Cite as: R. v. Munroe, 1991 NSSC 16

1991 SSB No. 402

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

- and -

KENNETH JAMES MUNROE

HEARD: At Shelburne, Nova Scotia before the Honourable Mr. D. W. Gruchy, Trial Division, on June 4th, 5th, 6th, 7th, 10th, 11th, and 26th, 1991

DECISION: On the 26th day of June, A.D., 1991

COUNSEL: J. Burrill, Esq., and R.M.J. Prince, Esq., Crown Attorneys

C. M. Garson, Esq., Defence Attorney

1. **Decision**

THE COURT: Before I give my sentence I want to make some preliminary remarks that don't form part of the sentencing at all. And they are directed to Mr. and Mrs. Munroe. I want to say a couple of things to you. I would like you to realize that I know, and the Court system knows, that we're all humans. I too am a parent and I think I have just a vague idea of the agony that you and your family have gone through over the past two years. I can offer you little comfort except to say that many of us have agonized, to a certain degree, with you. However, you still have a son and two other sons as well. Other sons have made mistakes in the past and many have paid with their lives for those mistakes. In your case, you're still here and your son is still here and I thank you for being here to assist your son when he needs it. I know that you will continue to assist him as much as you possibly can, and I thank you very much, both of you, for standing by him. I want you to know now that the humanity of another segment of our judicial system must take over from where we leave off.

Now again, before I pass sentence Mr. Munroe, it's really not a sentence, I've already sentenced you, but do you have anything that you wish to say personally?

MR. MUNROE: Uh, I just wish that the night of August first never happened and I'd do just about anything to've kept that from happening.

THE COURT: Thank you, Mr. Munroe.

I want to take some time to go through my reasoning and my thought process. It is, of course, a very sad duty that I have to perform today. I thank you, Mr. Garson, you Mr. Burrill and the Crown for your submissions and your assistance

in this matter. You have both been of great assistance to me throughout and I want to assure you that I feel that you have both fulfilled your duties very ably and have discharged your duties to the Crown and to the Court and to your client, Mr. Garson.

Kenneth James Munroe murdered Hallett Burns Corkum on the night of August 1st, or early morning of August 2nd, 1989. He did so in the course of a robbery of Mr. Corkum's home at Jordan Falls in the County of Shelburne. He did so by striking Mr. Corkum on the head, knocking him down repeatedly and striking him on the head. At the time of the offence Mr. Munroe was about twenty years of age and Mr. Corkum was eighty years of age, almost eighty-one. The accused had befriended the deceased and had, on occasion, borrowed money from him.

On the night in question the accused has said in his statements that he went to the residence of the deceased to borrow money. When Mr. Corkum refused to lend him the money, the accused said that he grabbed Mr. Corkum's wallet and when Mr. Corkum resisted and struck the accused, the accused knocked him down repeatedly and ultimately left him unconscious.

There was evidence that the accused had planned a robbery some time earlier and the Crown suggests that this murder was the result of the same plan.

After several days of voir dires, the accused and the Crown indicated that the accused was prepared to plead guilty to second-degree murder and the Crown was prepared to accept that plea. The accused entered the plea on Tuesday, June 11th, 1991.

Upon the plea of **guilty** being entered, as **Section 235 of the**

Criminal Code gave me no alternative or discretion as to penalty to be imposed, I imposed a life sentence of imprisonment. The sentence was pursuant to **Section 742(b)** of the **Code** and I adjourned the consideration of eligibility for parole under **Section 744** until the present.

The only issue before me is the minimum period of imprisonment to be served before the accused is eligible for parole. **Section 742(b)** provides that the minimum period of service of imprisonment without eligibility shall be ten years, which may be extended to a maximum of twenty-five years by the sentencing judge. In considering such extension, I must have regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission.

Mr. Justice Hart of our Appeal Court in **R. v. Mitchell** followed **R. v. Wenarchuk**, which was a Western case, and a two-stage procedure was set forth to be followed in making an order pursuant to **Section 744.** I must firstly decide whether to exercise the discretion given to me by that section. If I decide affirmatively, then I must quantify the period of ineligibility. At both stages, I must consider the three factors set out in **744:**

1. The character of the accused;
2. The nature of the offence and surrounding circumstances, and
3. The jury's recommendations.

