SUPREME COURT OF NOVA SCOTIA
Citation: *R. v Surette*, 2015 NSSC 141

Date : 20150428
Docket : CRK 436548
Registry : Kentville

Between :

Regina

-v-

Daniel Wayne Surette

-and-

Kyle David Fredericks

JUDGE:	The Honourable Justice Gregory M. Warner
HEARD:	April 28, 2015, in Kentville, Nova Scotia
COUNSEL:	Jim Fyfe and William Fergusson Q.C., crown attorney Ken Greer, counsel for Daniel Wayne Surette Geoffrey Newton, counsel for Kyle David Fredericks

BY THE COURT:

[1] Normally the sentencing process is a difficult one. In this particular case, the crown and the accused, or the offenders, come before the court with a joint recommendation. The joint recommendation changes the analysis that the court has to do. For that reason, I do not need time to make the determination that I intend to make this afternoon.

[2] I first want to say that I appreciate the very thorough written submissions that I received yesterday in respect of this matter. They were constructive. They were relevant. They were focussed on the important processes that this court is required to carry out as part of the criminal justice system.

[3] As is always the case when this court sits, there are never any winners. There are always losers, and everyone is a loser. It is simply a matter of the degree.

[4] On October 23, 2013, Harley Lawrence was sleeping in a bus stop on Commercial Street in Berwick, Nova Scotia – not Vancouver, not Toronto, not Montreal or not New York. He was burned alive while he slept.

[5] At the arraignment of Mr. Surette and Mr. Fredericks on February 23, 2015, before me, they both plead not guilty to first degree murder, which is planned and premeditated murder, but plead guilty to second degree murder, which is not planned and premeditated. The crown agreed to accept the plea on the included offence. In accordance with s. 745(c) of the *Criminal Code*, I am required by law and I sentence each of Mr. Surette and Mr. Fredericks to life imprisonment. That is the mandatory sentence; there is no discretion.

[6] The only issue that parliament has assigned to courts is to make a determination of when the date starts that they may apply for parole. It does not mean they get out; it means the earliest date they can apply to get out.

[7] Section 745.1 of the *Code* says that the court cannot make a determination of the date for eligibility for parole before 10 years nor later than 25 years, which date is the mandatory minimum eligibility for first degree murder. The issue for the court today is whether to accept a joint recommendation that Mr. Surette's eligibility for parole start in 20 years and Mr. Fredericks start in 18 years or not.

[8] I have reviewed the Agreed Statement of Fact that has been put in the record today and marked as Exhibit #1. I have looked at the photographs that were tendered by the crown. I have looked at the victim impact statements and heard Mr. Lawrence's

brother Ron. I have read the criminal records and I have read counsel's final submissions. I am not going to repeat all of the facts.

[9] Section 745.4 of the *Criminal Code* says in determining what the appropriate minimum period before either Mr. Surette or Mr. Fredericks is entitled to apply for parole, the court has to have consideration of three factors: their individual character, the nature of the offence and the circumstances surrounding the offence. Because they re-elected at the time of arraignment, there is no recommendation by a jury, which is a fourth factor, if there had been a jury trial.

[10] Counsel have directed the court to the Supreme Court of Canada decision of 1995 in *R v Shropshire*, [1995] 4 SCR 227 (SCC), which says that there is a very broad range of seriousness in the moral culpability of persons who commit second degree murder. That court directs this court to apply the same principles that apply to the general sentencing process when assessing eligibility for parole.

[11] It is important to say that those principles are:

* to denounce unlawful conduct;

* to deter both the accused persons of doing something again and others, called general deterrence;

* to separate people from society, where it is necessary;

* to assist offenders in rehabilitation, which, while not necessary popular, is an important element of sentencing;

* to provide reparations for harm where possible; and,

* to promote a sentence of responsibility in offenders and acknowledge the harm they have done to the victim or victims and to the community. And the community may be and is not limited to Berwick.

[12] Sentencing must be proportionate both to the offence itself and to the responsibility of the offenders. It can be increased or decreased by aggravating and mitigating factors.

[13] This court is required to impose similar sentences, on similar offenders for similar offences in similar circumstances. In other words, sentences should be consistent and predictable, they should not be off the wall.

[14] I am required in terms of assessing the eligibility for parole to deal with the nature and circumstances of the offence.

[15] It was articulately summed up by the crown at para. 50 of the Agreed Statement of Facts signed by Mr. Surette and Mr. Fredericks. They left Mr. Surette's home with a plastic jug and the intent to fill that jug with gasoline and do mischief. At some time before or after they filled up the jug, they picked their target.

