SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Rushton*, 2016 NSSC 313

Date: 20161115
Docket: CRT435268
Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

GERALD ASHLEY RUSHTON

Decision

Judge:	The Honourable Justice Michael J. Wood
Heard:	November 15, 2016, in Halifax, Nova Scotia
Counsel:	Alison Brown, for the Crown Luke Craggs, for Gerald Rushton

By the Court:

[1] On December 27, 2013, Gerald Rushton killed his common law spouse, Elizabeth MacPherson, and her daughter, Brittany MacPherson. On September 29, 2016, he pled guilty to two counts of second degree murder contrary to s. 235 of the *Criminal Code*. After satisfying myself that the requirements of s. 606 of the *Code* had been met, and in particular that the pleas were voluntarily and Mr. Rushton understood the consequences of them, I accepted those guilty pleas.

[2] A conviction for second degree murder carries a mandatory sentence of life imprisonment and Mr. Rushton will receive that sentence for each of the two murders with the sentences served concurrently.

[3] S. 745(c) of the *Criminal Code* says that when a person has been sentenced to imprisonment for life after a conviction of second degree murder they will not be eligible for parole until they have served at least ten years of the sentence. Under s. 745.4 a judge may increase the parole ineligibility period up to 25 years.

[4] Where a person has been convicted of two murders the sentencing judge must decide whether the periods for parole ineligibility shall run concurrently or consecutively (s. 745.51).

[5] There are three matters which I must deal with today.

[6] First, I must impose the mandatory sentence of life imprisonment resulting from the convictions for second degree murder.

[7] Secondly, I must determine the period during which Mr. Rushton will not be eligible to apply for parole.

[8] Lastly I must impose what have been referred to as ancillary orders.

Evidence

[9] The parties prepared an agreed statement of facts signed by both counsel and Mr. Rushton which was filed as an exhibit on September 29, 2016. That document was tendered as admissions by an accused pursuant to *Section 655* of the *Criminal Code*. It describes the circumstances of the offences and reads as follows:

The parties agree to the following facts as proven without the need of calling evidence:

1. On December 27, 2013 Gerald Rushton (hereinafter "Gerald") was living at 492 Pictou Road, Bible Hill, Colchester County in the Province of Nova Scotia with Elizabeth MacPherson, DOB October 15, 1959 (hereinafter "Elizabeth").

2. Gerald had been in a common law relationship with Elizabeth for approximately 15 years. Brittany MacPherson, DOB October 23, 1989 (hereinafter "Brittany") was Elizabeth's daughter from a different relationship. Brittany was staying in the residence on December 27, 2013 but it was not her usual place of abode.

3. Elizabeth worked as a nurse for the Victoria Order of Nurses (VON). She left the home to tend to a patient at approximately 8:00 am December 27, 2013 and returned from the patient visit at approximately 10:00 am. When she returned Gerald was still at the home and Brittany was still asleep. Elizabeth asked Gerald to remind Brittany she was to visit her grandmother at 2:00 pm that day.

4. In the late morning or early afternoon of December 27, Gerald and Brittany got into verbal dispute about recent problems the family had been encountering. The dispute carried on for several minutes. Brittany became extremely agitated and became verbally abusive toward Gerald.

5. Sometime around 12:00 noon, Gerald attacked Brittany with a baseball bat with a paperback book taped to its end. Brittany was in her bedroom at the time. He struck her several times with the bat. Brittany died as a result of the injuries caused by this attack. Medical Examiner Dr. Marnie Wood conducted a post-mortem examination on Brittany on December 29, 2013 and concluded her cause of death was blunt force injury to the head.

6. After attacking Brittany, Gerald pulled the bed covers up over her body.

7. Sometime after Brittany's attack Elizabeth returned to the home. There was a brief altercation between Elizabeth and Gerald. During this altercation, Gerald picked up a claw hammer and used it to hit Elizabeth in the head. Elizabeth fell to the ground and Gerald hit her in the head with hammer again. Medical Examiner Dr. Marnie Wood conducted a post-mortem examination on Elizabeth on December 29, 2013 and concluded her cause of death was blunt force injury to the head.