The latter factor, of course, is not applicable here, as the accused was not put in the hands of a jury.

Those factors have been previously fully examined and set forth by the Appeal Division of this Court in **R. v. Grady.**

In this case I adopt particularly the reasoning of Bayda, J.

and the ultimate question posed by him in **Wenarchuk** in the following terms:

> **'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 concomitant of individual and general deterrence, require that the accused serve a mandatory period of imprisonment not greater than ten years or must that period be greater than ten years? If greater, then how much greater?'**

A trial judge is effectively required to act as a spokesperson of society in the response to this question. It is not unusual to extend the ten-year minimum term of **Section 744.** I have here a list of cases which I have followed in this regard, as follows:

R. v. Moore (1979), 30 N.S.R. (2d) 476 (N.S.C.A.)

R. v. Moore and Parsons (1980) 36b N.S.R. (2d) 228 (N.S.C.A.)

R. v. McGrath (1980), 25 Nfld. & P.E.I. R.138 (Nfld.) S.C.-T.D.)

R. v. Gourgan (1981), 58 C.C.C. (2d) 193 (B.C.C.A.)

R. v. Viel (1982), 63 C.C.C. (2d) 271 (Que. C.A.)

R. v. Drummond, Knight and Lauzon (1982), 67 C.C.C. (2d) 498 (Ont. C.A.)

R. v. Kivell (1985), 21 C.C.C. (3d) 299 (B.C.C.A.)

R. v. King (unreported), S.C.C. No. 01055, February 15, 1985 (N.S.C.A.)

R. v. Smith (D.W.) (1986), 72 N.S.R. (2d) 359 (N.S.C.A.)

R. v. Mailloux (1986), 12 O.A.C. 339 (Ont. C.A.)

In **R. v. Gourgan** there is an elaboration of the factors to be considered. Those factors are as follows:

(a) a period of ineligibility should not be ordered except in unusual circumstances;

(b) the judge should not apply a period of ineligibility so as to implicitly reject a finding of the jury that the crime did not fall within the category of first-degree murder;

5. **Decision, con't.**

I add, and althought there was no jury in this case, I will speak to that point below.

(c) any recommendations of the jury; (which of course does not apply)

(d) the character of the accused, including previous record, lifestyle, age and relevant medical and psychiatric evidence;

(e) nature of the offence and circumstances surrounding its commission including the participants and their respective roles and the attacks on and injuries done to others present at the time of the crime;

(f) mitigating circumstances;

(g) regard to public opinion;

(h) deterrence to others;

(i) denunciation of the crime itself, having regard to its nature and the circumstances being of such a kind that justified a lengthier banishment from society than the more ordinary types of second-degree murder requiring a sentence of life imprisonment without eligibility for parole for ten years.

In considering these factors, there is a primary consideration; that is, the protection of the public, and whether that can be achieved by either deterrence or reformation and rehabilitation of the offender or by the deterrence and rehabilitation. Deterrence may be of an individual or general nature.

I will examine the case before me in relation to the factors application in **Section 744** as those are set forth in **R. v. Gourgan.** In this examination, I have had the following material before me:

submissions, both written and oral, of counsel;

the evidence led before me today;

the material and evidence led before me during the voir dires;

my own observation of the accused and his family during the days of the voir dires.

6. Decision, con't.

I will refer to the factors as they are set forth in **R. v. Gourgan:**

(a) The first factor appears not to have been followed in subsequent decisions; i.e., a period of ineligibility should not be ordered except in unusual circumstances. Perhaps the notion that there could be usual circumstances of murder is so abhorrent to our societal beliefs that we are prevented from conceding that there are anything but unusual circumstances in a murder. In this regard, however, it appears to me that the following facts of the present case are relevant:

(i) the murder occurred in the course of a robbery;

(ii) it occurred in the home of the deceased;

(iii) it occurred as a result of blows to the head, either directly inflicted by the accused or as a result of knocking the deceased to the ground, or possibly even a falling, which blows were probably intended initially to render Mr. Corkum unconscious.

(iv) there was no evidence of sadism, but rather a savage beating of an old, defenceless man in his own home. I consider that the fact the accused knew the deceased was a factor which makes the offence more serious, rather than less serious, where the accused may have killed a stranger.

