

R. v. McBride (appeal by Khun-Khun), [2019] B.C.J. No. 1588

British Columbia and Yukon Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

M.V. Newbury, H. Groberman and G.J. Fitch JJ.A.

Heard: April 3, 2019.

Judgment: August 23, 2019.

Docket: CA45319

[2019] B.C.J. No. 1588 | 2019 BCCA 305

Between Regina, Respondent, and Jujhar Khun Khun, Appellant [B.C.S.C.: R. v. McBride, Jones, Kuhn-Kuhn]

(54 paras.)

Case Summary

Court Summary:

The appellant pleaded guilty to conspiracy to commit murder in relation to a shooting that occurred outside the Delta Grand Hotel in Kelowna, BC. He was sentenced to ten years' imprisonment after being given eight years' credit for approximately five years in pre sentence custody. He appeals from sentence on the sole ground that the judge erred in making an order that he serve one half of his sentence before becoming eligible for full parole pursuant to s. 743.6(1) of the Criminal Code, R.S.C. 1985, c. C 46, without considering his time in pre sentence custody. Held: Leave to appeal granted; appeal dismissed. Credit for pre sentence custody is considered at the first stage of the analysis under s. 743.6(1), the determination of an appropriate sentence. It is not considered again at the second stage, the determination of whether the order for delayed parole eligibility should issue. Further, time spent in pre sentence custody does not form part of the sentence for the purpose of determining one half of the sentence.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated May 2, 2018 (*R. v. McBride*, 2018 BCSC 865, Kelowna Registry 78319).

Counsel

Counsel for the Appellant: M.P. Klein, Q.C.

Counsel for the Respondent: M. Mereigh.

Restriction on publication: Pursuant to s. 486.5(1) of the *Criminal Code*, information that could identify the witnesses named in the order of May 9, 2017 shall not be published, broadcast or transmitted in any way. This publication ban applies indefinitely unless otherwise ordered.

Reasons for Judgment

The judgment of the Court was delivered by

G.J. FITCH J.A.

I. Introduction

1 The appellant, Jujhar Khun Khun, applies for leave to appeal and, if leave is granted, appeals from an order made under s. 743.6(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*], requiring him to serve one half of a ten-year sentence before becoming eligible for full parole. The sentence was imposed on May 2, 2018, following the appellant's guilty plea to conspiracy to commit murder contrary to s. 465(1)(a) of the *Code*.

2 The offence involved an agreement to plan and carry out a retaliatory attack on three rival gang members the appellant and others believed to be responsible for the 2010 murder of Gurmit Dhak, the leader of a Surrey-based drug trafficking organization with whom the appellant was associated. The conspiracy came to fruition on Sunday, August 14, 2011 at approximately 2:30 p.m., in the circular driveway in front of the Delta Grand Hotel in Kelowna, BC. As the appellant waited nearby, fully aware of what was about to occur, individuals associated with or loyal to Mr. Dhak opened fire using automatic and semi-automatic weapons on a vehicle containing the three intended targets -- Jonathan Bacon, Larry Amero and James Riach -- and two other women -- Lyndsey Black and Leah Hadden-Watts. Mr. Bacon was killed in the attack. Ms. Hadden-Watts was grievously injured.

3 Offenders sentenced to terms of imprisonment of two years or more are subject to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [*CCRA*]. Under s. 120 of the *CCRA*, offenders are eligible to apply for full parole after serving one third of their sentence. Section 743.6 of the *Code* permits a sentencing judge, having arrived at a fit and appropriate sentence for the offence and offender, to delay the offender's eligibility for full parole until one half of the sentence has been served. Such orders are not routinely made and the prosecution has the burden of demonstrating that this additional punishment is required: *R. v. Zinck*, 2003 SCC 6 at paras. 30-31. A sentencing judge must be satisfied that a delayed parole eligibility order is needed to give proper expression to the objectives of sentencing with particular emphasis on the social objectives of general and specific deterrence and denunciation.

