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Parole Ineligibility and the Double Edges of Consistency in Sentencing

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Case Commented On: *R v Ryan*, 2015 ABCA 286

In *R v Ryan* the Alberta Court of Appeal clarifies how trial courts should apply some of the sentencing factors set out in sections 718-719 of the *Criminal Code* RSC 1985, c C-46 to the calculation of a period of parole ineligibility under section 745.4 for a person convicted of second degree murder. In that sense alone it has obvious pragmatic relevance for criminal practitioners and suggests answers to some interesting theoretical questions about the relationship between parole ineligibility and the denunciative function of a life sentence. Of potentially broader long-term significance, however, is the difference between the majority justices in this case. Madam Justice Ellen Picard reaffirms the *status quo* of broad judicial discretion in criminal sentencing. Though concurring in the result of allowing the Crown's appeal in this case, Justice Wakeling writes separately to assert that the interests of rationality, predictability and consistency require appellate courts to construct an analytical framework that will encourage sentencing courts to adopt a common methodology for sentencing. The justices' reasons trace lines of battle familiar to those who have watched the experiment with mandatory sentencing guidelines and its fallout in the United States. In the event that *Ryan* presages a sea change, practitioners should be aware of the analysis in both positions. But Canadian courts should be leery of starting down this fraught path.

Facts

In January 2006, drug dealer Gerald Robert Ryan, in the midst of a period of crack addiction, shot his employee Barry Head to death in retaliation for the latter's attempted theft of Ryan's truck and a large amount of cocaine. Ryan brought Head along with him while he pretended to pick up cash from another dealer's trailer but instead picked up his own gun and brought it back to the truck. According to Ryan's version of events, Head "reacted sneeringly and made a sarcastic comment" when Ryan got back to the truck, which prompted him to shoot the other man in the head (at para 4). Ryan was charged with first-degree murder but the trial judge was not satisfied beyond a reasonable doubt that the decision to kill Head had been planned and deliberate. The trial judge did, however, find that Ryan had "deliberately shot" Head and was therefore guilty of second-degree murder by intentional killing under section 229(a) of the *Criminal Code* (at para 8).

At sentencing the judge took into account the fact that, after a period of juvenile criminality, Ryan appeared to live a pro-social life for some time, up until he "fell into the grip of a crack cocaine addiction" in 2005 (at para 10). Consequently, the trial judge determined that Ryan was "not a dangerous person earlier in his life, but that under cocaine addiction he acted out" (at para 11). Ryan received a life sentence with a thirteen-year period of parole ineligibility. The Crown appealed the sentencing judge's decision on parole ineligibility, which was reviewable, like other more traditional sentencing decisions, for errors in principle, failure to consider a relevant factor,

over-emphasis of factors, or demonstrable unfitness. See, e.g., *R v Shropshire*, [1995] 4 SCR 227 at paras 43-53.

Issues on Appeal

1. Whether the sentencing judge erred in awarding credit for the time Ryan spent in pre-sentence custody?
2. Whether the sentencing judge erred in giving an unspecified amount of credit against parole ineligibility no the basis that Ryan, at the outset of the trial, had unsuccessfully offered to plead guilty to the included manslaughter pursuant to s 606(4) of the *Criminal Code?*
3. Whether the sentencing judge erred in using the lack of the aggravating factor of a pattern of prior dangerousness as if it were a mitigating factor?
4. Whether the sentencing judge erred by setting aside two key sentencing objectives under section 718 of the *Criminal Code*: specifically whether the sentencing judge improperly reasoned that deterrence and denunciation were largely subsumed in the automatic life sentence and therefore had little weight in determining parole ineligibility?
5. Whether the appropriate period of parole ineligibility, having regard to all relevant considerations, is 22 years as opposed to 13 years?

Decision

The Court allowed the Crown's appeal and held that the appropriate length of parole ineligibility for Ryan should have been 17 years.

Analysis

The Court's Reasons for Judgment

Of the four errors asserted by the Crown the Court found two to be errors in principle by the sentencing judge, with fairly straightforward reasoning on each.

On the issue of pre-sentence custody the Court states that it is now settled that pre-sentence custody is not deductible under section 719(3.1) of the *Criminal Code* from the period of parole ineligibility, because "Parliament has provided that the entire time spent in custody since arrest is counted by the corrections authorities as part of the ineligibility period imposed after trial" (at para 23). The Court further found that the sentencing judge's comments "reveal he was of the opinion that he was entitled to reduce Ryan's parole ineligibility by the amount of time Ryan spent in pre-trial custody" and that this error had a profound impact on the disposition (at para 26-27).