[16] Much of what I read in the court decisions says it is far more serious to kill a policeman than anyone else in society, because of the job that police do and, in one sense, that is correct. However, in my view, it is no less aggravating, and I think counsel agreed, to pick on any vulnerable person and maybe it is even worse: the helpless, the vulnerable, maybe a person who rejected some help in society because of a mental condition. Whether the least among us are entitled to the same protection as the best.

[17] What defence counsel said could very well be right. That the rationalization given when Mr. Surette and Mr. Fredericks started talking to the police, that they thought he was a rat, was really a rationalization for an extremely idiotic, irresponsible and animalistic event, treated casually by them, watching to see him burn, to see if he moved. And, that what they really were up to, as they said to their family when they asked them to cover up for them, they just burned "the bum" or the "Berwick bum". I suspect that is what they thought at the time. It is the most likely of circumstances but, quite candidly, that makes it probably more aggravating. That is, they later made up the excuse that they thought he was a rat.

[18] The fact that they were drinking or maybe consuming drugs makes it no less aggravating. Mr. Greer and Mr. Newton both acknowledge that fact. It might explain it. It does not justify it. It does not excuse it.

[19] Sentencing is not about vengeance, but it is about understanding. In this particular case, denunciation and general deterrence, when death results, while not the only considerations in sentencing takes some priority. But for that, rehabilitation is not on the table, and you would not have a joint recommendation today.

[20] With regards to the event, it is hard to imagine a more horrible death. It is hard to imagine anybody being so animalistic and devoid of any social responsibility that they would pour gas over a person, as their mischief of the night, and watch him.

[21] Second degree murder is unpremeditated, but as the Supreme Court said in *Shropshire* in 1995, there are varying degrees, a wide range, of moral culpability for second degree murder. That is why the time for eligibility for parole, not release, but eligibility for parole, is between 10 and 25 years, quite a broad range.

[22] In this case, the crown and offenders have agreed that Mr. Surette should spend 80% of the maximum time he could spend in prison before he is eligible to even ask. In the case of Mr. Fredericks, if my arithmetic is correct, 72% of the maximum time he can spend in prison before he can even ask to be paroled. In other words, the joint recommendation is at the high end of the range. It is much closer to first-degree, premeditated murder than to simple manslaughter, which is death that results from any wrongful conduct.

[23] The second factor the court is required to consider in determining the eligibility for parole is the circumstances of the offenders. Neither were youths; they were in their mid-twenties. Neither were really contributing members of society.

[24] We all like to think that we all have potential; they had not shown anything yet. Quite the contrary, they were wasting their lives, working seasonally, looks like for minimum wage, with minimal contributions, all probably affected by the consumption of alcohol and drugs, although I do not have clear evidence of the extent of any addictions. They certainly are not in the category of the offender in *Hawkins*, the case in which our Court of Appeal four years ago reduced the sentence from 20 to 15 years.

[25] Rehabilitation is always something that the court has to keep in its mind. While no one has a crystal ball, it appears from the sentencing history of both of these gentlemen, that both have considerable records, Mr. Surette includes several incidents of violence. Someday some people like him do see the light.

[26] The circumstances of these offenders do not mitigate towards an eligibility for parole at the lower end of the scale as opposed to the upper end of the scale.

[27] The court is required to take into consideration mitigating as well as aggravating circumstances. Obviously the most aggravating circumstance is the very inhuman manner, devoid in any sense that they were human, by the manner of the act they carried out and the callousness of it.

[28] I accept the fact, as a mitigating circumstance, that probably when they knew they were in the soup - by the time they were interviewed by the police, both made admissions and wrote letters of apology. That is relevant. It saves everyone involved considerable agony.

[29] As I said at the beginning, it is not a matter of this court on its own deciding what the sentencing should be, because the Crown and both offenders have agreed to a sentence or to jointly recommend a sentence to this court. They just have to satisfy this court that it meets the standard of a fit recommendation. That standard is well set out in Mr. Newton’s brief at page 6 when he quotes a case from 2003 from our Court of

Appeal called *R v MacIvor* (2003), 215 NSR (2d) 344, written by Justice Cromwell, now of the Supreme Court of Canada, and I am quoting:

> It is not doubted that a joint submission resulting from a plea bargain while not binding on the Court, should be given very serious consideration. This requires the sentencing judge to do more than assess whether it is a sentence he or she would have imposed absent the joint submission … It requires the sentencing judge to assess whether the jointly submitted sentence is within an acceptable range – in other words, whether it is a fit sentence. If it is, there must be sound reasons for departing form it …
>
> Even where the proposed sentence may appear to the judge to be outside an acceptable range, the judge ought to give it serious consideration, bearing in mind that even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate facts which may have influenced the joint recommendation.