8. Sometime after killing Elizabeth, Gerald wrote a note which said: *"Will you please put my dog down and burn him with me he is innocent and has been a wonderful dog – Gerry Rushton."* The note also stated: *"I'm sorry for my weaknesses but I do love them so much, I'm tired of seeing Elizabeth hurt and giving so much and getting so little in return. Too much*

shit, too much. Margaret grant shrink she knows a little, Lord take them Please."

9. Gerald retrieved a knife. He used the knife to cut Elizabeth's throat, his throat and his wrists. The purpose of cutting his throat and wrists was to commit suicide.

10. After cutting his throat and wrists, Gerald called 911 at 1502 hours and left the line open. This call prompted Colchester RCMP to attend the home. Cst. Adams arrived at the home at approximately 1510 hours. A white husky dog barked at her as she approached the house. She noticed the dog had blood splattered around its head and face. Cst. Adams knocked on the door but no one answered. She called Cpl. Simpson and awaited his arrival.

11. Cpl. Simpson arrived on scene at approximately 1512 hours. Both members entered the residence and found Gerald laying partially on top of Elizabeth in a large pool of blood. Cst. Adams checked Gerald and determined he was still alive. EHS arrived. Elizabeth and Brittany were determined to be deceased. Gerald was arrested for murder and taken to the hospital where he was treated for his injuries.

12. Gerald had a large laceration on the left side of his neck in his throat area and deep cuts to his left wrist.

13. Gerald was charged with two counts of first degree murder and was remanded to the Central Nova Scotia Correctional Facility. On December 30, 2013 Gerald intentionally fell backward from a second floor balcony and landed on the back of his head in an attempt to commit suicide.

[10] A pre-sentence report was prepared by probation services and dated October 25, 2016. It describes Mr. Rushton's family background, education and work experience. It describes a life that prior to December 2013 was relatively unremarkable. Mr. Rushton is 50 years old and was raised by a foster family in rural Nova Scotia. He left school after grade 11 and at age 20 moved west for work. In the 1980s he had three minor criminal convictions for theft. At age 30 he returned to Nova Scotia. Most of Mr. Rushton's employment has been as a labourer.

[11] Mr. Rushton began a romantic relationship with Elizabeth MacPherson in 1998 which continued until he killed her in December 2013. The pre-sentence report describes a relationship that was good with typical peaks and valleys. There were some financial stresses and worries about Ms. MacPherson's daughter Brittany as she moved into adulthood and independence. The report indicates that Mr. Rushton described Ms. MacPherson in the following terms:

> Speaking of Elizabeth MacPherson, Mr. Rushton stated, "I would say strong; extremely loving; she was a fighter. She didn't put up with bull shit, any foolishness, she would deal with it. She always put herself last." He was of the opinion they were a "good couple".

[12] The report also indicates that a psychiatrist with the East Coast Forensic Hospital has been treating Mr. Rushton. He has been diagnosed with depression and has attempted to harm himself. He has been in custody since he was arrested on December 27, 2013.

[13] S. 722 of the *Code* requires the sentencing judge to consider any victim impact statements which may be provided. These are restricted to addressing the harm suffered by the victim as a result of the offence and its impact on them.

[14] I have read and heard read victim impact statements presented by six relatives and close friends of Elizabeth and Brittany MacPherson. I have only considered those portions which speak to the harm caused by Mr. Rushton's actions. Individually and collectively the statements describe the horrendous impact of these murders. The damage that has been done will never be repaired.

[15] Mark MacPherson is Elizabeth's brother and Brittany's uncle. He describes a grief that will hang over many life events and family milestones and in particular Christmas because the murders took place only days after that holiday. These events have caused him to question his faith.

