

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** R v. Hawkins, 2009 NSSC 410

**Date:** (20091210)

**Docket:** SYD CRS 282648

**Registry:** Sydney

**Between:**

Her Majesty the Queen

v.

Herbert John Hawkins

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Frank Edwards

**Heard:** October 13 - November 3 and December 10, 2009, in Sydney,  
Nova Scotia

**Written  
Decision:** January 27, 2010 (delivered Orally December 10, 2009)

**Subject:** Sentence following conviction for second degree murder –  
determination of parole eligibility period.

**Facts:** Jury found offender guilty of second degree murder. Victim  
was 48 year old handicapped adult in his own home. Murder  
particularly violent, brutal and unprovoked. Motive was  
robbery. Offender not on drugs or alcohol at time but motive  
was to get money to buy cocaine. Offender on probation at the  
time of offence.

**Result:** Not eligible for parole until 20 years of life sentence served.

**Cases Noted:**     ***R. v. Mitchell***, [1987] N.S.J. No. 430  
                          ***R. v. Perlin*** (1977), 23 N.S.R. (2d)  
                          ***R. v. Muise*** (1993) 124 N.S.R. (2d) 105 (NSSC)

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**Counsel:**

Andre Arseneau & Shane Russell, for the Crown  
Darlene MacRury & Tony Mozvik, for the Defence

**By the Court:**

[1] This is my decision on sentence. A jury had found Mr. Hawkins guilty of second degree murder on November 3, 2009, and I adjourned the matter for sentence to December 10, 2009. The sentence of life imprisonment is automatic. The only outstanding issue is how long Mr. Hawkins must serve before he is eligible to apply for parole.

[2] The law of sentencing applies here because of course determining the eligibility period for parole is indicative of the minimum time that Mr. Hawkins will have to spend in custody. And the principles of sentence are set out in the Criminal Code. I will read it briefly:

The fundamental purpose of sentencing is 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;
- (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 and to the community.

[3] And on that score [item (f)] the victim impact statements are some indication of the loss which the family and the community have suffered in this case.

[4] Section 745.4 of the Criminal Code says that the judge in my position has to have regard to 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 doing that, the judge can substitute for 10 years a number of years of imprisonment more than 10 but not more than 25 without eligibility for parole.

[5] You will recall that nine of the jurors in this case did not make a recommendation but said that they would leave it up to me. I want to emphasize that I do not take that to mean that the jury is content with the ten year eligibility period. I take it as an acknowledgement by them that the trial judge with his

training and experience, and with the benefit of having read the pre-sentence report and hearing the submissions of counsel, would be in a better position to impose an appropriate figure for the ineligibility period. One of the jurors, you will recall, recommended the full 25 and the others recommended 12 years and 15 years respectively.

[6] I have considered the factors outlined in the pre-sentence report and take into account that Mr. Hawkins is relatively young. He is 33 now but he was 29 at the time of the commission of this offence. He had a difficult upbringing. He is capable of being a contributing member of society. Apparently he was quite accomplished in his chosen work of roofing. But I also consider that he was on probation at the time of this offence and that is a very serious matter. His record is set out in the pre-sentence report and, as Counsel have indicated, he has only one prior conviction for an act of violence, that being for a single count of assault causing bodily harm. Other than that, they were property related offences. So I do take that into consideration when I am determining what in my judgment will be an appropriate eligibility period.

[7] Mr. Hawkins' denial and refusal to take responsibility for this crime is also noted in the pre-sentence report. That does not in itself demonstrate a lack of remorse. Actions speak louder than words and, as I will relate later, Mr. Hawkins' actions show that he was completely unremorseful. The note he read in court today gives some cause for hope. Without admitting his involvement, he says his time in jail has given him insight into his drug problem. I hope that is true. His tears, however, more likely come from the realization that he has many more years in jail ahead of him.