4 A delayed parole eligibility order made under s. 743.6 is part of the sentence imposed and, with leave of the Court, is an appealable order: ss. 673, 675(1)(b) of the *Code*. As with other components of the sentence, a delayed parole eligibility order is subject to the deferential

standard of review set out in *R. v. Agin*, 2018 BCCA 133 at paras. 56-57; see also *Zinck* at para. 41.

5 The appellant submits that had the sentence that was imposed in this case, including the delayed parole eligibility order, been imposed immediately upon his arrest, he would have no cause for complaint. He argues, however, that the order operates unfairly in his case because of the length of time he spent in pre-sentence custody. He submits that despite being given full credit for time spent in pre-sentence custody pursuant to *R. v. Summers*, 2014 SCC 26, the effect of the order is to require him to serve more time before becoming eligible for full parole than he would have been obliged to serve had he been granted bail or convicted and sentenced the day of his arrest. In addition, the appellant submits that the effect of the order in this case runs afoul of the language of s. 743.6(1), as it requires him to serve more than ten years' imprisonment before becoming eligible for full parole.

6 For the reasons that follow, I would grant leave but dismiss the appeal from sentence and uphold the delayed parole eligibility order made by the sentencing judge.

II. Overview

1. Circumstances of the Offence

7 Some significant mental gymnastics would be required to conjure up a fact pattern giving rise to the offence of conspiracy to commit murder that is more serious than what occurred here.

8 The circumstances of the offence committed by the appellant and his co-conspirator, Michael Jones, along with the offences of second degree murder and attempted murder committed by Jason McBride, one of the shooters, were set out in a detailed Agreed Statement of Facts filed on sentencing.

9 I will only briefly review the circumstances as they are relevant to the appellant.

10 Between June 1 and August 14, 2011, the appellant, McBride and Jones actively searched for their intended targets with the intention of killing them. The appellant personally attended 30 to 40 locations in the course of the search, including residences believed to belong to or be associated with the intended targets, and nightclubs, bars, restaurants and other meeting places the intended targets were believed to frequent. Information was gathered concerning vehicles associated with the intended targets, such as descriptions and license plate numbers. This information was collected to the end of determining the optimal time and place for the ambush and killing of one or more of the intended targets.

11 On the night of August 13, 2011, information was conveyed to the appellant, Manjinder Hairan, McBride and Jones that the intended targets were guests of the Delta Grand Hotel in Kelowna. McBride and Jones travelled to Kelowna in a Ford Explorer which they parked directly across the street from the hotel. The appellant and Hairan travelled to Kelowna in a Jeep Grand Cherokee rented by the appellant.

12 After arriving in Kelowna in the early morning hours of August 14, 2011, the appellant participated in searching for the intended targets. The offenders obtained information confirming that the intended targets were staying at the Delta Grand Hotel.

13 In the morning, the appellant and Hairan met with McBride and Jones at an abandoned residence. The appellant knew that firearms were to be transported in the Ford Explorer for the purpose of carrying out an attack on the intended targets and that the attack would likely take place as the targets were leaving the Delta Grand Hotel. The Ford Explorer was driven to a parking lot directly across from the hotel. From this vantage point, the occupants of the Ford Explorer had a clear view of the circular driveway leading to the main entrance of the hotel.

14 The three intended targets, Ms. Black and Ms. Hadden-Watts left the hotel at approximately 2:30 p.m. They boarded their Porsche Cayenne which was parked in the circular driveway. The Ford Explorer, driven by Jones and carrying three other occupants, then pulled up alongside and slightly in front of them. An unidentified occupant of the Ford Explorer began shooting at the occupants of the Porsche using an automatic rifle similar to an AK-47. McBride and Hairan exited the Ford Explorer and participated in shooting at the occupants of the Porsche. McBride used a semi-automatic rifle similar to an AK-47. Hairan used a Glock 9 mm handgun. The weapons used by McBride and the unidentified shooter are prohibited firearms. The handgun used by Hairan is a restricted firearm.

15 Forty-five expended cartridge cases were recovered from the scene. Thirty-four bullets penetrated the Porsche. One bullet went through the front window of an art gallery located across the street from the hotel. Two bullets went through the external wall of the hotel complex and into the interior space of a salon located inside.

