned shortly thereafter, visibly armed with fence pickets. Upon arriving at the scene, they went immediately in pursuit of others.

(3) Blows were struck. Palmer was swinging a fence picket over his head warning others to stay away from Riggs. In view of their aggressive belligerence, an onlooker may well have concluded, in view of the earlier warning, that Palmer and Riggs may have had concealed weapons.

The foregoing circumstances led the Youth Court judge to conclude that:

> "It is difficult to minimize the act: it is a violent and extreme act that ended the victim's life. Yet it was quick, without lengthy premeditation, in an atmosphere of some street violence on a warm August night."

The evidence discloses that the respondent:

(1) Despite being raised by a single parent, maintained close relationships with both his parents and his sister.

(2) Did not use alcohol or drugs.

(3) Was not involved in the drug trade.

(4) Was not involved in any disturbances in the Creighton Street area.

(5) According to his teacher at [...], has potential to improve.

(6) Except for a conviction for common assault, has no previous criminal record. He co-operated with his probation officer.

(7) During a short custodial period at the Nova Scotia Youth Centre, displayed initiative, made an honest effort at work, did not attempt to exploit his notoriety with young offenders and was co-operative with staff.

(8) Was not a behavioral problem at school, and

(9) Requires counselling to control his anger.

The respondent has pleaded not guilty to the charge. At the stage of the s. 16(1) hearing, the respondent should not feel compelled to compromise his plea, or reveal defence strategy, by adducing the type of evidence suggested by the Crown.

The evidence developed, and the inferences that may be drawn, relating to the

circumstances of the offence and the character and background of the respondent in this case was sufficient to convince the Youth Court judge that the Crown had not satisfied the burden. In the course of construing the provisions of s. 16(2) of the Young Offenders Act, these were some of the critical factors on which he placed emphasis.

The Youth Court judge agreed with the description of the respondent in the predisposition report that he:

> "Appeared to require guidelines and boundaries in his personal life and is not an adult yet."

In a key passage, the Youth Court judge concluded:

> "The Crown argues forcefully that the circumstances of the offence call for a tipping of the balance towards the protection of the public as opposed to rehabilitation, in accordance with s. 16(1.1), and that the absence of special mental or emotional problems which could be treated within the 3 or 5 years provided by the maximum sentence under the **Act**, by inference, eliminate the rehabilitation possibilities of (the respondent).
>
> I am unable to agree with this proposition. As I understand the argument, in the absence of such medical or psychiatric evidence, I must infer from the mere evidence alleged against the accused that, if released, he is a danger to the public. The evidence simply does not support this conclusion and the jurisprudence is unhelpful to the Crown's hypothesis. The evidence simply does not show (the respondent) as a sadistic or cruel young offender without empathy for others and already well versed in the criminal way of life. He has been impetuous, not always candid, somewhat immature and not taking full responsibilities for his act or his life. But he was then 17 and a half years of age and committed really only one other crime, i.e. common assault. The evidence simply does not show an accused having committed a crime in such a way that, upon sentencing, the young offender system could not handle successfully and thus provide long term protection of the public.
>
> Indeed I am satisfied that the best interest of society can be served under this **Act** and that both the rehabilitation of (the respondent) and the protection of the public through general and specific deterrence can coincide."

I am persuaded, after a full review, that this conclusion is justified and is fully supported by the evidence.

This case is not comparable to that before the Ontario Court of Appeal in R. v. S.

(G.), supra. There was not the element of "planning and deliberation" disclosed in that case, nor are the circumstances of the offence, or the character and background of the parties, comparable.

I would accordingly confirm the decision of the Youth Court judge denying the application for transfer.

J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.