[8] The fact that there is a discretion granted to the court in second degree murder cases is an indication that the legislature recognized that in some cases the act of committing second degree murder will be as serious or approach the seriousness of a first degree murder situation. Indeed, in this case, it would be hard to imagine how a first degree situation, which in most cases would mean that there was planning and deliberation, would be worse than what occurred in Sheldon Boutilier's home on that day in July 2006. That thought was encapsulated in a quote in the Crown brief by Justice Hart in our appeal court in *R. v. Mitchell*, [1987] N.S.J. No. 430, when he wrote:

“Parliament must have considered that there were ways of committing second degree murder that would be equally serious

to first degree murder and that the court should be free to ensure that the perpetrator remained in prison for an appropriate number of years.

...

The emphasis clearly is not the protection of society through an assessment of the accused's future rehabilitative needs, or the likely progress of his rehabilitation ... but on the protection of society through its expression of repudiation for the particular crime by the particular accused, along with that repudiation's concomitants of individual and general deterrence.”

[9] In *R v. Perlin* (1977), 23 N.S.R. (2d), Justice Angus MacDonald of our Court of Appeal said:

“In my opinion the over riding consideration in sentencing with respect to crimes of violence must be deterrence and it is for such reason that save for exceptional cases substantial terms of imprisonment must be imposed.”

[10] It is not possible to say with certainty what evidence the jury accepted and what if any evidence it rejected. In that situation the trial judge is entitled to make his own findings of fact so long as they are consistent with the jury's verdict. Consequently, I will now outline the facts as I see them.

[11] **Facts:** To appreciate the magnitude of the crime Mr. Hawkins committed, it is necessary to review the facts in detail with particular emphasis on the details of the actual murder.

[12] Mr. Hawkins was there twice on July 8<sup>th</sup>. We heard evidence that he left at approximately 3 p.m. and of course Dena Quinn gave evidence about having to let him out of the driveway at that time. There is other evidence too and it is not in dispute that that he was there and left around 3 p.m. And then he came back at around 5:30 p.m. and left again sometime before 8 p.m. The Quinns who live next door were away. I suggest that the absence of vehicles or any activity around the Quinn residence would have made it apparent that there was probably no one there. But, in any event, they were away between 5:30 p.m. and 8:00 p.m. Mr. Hawkins had plenty of time and lots of opportunity to carry out the murder between 5:30 and 8:00 and I am satisfied that Sheldon Boutilier was dead before 8 p.m.

Saturday, July 8, 2006.

[13] Kenneth Burton was called by the Accused. He is probably mistaken about having seen Mr. Hawkins on that night. His statement given to police at the time said that it was Friday or Saturday night, although he insisted in court here that it

was Saturday night. But even if he did see Mr. Hawkins that night it was between 9 and 9:30 p.m. and that was well after Mr. Hawkins had committed the murder.

[14] His sister Heidi testified that she had seen him between 7 and 8 that evening, and I am satisfied that, if she did see him, it was closer to the 8 than the 7. It is hard to believe that he, as she said, looked normal at that time. I cannot rule out that by that time he had cleaned up and calmed down and was deliberately trying to create an alibi.

[15] Despite the obvious credibility issues relating to the drug dealer, Christopher Marsh, and his wife, Deborah Marsh, I am satisfied that they were truthful regarding Hawkins coming to their residence twice on the evening of July 8. Mr. Hawkins came the first time to buy cocaine with the blood-stained money he had just stolen from his victim. The second time, he came to attempt to sell the cigarettes that he had stolen from his victim. The bag containing the cigarettes had Sheldon Boutilier's blood on it. When the Marshs' evidence is viewed against the backdrop of Sergeant Sehl's evidence, I have no difficulty accepting their evidence of what happened that night.

[16] It is difficult to overstate what that says about the personality of Herbert Hawkins. He was not under the influence of alcohol or drugs, yet after the savagery of the act he had just committed, he goes to the drug dealer with money he had just stolen from the victim and then comes back to sell the cigarettes he had also stolen. These are not the actions of someone who momentarily lost control in the course of an argument or physical confrontation. Nor are they the actions of someone who has lost control because of the ingestion of drugs or alcohol. Those actions demonstrate a cold bloodedness and total lack of human empathy which is impossible to understand. They also demonstrate the need to protect the public by incarcerating Mr. Hawkins for a very long time.