[16] Jessica MacPherson is Elizabeth's niece and Brittany's cousin. She was 10 years old at the time of the murders. She felt betrayed frustrated and angry at losing two of the most influential and loving people in her life. She feels different than her friends because of what she's had to go through. She felt as if she had an added weight on her shoulders and nobody had the strength to lift it.

[17] Candace MacPherson is a sister-in-law to Elizabeth and aunt to Brittany. She says that on December 27, 2013, her life irreversibly changed and her trust in the world was replaced with betrayal, anger, frustration, confusion and fear. She talks about her grief which has no end. She questions her faith in humanity.

[18] Deena Trosky is Brittany's grandmother and Elizabeth's mother-in-law. She describes the horror of learning about the murders through social media and her frantic attempts to find out what had happened. The deaths have left her heart broken and makes planning family events difficult knowing Elizabeth and Brittany cannot be there to celebrate. There is a hole in her family that will never heal.

[19] Brenda Jones is Brittany's aunt and Elizabeth's sister-in-law. She describes the toll the murders have taken on herself, her mother and her daughter, who is the same age as Brittany. She cannot think of Brittany and Elizabeth without having nightmares. Their loss has caused so much stress, depression and unanswered questions for her family.

[20] Kimberly Carlow-Berkeley is Elizabeth's best friend and Brittany's godmother. Their sudden death tore her life apart. She has needed therapy for grief and depression for many months. It has negatively impacted her family and she believes her life will never be the same.

Position of the Crown

[21] The Crown says the brutal nature of the two killings would place parole eligibility in the range of 15 to 20 years in comparison with other cases. They emphasize that the murders involved domestic abuse and abuse of a position of trust, both of which are aggravating circumstances and would justify a period at the high end of the range. The Crown argues for a period of parole ineligibility between 18 and 20 years to run concurrently for both offences.

[22] The Crown suggests that there are few mitigating circumstances. Although Mr. Rushton pled guilty he did not do so at the earliest opportunity. There is little evidence of serious remorse in the pre-sentence report.

Position of the Offender

[23] The Defence says the period for parole ineligibility should be 13 years. This represents 11 years for Brittany's murder and 13 years for Elizabeth, served concurrently. The increase for Elizabeth is to reflect that it was the second killing.

[24] The Defence acknowledges the brutal nature of the killings but says the determination of parole eligibility should focus more on the nature of Mr. Rushton as an offender. They rely on the comments from the New Brunswick Court of Appeal in **R. v. Nash**, 2009 NBCA 7, at paragraph 54 where the court discusses three general ranges for the period of parole ineligibility:

> [54] The role of an appellate court is to ensure that the trial judge did not err in principle and that the sentence is not "demonstrably unfit". Part of the task is to ensure that the parity principle is respected and, indeed, the Court of Appeal is ultimately responsible for deciding what constitutes an "acceptable range". The one constant that exists when applying s. 745.4 is that all of the offenders are

> guilty of the same offence: "second degree murder". This leaves for consideration the task of isolating cases in which offenders have similar profiles and the murders involve similar circumstances. At times, it may be helpful for trial and sentencing judges to isolate those cases that bear a close resemblance with respect to key facts. For example, cases in which the murder conviction involves the death of the offender's spouse or partner are, unfortunately, too plentiful. The same holds true with respect to parents or guardians convicted of murdering their child. While the present case does not fit neatly within either category, I am going to focus initially on a few cases involving the murder of a child. Not only are these cases instructive, they provide support for a general thesis: more often than not, trial and sentencing judges work with three time frames when fixing the period of parole ineligibility: (1) 10 to 15 years; (2) 15 to 20 years; and (3) 20 to 25 years. In practice, the third time frame is reserved for the "worst of offenders" in the "worst of cases". The first is reserved for those offenders for whom the prospects of rehabilitation appear good and little would be served by extending the period of parole ineligibility other than to further the sentencing objectives of denunciation and retribution. The second time frame is reserved for those who fall somewhere in between the first and third. Obviously, these time frames are not cast in cement and represent a basic starting point for analysis.