As to Ryan's offer to plead guilty to manslaughter, the Court holds it ought not to be relevant for mitigation purposes because (1) the offer, since it was unaccepted, has no evidential value; (2) giving credit for it would encourage accused persons to make gratuitous plea offers for lesser offences in the hopes of reducing their periods of parole ineligibility; and (3) the offer to plead guilty to a lesser offence like manslaughter does nothing in the way of encouraging the accused to accept responsibility for his or her actual crime—here second-degree murder—which is the normative principle embodied in section 718(f) of the *Criminal Code* (at paras 34-35). The Court therefore holds it to be an error in principle if the trial court gave any credit to Ryan's offer.

With regard to the pattern of prior dangerousness, the Court found that the sentencing judge accepted that Ryan had become dangerous while under the influence of cocaine but was not persuaded to infer that after years in prison Ryan would still be dangerous. The Court also read the sentencing judge's reasons as "essentially setting out Ryan's life narrative, and the damage done to it by drugs" and was not persuaded to lengthen the injunction against future parole based on a forecast that Ryan would not change his ways (at para 40). The Court thus found no error on that issue.

Finally, the Court found that the sentencing judge's reasons, including references to such factors as "planning or premeditation," indicated that he had properly taken denunciation into account in calculating the period of parole ineligibility. However, the Court expressed confusion over the sentencing judge's apparent position that "for the purposes of *individual* deterrence, the life sentence by itself carries great deterrent effect and consequently enhanced parole ineligibility would not much increase deterrence on an individual basis" (at para 43). Yet it did not find that this aspect of the sentencing judge's reasons had any real effect on his conclusion and thus did not find error on that basis.

Calculation of the Proper Range of Disposition: Should Courts Be Constrained?

The majority of the Court agree that the sentencing judge's errors resulted in too short a period of parole ineligibility for Ryan, but the difference within the majority justices (Justices Picard and Wakeling) in their analytical frameworks reveals two incompatible views of the judge's function in sentencing. Section 745.4 allows the sentencing judge to increase the period of parole ineligibility from ten years to any period up to 25 years, with 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 by the jury. After considering such factors as, on the one hand, Ryan's youth and the sentencing judge's finding that he was not a hardened criminal and, on the other, the signs of foresight on Ryan's part and his subsequent efforts to conceal the body, the Court concluded that had the sentencing judge not made his other errors he would have found that 17 years would have been the appropriate period of parole ineligibility.

In his concurring reasons for the majority, Justice Wakeling takes issue altogether with the discretionary approach to sentencing determinations exemplified by the Court's disposition of this appeal. The status quo, he argues, runs counter to the equality principle embodied in section 718.2 of the *Criminal Code*, which mandates that "a sentence should be similar to sentences imposed on similar offenders for offences in similar circumstances." Justice Wakeling argues that a purely discretionary regime results in unequal outcomes. His reasons outline a comprehensive system for realizing "rationality, predictability, and consistency" in sentencing (at para 66). They draw heavily on the Australian practice of allowing the highest court of each state to issue "guideline sentencing judgments" which consider appropriate sentences for offenders convicted of a specific offence grouped together by distinguishing features of the offence and other relevant traits (at para 67).

Justice Wakeling proposes three ranges of parole ineligibility to apply in all cases of second-degree murder, based upon the typical sentences he gleans from a lengthy review of the case law. One would span 10-15 years and apply to the least egregious offenders, typically those whose crimes were to some degree spontaneous. The second would span 16-20 years and apply in cases where: (1) the offender was or had been the domestic partner or was a parent or grandparent of the victim and the homicide was directly attributable to this relationship; (2) the offender betrayed the kindness extended by the victim; (3) the victim was a vulnerable member of the

community. The third range, of 21-25 years would apply in cases of premeditation or extreme violence.