[17] Nor was this a fight between persons of relatively equal physical and mental ability. The deceased was a mentally handicapped, trusting, and highly vulnerable individual in his own home. He was killed because he apparently tried to interfere with Mr. Hawkins helping himself to Mr. Boutilier's money and possessions. After the initial stabbing, cutting his throat, he was strangled apparently either to prevent further interference or to prevent him from getting to the telephone. It is hard to know because Sheldon Boutilier's body was found in the proximity of the telephone on the wall at the entrance to the hallway. Sheldon Boutilier was

physically smaller and no match for the Accused. Mr. Hawkins actions were as cowardly as they were despicable.

[18] There is no evidence, of course, that this murder was planned and deliberate and that is why it is second degree. I have no doubt however that Mr. Hawkins returned to Sheldon Boutilier's residence for the purpose of helping himself to whatever valuables Sheldon Boutilier possessed. He claimed in one of his statements that he had gone to purchase cigarettes for Sheldon Boutilier and was returning to deliver them at that time. Well that gave him an excuse to go back, but his real purpose was made evident by the actions he took after his return. And why? So he could get a few dollars to buy cocaine.

[19] As police suggested to Mr. Hawkins in one of the video statements, Mr. Hawkins probably got the surprise of his life by Sheldon Boutilier's determination both to survive and possibly to protect what was his. Mr. Hawkins' response was to cut Sheldon Boutilier's throat and then go about or continue ransacking Sheldon Boutilier's house. When an almost lifeless Sheldon Boutilier crawled to the hallway, Mr. Hawkins ensured there would be no further interference and consequently no chance of survival. He did so by strangling Mr. Boutilier first

with a towel and then applying the telephone cord around Sheldon Boutilier's neck and then tying the other end of the cord to a doorknob.

[20] The presence of the footprint on Mr. Boutilier's torso is disturbing. One can reasonably infer that he did not accidentally walk on Mr. Boutilier at the point but he was putting his foot on Mr. Boutilier's torso in order to immobilize him or, as the Crown suggested, create tension on the cord. The brutality of that conduct is beyond measure.

[21] Mr. Hawkins helped himself to whatever valuables he could find, a watch collection, a dvd player and money. The watch collection and the dvd player have never been recovered so presumably Mr. Hawkins did not even profit by them, and I have already referenced the money he stole.

[22] During the trial, there was quite a bit of contention about a pair of trousers that were found on the kitchen floor. They were blood-soaked Calvin Klein jeans, and I am satisfied that Mr. Hawkins had put these on sometime before attacking Sheldon Boutilier. It is conceivable, though there is no way of knowing, Sheldon Boutilier may even have given them to him because the evidence of Kelly Quinn

was that he had given several pairs to Shelly. What is certain is that those jeans were in Sheldon Boutilier's home prior to Hawkins getting there.

[23] I am satisfied that the barefoot and the footwear impressions found throughout the house were made by the same person. I am satisfied beyond any question that Mr. Hawkins acted alone in this. There was one person when the jeans were changed, one person in the bathroom (Mr. Hawkins says in the statement he gave to Kimberley Boyce that it was him in the bathroom where there were only footwear prints), and one person with footwear left the house and deposited Sheldon Boutilier's blood on the floor mat of Mr. Hawkins' car. There is no doubt that that one person was Herbert Hawkins.

[24] His actions after the fact, in addition to selling the proceeds of the crime, were also indicative of a person without remorse or the slightest sympathy for his victim. His police statements show that he did everything he could to deflect suspicion from himself. His flight to Vancouver and lying to police were no doubt motivated by feelings of guilt, not remorse, guilt and the pressure of the imminence, as he must have perceived it, that he was going to be charged with this crime.