16 Mr. Bacon died as a result of blood loss from multiple gunshot wounds. Mr. Amero was shot in the right cheek, right chest and left forearm. He survived the attack but his injuries resulted in a loss of function in his right arm. Ms. Black was shot twice in her legs but was able to recover from her injuries. Mr. Riach rolled out of the car when the shooting began and escaped without injury.

17 Ms. Hadden-Watts was shot once in the back of the neck and sustained horrific injuries. The bullet shattered her C6 and C7 vertebrae and severed her spinal column. She underwent multiple surgeries before being released from Vancouver General Hospital in February 2012, when she was transferred to G.F. Strong Rehabilitation Centre. She was discharged from G.F. Strong about seven months later. As a result of her injuries, Ms. Hadden-Watts has no voluntary motor or sensory function below the level of C5 in her spinal cord. As such, she has no functional capacity in her legs and only limited capacity in her upper extremities. Since the shooting, she has developed severe osteoporosis and experienced a spontaneous fracture of her lumbar spine. Due to the severity of her osteoporosis, it is likely that spontaneous fractures will reoccur. Her life expectancy has been reduced to approximately 70% of that of a person without a spinal cord injury.

18 The shooting was captured on video by a surveillance camera located in the driveway of the hotel. As would be expected on a summer afternoon in the height of the tourist season, the hotel was busy. Taxicabs can be seen picking up guests. Hotel employees can be seen retrieving the cars of departing guests and loading luggage into vehicles. People are walking with their pets in the area of the shooting. A family, with what appear to be small children, was caught between the shooters and the Porsche and can be seen cowering and then fleeing the scene in panic. It is miraculous in these circumstances that no one else was killed or seriously injured. As the judge put it, "[b]ut for it being true, that result would seem unbelievable."

19 The risk-taking behaviour of the appellant and his co-accused is shocking. The associated moral culpability that attaches to the commission of the substantive offences committed by McBride and the conspiracy engaged in by the appellant and Jones is obviously very high.

20 After the shooting, Jones drove the Ford Explorer and its occupants back to the abandoned residence to meet up with the appellant. The weapons used in the attack were hidden in some bushes. Jones drove the Ford Explorer away from that location. The appellant followed in the rented Jeep with McBride and Hairan. The four of them set the Ford Explorer on fire at a rural location some distance away. The appellant then drove McBride, Jones and Hairan back to the Lower Mainland in the Jeep.

21 All of the victims declined to provide victim impact statements. One victim impact statement was provided by a hotel employee who witnessed the attack and was seriously traumatized as a result.

22 The appellant, McBride and Jones were originally charged with first degree murder, four counts of attempted murder and various firearms offences.

23 The guilty pleas were entered following resolution discussions between the Crown and defence. At the time of sentencing, all three accused had been in pre-sentence custody since their arrest on February 22, 2013 -- a period of five years, two months and ten days.

24 McBride pleaded guilty to second degree murder and was, pursuant to a joint submission, sentenced to life imprisonment without parole eligibility for 18 years. On the charge of attempted murder, McBride was given a 15-year concurrent sentence which was reduced to seven years, two months, and 15 days with credit for pre-sentence custody.

25 The appellant and Jones both entered guilty pleas to the offence of conspiracy to commit murder.

26 Consistent with *Summers* and the joint submission of counsel, Jones was given credit for time spent in custody prior to sentencing at a ratio of 1.5 to 1 (1.5 days credited for every day spent in pre-sentence custody). He was sentenced to a term of imprisonment of ten years, two months and 15 days. Jones did not oppose the making of an order pursuant to s. 743.6(1), delaying his full parole eligibility date until he had served one half of the sentence.

27 Consistent with *Summers* and the joint submission of counsel, the appellant was also given credit for time spent in custody prior to sentencing at a ratio of 1.5 to 1. In addition, the appellant was given credit for a four-month period while he was hospitalized and in pre-sentence custody at a ratio of 2 to 1. In total, the appellant was given credit for eight years attributable to pre-sentence custody. He was sentenced to a term of ten years' imprisonment.

28 Unlike Jones, the appellant opposed the making of a delayed parole eligibility order for some of the same reasons he now challenges that order on appeal.