[30] In this case, the Crown referred the court to:

- the infamous *Boudreau* case in Bridgewater where mom killed her 12-year-old daughter; showed no remorse; covered up the offence and the court accepted a joint recommendation of 20 years;

- the Nova Scotia Court of Appeal 1987 *Mitchell* decision that increased the eligibility date of a 22-year-old father who cruelly and sadistically had starved and killed his two-year-old son, from 15 to 20 years;

- the *Johnson* case from 2004 of the strangling of the girlfriend and child; where the 21 year eligibility date was upheld - the accused, 25 years old, had a record of violent offence;

- the *Hutchinson* case from last year, the murder of the girlfriend, no remorse and the 21 year eligibility date;

- the *Hawkins* Court of Appeal decision which reduced from 20 to 15 years, an eligibility date, where the court noted that some of the factors relevant to sentencing had not been considered; in particular, the circumstances of that offender, whose circumstances were significantly different from those described today in respect of either Mr. Fredericks or Mr. Surette; and,

- the *Hales* decision of last year, of a 36 year old with no criminal record or drug issues, who murdered his former spouse and where the court accepted a joint recommendation of 17 years.

[31] Many other decisions are available, but those are all within the range, the higher end of the range, for second degree murder. No two circumstances are identical. In my reading yesterday, I saw several other cases that were in the range of 20 to 18 years in circumstances not entirely different than the horrible events, not premeditated, that happened in this case: *Dooley* from the Ontario Court of Appeal, 18 years; *Lane* from the Ontario Court of Appeal, 20 years; *Strongman* from the Alberta Court of Appeal, 22 years; and, *Bottineau* from the Ontario Court of Appeal, in which terms for two adults of 22 and 20 years were imposed.

[32] This sentence is not outside the range. There is no justification I have in not accepting the sentence. For that reason I did not take an adjournment; I did not need it. Counsel have prepared the matter thoroughly. They made competent submissions to the court. I accept the recommended eligibility date for parole as constituting a fit sentence. In particular, because it is a joint recommendation, and I am limited with respect to joint recommendations - to rejecting them only if they are likely to bring the administration of justice into disrepute. In my view, sentences in that range, in the circumstances of this case, should not.

[33] Obviously there is always someone who would not be satisfied with anything, one way or the other. But, in this particular case, in my view, any reasonable person, having heard all of the circumstances that I have heard, would accept this as being an appropriate sentence and within the range.

[34] As I say, there are no winners. There is a room full of losers, and everyone outside this room loses too by events like this.

[35] The crown noted and asked for, and I think it is compulsory in any event, that I give the DNA order and has asked for and it is not opposed that there be a lifetime firearm prohibition order. I will sign those orders whenever they are prepared and ready, if they are.

[36] The only other thing nobody addressed in their briefs, which I think is, the law has changed recently, and I am not up to speed on it, is the victim fine surcharge business. Now, it sounds ridiculous for two people who probably have nothing and have been in jail for a while and going to be in jail for a long time after this to deal with it, but, if it is in issue, I think I am required to deal with it.

[37] Finally, with the issue of eligibility of parole and the start. Quite candidly, I noted during the noon hour break that s. 746 provides how it will be calculated, so I do not have to do the arithmetic. I think it is an automatic process, under s. 746.1(2). Sorry, it is not sub 2 - I saw it here at noon hour, if I can find it

[38] Section 746(a), in calculating the period of imprisonment for the purposes of 745, which the eligibility for parole section, there shall be included any time spent in custody between "a" and the case of the life imprisonment after July 25, 1976, the day on which the person was arrested and taken into custody with respect to the offence for which that person was sentenced to imprisonment for life and the day that sentence was imposed. I think that determines the calculation or at least according to Cooley, no longer an issue. That is Gary Cooley, the textbook on sentencing, but I leave it that the calculation will be done in accordance with s. 746 of the *Code* as required. It is not a discretionary determination that this court is – I asked the question before at the beginning of the day, I found the answer at noontime, I think.

Warner, J.