[25] Overall, as I have already said, this was a particularly brutal, cruel and despicable act. Mr. Hawkins protestations of innocence are hard to fathom. They have to be for his family because no one who paid attention to the evidence could have the slightest doubt about Mr. Hawkins' guilt. Sheldon Boutilier died a horrible death and for what? For probably less than \$200.00, some watches and cigarettes, cigarettes for which Mr. Hawkins got \$10.00.

[26] I would like to think that the reason that Mr. Hawkins will not admit to what he has done is that he is too ashamed to do so. But his actions after the fact are not those of an ashamed person, they are the actions of someone who does not have the slightest regret about what he has done. They are the actions of someone who simply did not want to get caught. So why does he continue to deny? At this stage, all he has left in the world are those he has convinced that he did not do it. He is only able to do that because his family do not want to believe that one of theirs could possibly do such an act.

[27] The jury had no difficulty finding guilty beyond a reasonable doubt. I instructed them in the part of my charge on the doctrine of reasonable doubt that it

was not necessary for the Crown to prove its case to a certainty. But that is what it has done. That is the beauty of a circumstantial case, one does not have to be concerned that some day an eye witness is going to recant their statement or with the other frailties or problems with eye witness evidence. Here we have circumstantial evidence. We have foot prints which were analysed by an examiner out in British Columbia and a footprint examined here locally, and they both came to the same conclusion; they are Mr. Hawkins' footprints.

[28] The blood spatter expert was able to reconstruct with remarkable certainty what went on in the house as I have just described it. As I noted, I have no doubt, Mr. Hawkins, but that you and you alone committed this horrendous act.

[29] I have looked at the cases and case authorities presented to me by Counsel and they are helpful in the sense that they highlight the general guidelines which a sentencing court must consider in these situations. But they are of limited value because each case will turn on its particular facts. As the crown noted in its citation from the *R v. Muise* (1993) 124 N.S.R. (2d) 105 (NSSC):

“Comparisons with other cases is a difficult exercise. Attempts to seek similarities with or differences from other murders committed by other people can be very frustrating and counter productive. We are not dealing with an exercise of reviewing

"comparables" such as is done in a property appraisal. In exercising the direction under s. 744 of the Code, other cases are no more than a rough guide for the sentencing judge in identifying the types of aggravating or mitigating circumstances that other courts have relied on as relevant in applying the guidelines."

[30] As I pointed out to Ms. MacRury during her presentation, cases where there has been a plea bargain or joint recommendation are of very limited value as precedents because there are all kinds of reasons why the Crown may in a given case agree to go along with something which is less than what would otherwise be warranted by the particular facts. In the case cited, for example, I believe it was the desire to prevent or keep young witnesses from having to testify about very traumatic events that motivated the Crown.

[31] It should be obvious from what I have said that I consider that there are many aggravating circumstances in this case, a vulnerable victim in his own home. And then there is the sequence of the murder – slashing the victim's throat and then going about committing theft of the dying individual's possessions while the individual is there bleeding to death. And then ensuring that there is no further

interference from the victim by coming back and strangling the person, first with a towel and then with a telephone cord.

[32] I have also considered the mitigating circumstances that I have referred to which were outlined in the pre-sentence report and in the defence brief. But the overwhelming imperative in this case is deterrence. Mr. Hawkins must not get another opportunity for a very long time to commit such a brutal crime. A signal to others who might be similarly inclined must also be sent. The sentence must also signal the community's revulsion and abhorrence of this crime.

[33] Prior to hearing Mr. Hawkins read his prepared statement, I was prepared to accept the Crown's recommendation that he would not be eligible for parole for 22 years. His statement this morning, to the extent that it may in part have been motivated by remorse, demonstrates that there may be a faint glimmer of hope for Mr. Hawkins' eventual rehabilitation.

[34] Stand up Mr. Hawkins. I am ordering that you shall not be eligible for parole until you have served at least 20 years of your life sentence. I am also granting the requested Firearms and DNA Orders.

**J.**