29 A variety of ancillary sentencing orders were also made which have not been put in issue on appeal.

30 In accordance with s. 719(3.3) of the *Code*, the Record of Proceedings and Warrant of

Committal Upon Conviction were endorsed as follows:

SENTENCE: Jail: 10 Year(s) [Jail term that would have been imposed before Credit Granted: 18 Year(s); Actual Pre-Sentence Time in Custody: 5 Year(s) 2 Month(s) 10 Day(s); Credited Pre-Sentence Time in Custody: 8 Year(s)] ...

2. Circumstances of the Appellant

31 The appellant was 31 years of age at the time of sentencing. He was 24 at the time of the offence. He had a prior criminal record. He was sentenced on November 2, 2007, to one year in prison (having been credited with two years for time spent in pre-sentence custody) following his guilty plea to kidnapping contrary to s. 279(1)(a) of the *Code*. At the same time, the appellant was prohibited from possessing firearms for a period of ten years. He was subject to that order when the offence in the case at bar was committed. On June 11, 2008, the appellant entered guilty pleas to one count of breaching the terms of an undertaking or recognizance, one count of possessing or using a stolen credit card, and three counts of fraud. He was sentenced to 30 days in jail and placed on probation for 18 months.

32 The appellant's counsel advised the sentencing judge that the appellant suffers from a number of health-related issues attributable to "negative lifestyle" choices. He was said to have strong family support and to have taken steps while on remand to improve his education.

3. Reasons for Sentence

33 In Oral Reasons for Sentence indexed as 2018 BCSC 865, the judge acceded to the joint submission but concluded, given the egregious nature of the offence and the "magnificent risk" assumed by the appellant, that it was appropriate to make an order requiring him to serve one half of his ten-year sentence before becoming eligible for full parole. The judge did not explicitly engage with the appellant's technical argument that such an order would operate unfairly as a consequence of the time he spent in pre-sentence custody. In fairness to the judge, the technical argument advanced by the appellant appears to have been made orally for the first time in sentencing submissions.

III. Grounds of Appeal

34 The appellant takes no issue with the ten-year jail sentence or the credit he was given for time spent in pre-sentence custody. His attack on appeal centres exclusively on the propriety of the delayed parole eligibility order.

35 The appellant submits that in making the delayed parole eligibility order, the judge erred in principle in two ways. First, the appellant argues that the judge failed to have regard to the differential and unfair impact such an order would have on him given the time he spent in pre-sentence custody as compared to the impact such an order would have on an offender who was either granted bail or pleaded guilty and was sentenced immediately upon his arrest. At the heart of the appellant's submission is the parity principle underlying the decision in *Summers* (at paras. 60-61), that offenders who do not receive bail should not be treated more harshly than otherwise identically situated offenders who are granted bail.

36 At its simplest, the appellant's position on this point is mathematically illustrated by juxtaposing these two scenarios. Had the appellant pleaded guilty and been sentenced

immediately upon his arrest to an 18-year term of imprisonment and made subject to a delayed parole eligibility order, he would have served nine years before becoming eligible for full parole. As matters stand, the appellant served five years, two months and ten days in pre-sentence custody (for which he was given enhanced credit of eight years). On the ten-year sentence imposed, the appellant will, as a result of the delayed parole eligibility order, be required to serve five years before becoming eligible to apply for full parole. He will thus spend ten years, two months and ten days in custody before becoming eligible for full parole -- one year, two months and ten days more than he would have served before becoming eligible for full parole had he been granted bail or convicted and sentenced immediately following his arrest. The appellant submits that this difference violates the parity principle underlying the decision in *Summers*.

37 Curiously, what the appellant seeks if successful on this ground of appeal is an order allowing the appeal and setting aside the delayed parole eligibility order. The effect of such an order would be that the appellant would be eligible to apply for full parole after three years and four months -- one third of the ten-year sentence imposed. Given that he served five years, two months and ten days in pre-sentence custody, the order the appellant seeks on appeal would permit him to apply for full parole after spending eight years, six months and ten days in custody. In short, the appellant seeks on appeal an order that is more favourable to him than what he says he deserves -- an 18-year sentence with eligibility for full parole after nine years.