[25] With Mr. Rushton's normal background, age, expression of remorse and lack of any significant criminal record Mr. Craggs argues he should fall into the first category described in **Nash** which sets a range of 10 to 15 years of parole ineligibility.

Legal Principles

[26] The determination of parole ineligibility is part of the sentencing process when a conviction is entered for second degree murder. S. 745.4 of the *Code* sets out the factors for the court to consider in determining whether to substitute the 10 year minimum period for parole ineligibility with a greater one. The section reads:

> **Ineligibility for parole**
>
> **745.4** Subject to section 745.5, at the time of the sentencing under section 745 of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.2, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as the judge deems fit in the circumstances.
>
> 1995, c. 22, s. 6.

[27] The general purpose of sentencing is found in s. 718 of the *Code* which states:

> **Purpose**
>
> **718** The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> > **(a)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> >
> > **(b)** to deter the offender and other persons from committing offences;
> >
> > **(c)** to separate offenders from society, where necessary;
> >
> > **(d)** to assist in rehabilitating offenders;
> >
> > **(e)** to provide reparations for harm done to victims or to the community; and
> >
> > **(f)** to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
>
> R.S., 1985, c. C-46, s. 718; R.S., 1985, c. 27 (1st Supp.), s. 155; 1995, c. 22, s. 6; 2015, c. 13, s. 23.

[28] As this indicates the fundamental purpose of sentencing is to "contribute to respect for the law and the maintenance of a just, peaceful and safe society". In doing so the court must attempt to balance the objectives set out in that section.

[29] S. 718.1 requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. S. 718.2 identifies specific sentencing principles which must be considered. Of particular relevance to this case are the following:

1. The sentence should be increased or reduced to account for any relevant, aggravating or mitigating circumstances relating to the offence or the offender.
2. The sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[30] S. 718.2(a) includes a list of circumstances which are deemed to aggravating including;

> **(ii)** evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
>
> **(iii)** evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

[31] Because Mr. Rushton committed two murders s. 745.51 of the *Code* is applicable. It gives the court discretion to decide that the periods of parole ineligibility shall be served consecutively. Such a decision requires the court to consider the character of the offender, the nature of the offence, and the circumstances surrounding its commission.

[32] Both counsel agree that the periods of parole ineligibility should run concurrently and not consecutively. In the circumstances of this case I will accept that position as it accords with my assessment of the jurisprudence.

Analysis

[33] I have carefully considered the evidence presented at the hearing, the oral submissions of counsel, the victim impact statements, Mr. Rushton's comments and the legal precedents provided to me. I will review what I consider to be the important factors and explain how I have applied them to the decision on parole ineligibility.

Circumstances of the Offences

[34] The circumstances are outlined in the Agreed Statement of Facts. It is hard to imagine a more horrific set of facts. A mother and daughter were brutally beaten to death with a hammer and baseball bat in the sanctity of their own home by someone who should have been providing support and protection. They had no reason to think their trust would be so callously abused.

[35] There is little in the evidence to explain why these killings occurred. Perhaps there was an argument about finances or angry words spoken. Whatever happened two innocent people are now dead and their families left to grieve and suffer.

[36] Mr. Rushton could have stopped at any time but he did not. He hit Brittany multiple times with the bat. After she was dead some time passed before Elizabeth arrived home and there was another altercation. After hitting her with a hammer Mr. Rushton took the time to write a note and call 911 before cutting Elizabeth's

throat. All of these events unfolded over several hours. This was not a sudden spontaneous occurrence fueled by high emotion.

[37] The circumstances of the murders include many aggravating factors which suggest a lengthened period of parole ineligibility. There were two separate killings both of which involved a significant breach of trust. The attack on Elizabeth was domestic abuse in the extreme. The brutality of the attacks is hard to comprehend.