Madam Justice Picard addresses this proposal, noting that it was unsurprising that Parliament had not created such guidelines itself but rather left the courts with a broad scope of discretion. What Justice Wakeling decries as inequality Justice Picard sees as the flexibility to account for variations in fact that would escape the distinctions made by such broad categories. As Justice Picard puts it, "the potential for variation of facts, both aggravating and mitigating, within each area is as large as human behaviour can imagine" (at para 47). In turning to the language of section 745.4 Justice Picard observes that "[t]he reality is that there are many different factors comprised within the scope of what Parliament means by 'character' of the offender and 'nature' of the offence and 'circumstances'. None of these terms is expressed in literal, mathematical or formulaic terms" (at para 49). Second, Justice Picard asserts that it is more properly the task of Parliament to authorize such laws if it sees fit; as an example of judicial shortcoming when it comes to the task of legislating she points out that Justice Wakeling's somewhat specific categories are both over and under-inclusive. Finally, Justice Picard criticizes Justice Wakeling's discussion of *R v Shropshire*, which provided some of the basis for his category of "least egregious" offenders ranging up to 15 years as opposed to the ten-year period specifically mentioned in section 745.4 serving as its own distinct category. In *Shropshire* the Supreme Court of Canada referred to the ten-year threshold specified in the *Code* as the median. Justice Picard read the reference to a 'median' as simply recognizing the practical reality that the 'ordinary' or 'typical' period of parole ineligibility for second-degree murder may well be 10 years (at para 54). The distinction between the two opinions which form the majority judgment in *Ryan* is significant, because Justice Wakeling's interpretation would result in more punitive periods of ineligibility by as much as five years for the lowest category of offenders.

Additional Grounds for Caution

The experience of the United States with mandatory sentencing guidelines provides further grounds for caution in following the proposal by Justice Wakeling. The U.S. Federal Sentencing Guidelines, unlike Justice Wakeling's proposal, were the creatures of legislative, rather than judicial, initiative. Formally adopted in 1987, they were nonetheless motivated by similar concerns over consistency and predictability, which had already generated a number of parallel guidelines in the state courts (See Kate Stith & Steve Koh, "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines," 28 Wake Forest L. Rev. 223 (1993)).

Most of the literature on the Guidelines, prior to their being rendered non-binding in 2005, has made the case that they run afoul of both of the primary theoretical justifications for punishment. As Madam Justice Picard predicts in *Ryan*, mandatory sentencing ranges tend to obviate proportionality goals by rendering case-specific information about the offense and offender irrelevant (Erik Luna, Testimony Before the United State Sentencing Commission (May 27, 2010), available here). For this reason they arguably offend the basic just deserts inquiry underlying retributive punishment. But they also appear to fail at capturing utilitarian goals. Certainty of punishment does not create appropriate deterrence unless the accused not only knows the rule, but also believes that the costs outweigh the benefits of violating it and correctly applies this information to his conduct. Empirical literature suggests, however, that offenders do not make these calculations correctly, thus thwarting the deterrent purposes of mandatory

sentencing (See e.g., Paul H. Robinson & John M. Darley, The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing its Best, 91 Georgetown L.J. 949, 953 (2003)).

U.S. observers have also noted how the existence of mandatory guidelines have increased the overall punitive nature of the criminal justice system, due to the power of prosecutors in plea negotiations. Because these conversations take place outside of the courtroom, the parties can essentially bargain about which facts will be formally taken notice of during sentencing. Prosecutors can thus negotiate around mandatory minimums by threatening to bring higher charges with even higher mandatory ranges (See William Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harvard L. Rev. 2548, 2569 (2004)). It is interesting to note that as applied to the facts of *Ryan*, the sentencing framework proposed by Justice Wakeling would result in a longer period of parole ineligibility by treating ten years as the floor for the lowest category of offender, as opposed to the typical sentence the Court appears to consider it attracts.

Finally, the theory by which the United States Supreme Court eventually held the mandatory Guidelines to be unconstitutional is relevant here as well. In *United States v Booker,* 543 U.S. 2005, the Court declared that the Guidelines, to the extent that they allowed courts to enhance sentences using facts not reviewed by juries, violated the accused's right to a jury trial. Justice Wakeling's model—while judge-created rather than legislated—nonetheless appears to create a similar problem vis-à-vis section 11 of the *Charter.* The Supreme Court of Canada has recently expressed skepticism over mandatory minimums, although under a section 12 cruel-and-unusual analysis rather than under section11. In *R v Nur*, 2015 SCC 15, the court held that mandatory minimums for gun crimes violate section 12 because "they emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime" (at para 44). Because, as noted in the American context, these proportionality problems are as likely to arise under all mandatory ranges--judicially-created as well as statutory--*Nur* suggest that Justice Wakeling's proposal is unlikely to become the law of the land any time soon.