38 Second, the appellant submits that the delayed parole eligibility order is illegal because it has the effect of requiring him to serve ten years, two months and ten days in custody before becoming eligible for full parole. The appellant submits that s. 743.6(1) does not authorize the making of a delayed parole eligibility order that requires an offender to serve more than ten years before becoming eligible for full parole.

IV. Analysis

1. Legislative Framework

39 The provisions of the *Code* most particularly engaged by this appeal, as they stood at the time of sentencing, are set out below:

Commencement of sentence

719 (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

...

Determination of sentence

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

Exception

(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

...

Record of proceedings

(3.3) The court shall cause to be stated in the record and on the warrant of committal the offence, the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed.

...

Eligibility for Parole

Power of court to delay parole

743.6 (1) Notwithstanding subsection 120(1) of the *Corrections and Conditional Release Act*, where an offender receives, on or after November 1, 1992, a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for an offence set out in Schedule I or II to that Act that was prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

...

Principles that are to guide the court

(2) For greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles.

2. R. v. Zinck

40 A delayed parole eligibility order remains out of the ordinary and must be used in a manner that is fair to the offender: *Zinck* at para. 29. Section 743.6 contemplates a two-step process.

41 At the first stage, the sentencing judge must determine the appropriate sentence for the offence, having regard to the circumstances of the offence and offender, aggravating and mitigating circumstances, the applicable objectives and principles of sentencing set out in ss. 718 and 718.2, and the fundamental principle of proportionality reflected in s. 718.1, to the end of determining the length of the jail sentence to be imposed. It is at the first stage of the analysis that credit for time spent in pre-sentence custody will be given to arrive at a sentence that is, in its quantum, just and appropriate.

42 Having determined the quantum of the sentence to be imposed, the analysis shifts at the second stage to focus on whether an order delaying full parole eligibility should be made. At the second stage, consideration must once again be given to the applicable sentencing factors. At this stage, however, priority must be given to the objectives of deterrence and denunciation. The prosecution has the burden of demonstrating that a delayed parole eligibility order is required: *Zinck* at paras. 30-31. A sentencing judge must bear in mind that a delayed parole eligibility order is an additional form of punishment not routinely meted out.

3. *R. v. Summers*

43 As explained in *Summers* at paras. 22-29, there are two rationales for granting enhanced credit for time spent in pre-sentence custody: one qualitative and the other quantitative. The qualitative rationale is to recognize that conditions in remand centres may be more onerous than those in post-sentence facilities. The quantitative rationale is to ensure that an offender who is denied bail does not spend more time in custody than a similarly-situated offender who is released on bail. Because a sentence begins when it is imposed and the *CCRA* provisions governing eligibility for parole do not take into account time spent in custody prior to sentencing, pre-sentence detention generally needs to be credited at a rate higher than 1 to 1 to ensure that the offender denied bail is not prejudiced. Awarding credit at a ratio of 1.5 to 1 accounts for the loss of eligibility for parole. Writing for the Court in *Summers*, Justice Karakatsanis said this:

[60] ... an interpretation of s. 719(3.1) that does not account for loss of eligibility for early release and parole during remand custody means that offenders who do not receive bail will serve longer sentences than otherwise identical offenders who are granted bail.

[61] This result is incompatible with the parity principle. A rule that results in longer sentences for offenders who do not obtain bail, compared to otherwise identical offenders, does not result in "similar . . . sentences imposed on similar offenders for similar offences committed in similar circumstances": s. 718.2(b).

4. The Sentence Imposed Gives Effect to *Summers*

44 As noted earlier, the appellant submits that the effect of the delayed parole eligibility order made in this case is that he is required to serve a longer sentence than he would have been required to serve had he been released on bail pending the imposition of sentence, or convicted and sentenced immediately following his arrest. It is for this reason he says the order violates the parity principle underlying *Summers*.