I do not know the statistics, but it seems to me that in all likelihood the most 'usual' murders are committed firstly, during domestic violence and secondly, during the course of robberies. There are, of course, degrees of savagery and I must keep those degrees in mind in performing my duties today.

Factors (b) and (c) in this decision in **Gourgan** do not apply, as they only apply in jury trials. I will, however, speak below to the concept of rejection by a trial judge of a jury's finding, that the crime did not fall within the category of first-degree murder.

(d) The personal background of the accused has been developed for me by counsel and by the evidence of his mother today. The accused is now twenty-two years of age. He appears to have had a good family, but was involved in some petty crime and some trouble in his high school days. He was and is unmarried. At the time of the offence he was living with a girlfriend in what appears to have been essentially a common law relationship. The accused appears to me to be relatively intelligent, but not particularly articulate. He had been singularly unsuccessful in finding any sort of steady or reliable employment and his earning capacity was minimal. His income was 'spotty'. He had been trying to support himself and his girlfriend. At the time of the offence, he had been suffering severe financial problems and was unable to pay his rent or buy food. He did not want to go back to his parents again for money, as he might have, as he was apparently embarrassed by the amount of money which they had previously given him. The accused was not known to have abused alcohol or drugs recently to any great degree, although there is a suggestion that he may have done so during his school days. While he has little training the accused is mechanically inclined. He has a criminal record, as was submitted to me by Mr. Burrill, and I will not now read it. It appears that his criminal activity may possibly have been on the increase.

(e) The murder with which we are concerned here was senseless. If I accept the accused's version of the killing, which I do not fully accept, then the accused simply went to the residence of Mr. Corkum with the intention of borrowing forty dollars from him and then killing Mr. Corkum in the process of grabbing his wallet. Mr. Corkum was probably a somewhat harmless eccentric who either had

or pretended to have considerable cash upon his person and/or around his house. There is a suggestion, therefore, that the accused broke into the residence of the deceased with the intention of stealing cash which was purportedly hidden in the house. There is no evidence that there were any other persons present at the time of the murder and no other persons were physically injured.

(f) There are few mitigating circumstances in this crime, but very few. I have no doubt that the accused is remorseful and I am convinced that, as soon as the crime was committed, the accused realized what he had done, but it was only then that he realized the enormity of his actions. He is very young and has already served some 'dead time' as a result of this offence. I'm also convinced that the accused has gone through his own personal hell since the killing and will continue to do so. The accused says, and I accept, that he entered upon this crime because of his desperate financial situation. It is hard to believe, however, that in this day and age material aid would not have been available to him. The accused is now only twenty-two years of age and he has a long life ahead of him. Undoubtedly, the act committed was one of extreme immaturity.

(g) Public support of the courts and the legal system is important. I refer to **R. v. Oliver**, 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 the 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 Dennis has said, where the punishment inflicted for grave crimes should reflect the revulsion felt by the major-**

> **ity of citizens for them. In his view, the objects of punishment are not simply deterrent and reformative. The ultimate justification of punishment is the emphatic denunciation by the community of a crime'.**

The Courts have no ready means to gauge public opinion, except to attempt to apply the feelings of a reasonable person. In this case I did, however, have the advantage of hearing many applications for exemption from jury duty by citizens of this community. The majority of such applications were on the basis of strong feelings about the actions of the accused and the killing of a popular old man. A reasonable person is conscious of the feelings and opinions of his fellow citizens. It is my opinion that such a reasonable person would be shocked at this crime. Public opinion, it seems to me, must take into consideration the circumstances of both the accused and the deceased, and the state of the law as set forth in the **Criminal Code.**

(h) Public opinion and general deterrence go hand in hand in this case. Violent crimes and murders occupy much of the attention of the public today, and there can be no doubt that such attention is warranted.

I want to return, for a moment, to the matter of impliedly overruling a jury's decision to convict of second degree instead of first degree murder. Obviously, that does not apply here. But as well, I must not overrule impliedly the decision of the Crown to accept the guilty plea to second degree murder, and I do not do so.