[38] There is nothing in the nature of the offences that could be said to be a mitigating factor.

Victim Impact Statements

[39] These statements remind us of the profound loss suffered by this family and the community. The damage which has been done will be ongoing. Family events such as Christmas and birthdays cannot be celebrated as they were in the past. There is a new reality and it does not include Elizabeth or Brittany.

Circumstances of the Offender

[40] Mr. Rushton's life prior to December 2013 was typical of many people. There were ups and downs but overall he appears to have been a normal fellow trying to get by. He had a dated criminal record for minor property offences. His personal history is a slightly mitigating factor when it comes to sentencing.

[41] Mr. Rushton pled guilty which is a mitigating factor. It saved the victim's family from the uncertainty and anxiety of having to endure a lengthy criminal trial. I would qualify this by noting that the admission of guilt was not made at the earliest opportunity despite a number of court appearances. This delay diminishes the mitigation impact of the plea to some extent.

Range of Sentences

[42] Sentencing is a highly contextual process which requires consideration of many factors including the specific circumstances of the offender and the details of the offending conduct. Despite this, it is possible, and desirable, to compare offenders and crimes to ensure that people are subject to equivalent punishment for comparable behaviour.

[43] I adopt the approach of the New Brunswick Court of Appeal in **R. v. Nash**, to the process of deciding parole eligibility for second degree murder. The three ranges for the period of ineligibility provide an analytic framework which can be helpful. I disagree that deterrence or other sentencing principles should be ignored or given reduced weight in favour of the circumstances of the offender. That is not what s. 745.4 says. In **Nash** (at para. 4) and the Nova Scotia Court of Appeal decision in **R. v. Hawkins**, 2011 NSCA 7, (at para. 16) the courts confirmed that general deterrence is a factor to consider in assessing parole ineligibility. I also recognize the caution at paragraph 42 of Hawkins that it is wrong to overemphasize this factor in determining the appropriate period.

[44] The use of these ranges as a starting point for parole ineligibility was approved by this court in many cases including **R. v. Smith**, 2014 NSSC 352, and by the Nova Scotia Court of Appeal in **Hawkins**.

[45] I believe the circumstances of this case fall within the second range of 15 to 20 years. I say this primarily because of the aggravating factors of domestic abuse and breach of trust combined with the violent nature of the actual killings. This is consistent with other cases involving the murder of a spouse or child such as **R. v. Doyle**, [1991] N.S.J. 447 (NSCA) (17 years), **R. v. Boudreau**, 2009 NSSC 30 (20 years), and **R. v. Hales**, 2014 NSSC 408 (17 years).

[46] The fact that there were two murders is another aggravating factor which would tend to increase the parole ineligibility period. In **R. v. Johnson**, 2001 NSSC 119, the killing of a romantic partner and her child resulted in 21 years of parole ineligibility. In **R. v. K.W.M.**, 2003 BCCA 688, the murder of the offender's wife and mother-in-law justified a 20 year period.

Conclusion and Disposition

Parole Ineligibility

[47] Mr. Rushton's sentence must recognize the gravity of his offences and the harm which he has caused. I accept the view of Beveridge J.A. in **Hawkins** at para 42 that an increased period of parole ineligibility may be used to "express denunciation and the community's revulsion over the offence". That is certainly applicable to these murders.

[48] Domestic violence is a plague on our society and when it results in death it is a tragedy. In my view a message must be sent to the community at large that

offenders who commit such crimes will be harshly dealt with. This general deterrence is an appropriate consideration in sentencing Mr. Rushton.

[49] When I consider all of the applicable sentencing objectives, other decisions and the particular circumstances of this case I find the proper period of parole ineligibility to be 18 years on each count starting on the date that Mr. Rushton came into custody – December 27, 2013. The periods will run concurrently.

Ancillary Orders

[50] I will also grant the ancillary orders under s. 487.051 for a DNA sample and s. 109 prohibiting possession of designated weapons for life.

Wood, J.