45 I cannot accept this submission. As explained in *Summers* at para. 26, one of the purposes of awarding enhanced credit for time spent in pre-sentence custody is to compensate the offender for the fact that this time does not count towards the calculation of parole eligibility. Accordingly, the effect of an offender's time in pre-sentence custody on his parole eligibility date is considered and compensated for at the first stage of the analysis set out in *Zinck*, when the sentencing judge determines the appropriate sentence. There is no reason for the sentencing judge to consider and compensate for it again at the second stage of the analysis, when the quantum of the sentence is already fixed and the rationale underlying *Summers* is spent.

46 Here, the appellant was credited for time spent in pre-sentence custody at a ratio of 1.5 to 1. Indeed, for the four-month period he was hospitalized while in custody, the appellant was credited for time spent in pre-sentence custody at a ratio of 2 to 1. In determining the appropriate sentence to be imposed, the judge gave full effect to the requirements of *Summers* and compensated the appellant for his time in pre-sentence custody. The appellant does not suggest on appeal that additional credit for pre-sentence custody ought to have been given or that the judge erred in principle in this regard. In fact, the judge followed the joint submission of counsel in crediting the appellant with eight years for time spent in pre-sentence custody.

47 Having determined after the credit for pre-sentence custody was given that a ten-year sentence was appropriate, the judge turned to the second stage of the *Zinck* analysis. At this stage, he properly considered whether the circumstances of the offence and offender, and the

objectives of general deterrence and denunciation in particular, required the making of a delayed parole eligibility order. The judge's consideration of the criteria set out in s. 743.6(1) and his application of the analytical framework set out in *Zinck* do not reflect error in principle. With the exception of the pre-sentence custody issue, the appellant does not suggest otherwise.

48 In my respectful view, it is not open to the appellant in these circumstances to challenge the propriety of the s. 743.6(1) order.

49 Before addressing the grounds of appeal, I would note that the Crown tendered new evidence on appeal, the admission of which was not opposed by the appellant. The evidence is of assistance to the Court in determining the effect of the delayed parole eligibility order in this case. The effect of the order is that the appellant is eligible to apply for full parole on May 2, 2023. Had the appellant been sentenced immediately following his arrest, his full parole eligibility date would be February 22, 2022. The new evidence also makes clear that as a consequence of having served time in pre-sentence custody, the appellant's statutory release and warrant expiry dates are advanced. As matters stand, the appellant's statutory release date is December 31, 2024. His warrant expiry date is May 1, 2028. In the hypothetical situation the appellant posits, his statutory release date would be February 21, 2025. His warrant expiry date would be February 21, 2031.

50 Against this background, I am of the view that there is no unfairness to the appellant and that he is not entitled to the relief he seeks on appeal.

5. The Delayed Parole Eligibility Order is not Illegal

51 I am also unable to accept the appellant's position that the delayed parole eligibility order is illegal because it requires him to serve more than ten years in custody before he becomes eligible for full parole. Section 743.6 limits the portion of the sentence that must be served before the offender may be released on full parole to one half of the sentence or ten years, whichever is less. The section refers to the sentence itself, not to the sentence plus the period of time the offender serves in pre-sentence custody.

52 In this respect, it is important to recall that a sentence commences when it is imposed: s. 719(1). Time spent in pre-sentence custody is taken into account by the judge in determining the sentence, but it is not itself part of the sentence: *R. v. Mathieu*, 2008 SCC 21 at paras. 6, 17-18. In *Mathieu*, the Court held that when determining whether a sentence of imprisonment is two years or more for the purposes of s. 743.6, time spent in pre-sentence custody is not to be considered: at paras. 23-27. Equally, time spent in pre-sentence custody should not be considered in calculating one half of the sentence.

53 In the case at bar, the appellant was sentenced to a term of imprisonment of ten years. His five years, two months, and ten days in pre-sentence custody did not form part of the sentence. As a consequence of the delayed parole eligibility order, he is required to serve five years of that ten-year sentence before becoming eligible to apply for full parole. The sentence does not therefore violate s. 743.6(1).

V. Conclusion

54 For the foregoing reasons, I would admit the new evidence and grant leave to appeal but dismiss the appeal from sentence.

G.J. FITCH J.A.

M.V. NEWBURY J.A.:— I agree.

H. GROBERMAN J.A.:— I agree.

End of Document