Briefly, the Crown has submitted in this case that this was a brutal, senseless crime wherein a vulnerable, defenceless old man was murdered in his own home. It is submitted that the accused

had the full intention of robbing Mr. Corkum and, if necessary, to beat him, being reckless as to the results. It is submitted that the accused's record is such as to show that he had commenced a lifestyle of ever escalating crime, showing little respect or regard for law and order.

The defence, on the other hand, has in part submitted that the accused had no intention to kill Mr. Corkum, but rather knocked him unconscious and left him, and that later Mr. Corkum got up, staggered about and fell, thereby accounting for some of his injuries. It has been submitted by the defence that the offence did not occur, as was planned, with one **Russell Schumacher.** It has been submitted that the accused's record is not such as requires further severity in my decision today, and really is of little relevance herein. The defence has given me, as well, a review of certain of the relevant cases. He has asked to decline my jurisdiction and make no order extending the period of eligibility.

I am not at all certain that severity of punishment can be proven to be a general deterrent. But lack of severity may be perceived as a form of condonation, and that is unacceptable. Any form of violence must be met with a firm but just reaction. That is certainly true in the case of murder. This murder is no exception. I adopt the words of McGarlane, J. in **R. v. Jordan**, when he said,

> **'If the point is to be made that society will not tolerate such conduct, there must be a marked departure from the norm of ten years' eligibility for parole'.**

But what is the norm? More precisely, is there an acceptable norm for murder? Is it possible that a failure to set the period of eligibility for parole in excess of the ten years could be perceived by the public as some sort of acceptance of the crime? I have already set forth the nature and circumstances of this crime. It is necessary for the Court to denounce the crime itself in very clear terms. We cannot be taken in any way to condone or tolerate this kind of activity. Society **must** be told and reassured that murder will be dealt with justly, but firmly.

I hope that individual deterrence is not a major concern in this case. I have been impressed by the remorse shown by the accused and I rather feel that the likelihood of him ever committing another offence such as this is extremely remote. It may not, however, be totally disregarded. There are certain contra-indications as well in the record of the accused. Specific or individual deterrence is best achieved through reformation. I feel that there is a strong possibility of reformation in this case. I sincerely hope that the accused, in the years ahead of him, will take advantage of the oppor-

tunities that may be afforded him and build upon his mechanical skill. I hope that his remorse, together with his taking advantage of such opportunities as may be afforded him, will enable him to assume a normal, productive life upon his release. But I must balance the individual deterrence with the necessity of sending a clear signal to the public at large.

In fixing a period of ineligibility for parole, it is necessary to consider the sentences imposed in like cases. A broad spectrum of cases should be examined and an attempt made to relate this sentence to those cases which are most similar to the instant case. The dissimilar cases must also be regarded so as to ensure that there is some sort of logical progression of the severity of sentences related to the crimes committed.

I have read a number of cases in an attempt to obtain the necessary range of sentencing. I refer specifically to the cases cited to me by counsel.

R. v. Carrigan - this case dealt with the murder of a young woman during sexual foreplay at the end of a date. The accused had a long record of previous criminal convictions and apparently had an unacceptable lifestyle. As Mr. Justice Pace said concerning the sentence, **'The trial judge considered the nature of the offence and the circumstances surrounding its commission and concluded, on the evidence, that it was a 'damnable crime' committed without apparent motive in an excessive and uncontrolled, undisciplined and misbehaved fashion, and with no remorse on the part of the appellant for his actions'.** A period of fifteen years of ineligibility for parole was set by the Trial Judge, and that period was confirmed by the Appeal Division.

R. v. Martin and Gabriel - In this case two accused persons beat a man to death in the course of a robbery. Periods of ineligibility for parole were set at twelve and fourteen years respectively for the accused.

R. v. Smith - In this case the accused was convicted of second degree murder and sentenced to life imprisonment without eligibility for parole for twenty years. The case was described by the Appeal Court in the following terms:

> **'The murder was described as a brutal and savage killing of the victim with multiple blows from a meat cleaver and a knife. It was perpetrated by a man with a substantial criminal record who had shown no desire to reform his lifestyle. The murder was committed while he was in fact on release from prison on parole'.**

R. v. Picco - In that case the Appeal Division increased the period of ineligibility for parole from thirteen years to eighteen years. In this case the accused killed his victim in a particularly heinous faashion, described by the Appeal Court as follows:

> **'The respondent had come to Nova Scotia from Newfoundland to seek work. He was in his early twenties and was unemployed and on the evening of August 5, 1986 he learned that his girlfriend had decided to leave him and go steady with another man, Kelly Joseph Dixon. The respondent was very upset by this news. He had been drinking and using hashish that day and, when he returned to the hostel where he was living, he borrowed a buck knife from a friend. The next day, while in company with a former girlfriend and her new boyfriend, he saw the victim, Kelly Dixon, beside his two-door Camaro car. The three of them crossed the street and forced Dixon into the back seat of his car. The car was driven around Halifax streets for about an hour and a half, during which time the victim was beaten and stabbed with multiple knife wounds. He was then left behind a building to die in a pool of blood'.**

R. v. Mitchell - This case is particularly helpful and instructive, especially paragraphs thirty-seven to fifty, as Mr.

Justice Hart there reviewed the law and the considerations to be given in fixing a period of ineligibility for parole. I need not set forth those considerations in detail herein, but I have kept them very much in mind. The facts in the murder committed by Mitchell were particularly heinous. The accused was cruel and sadistic to a two-year old child for a period in excess of two and one-half months. The abuse and sexual abuse inflicted upon the child over a prolonged period eventually caused the child's death. The trial judge fixed the period of ineligibility for parole at fifteen years, but the Appeal Division increased the same to twenty-one years, as anything less would not express society's abhorrence to such a senseless crime. It is, in some respect, somewhat similar to the case of **R. v. Gotchall**, cited by the defence.

R. v. Feltmate - In this case Mr. Justice Kelly fixed the period of ineligibility for parole at fourteen years. The accused, apparently considered to be a simple person, murdered an elderly lady by striking her repeatedly on the head with a hammer. It is somewhat similar to the case at hand in that the accused had gone to the residence of the victim for the purpose of obtaining a loan. Mr. Justice Kelly's decision in the sentencing was helpful and instructive. I do point out, however, that the accused in that case was considerably older than the accused here.

I refer also to a case by the name of **R. v. Rogers,** an unreported case of April, 1990 wherein Mr. Justice Davison fixed the period of twelve and a half years for an accused who had murdered a young man by the name of Tha Din, who was proceeding through the graveyard at Camp Hill. I also refer as well to the case last week, and I'm sorry I don't have their names, but wherein

Chief Justice Glube imposed terms of twelve and fourteen years of ineligibility for the murder of a young prostitute. I've also considered, of course, the case of **R. v. Gotchall**, as I mentioned; a case in which I was involved, **R. v. Baillie** has been mentioned. I have considered it. I have considered Mr. Justice Rogers' decision in **R. v. Cooper;** Mr. Justice Nunn's decision in **R. v. Simmons** and I have listened to argument and the development of the argument about the cases of **Lewis** and **Chetwynd.**

Having regard to the character of Kenneth James Munroe, the nature of the offence which he committed and the circumstances surrounding its commission, I order that the accused shall serve **twelve and a half years** of imprisonment without eligibility for parole. I express the desire or hope that he will be incarcerated in a location where he may be seen by his family occasionally, and that he will have an opportunity to build on his abilities. In addition, and pursuant to **Section 100(1)** of the **Criminal Code,** I do order that in addition to the above punishment, the accused be prohibited from having in his possession any firearm or ammunition or explosive substance for a period of **ten years** after his release from imprisonment.

Mr. Munroe, I wish you good luck, sir. I hope you can make it.

J.

CASES CITED:

R. v. Mitchell (1988), 81 N.S.R. (2d) 57

R. v. Wenarchuk (1982) 67 C.C.C. (2d) 169

R. v. Grady (1971) 5 N.S.R. (2d) 264

R. v. Oliver (1977) 5 W.W.R. 344

R. v. Jordan (1984) 7 C.C.C. (3d) 143 (B.C.C.A.)

R. v. Carrigan (1982), 53 N.S.R. (2d) 142 (N.S.S.C.A.D.)

R. v. Martin and Gabriel (1981), 49 N.S.R. (2d) 361

R. v. Smith (1986) 72 N.S.R. (2d)

R. v. Picco (1987) 79 N.S.R. (2d) 139 (N.S.S.C.A.D.)

R. v. Feltmate (1988) 85 N.S.R. (2d) 437

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