C.A.C. No. 117026

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Izzard, 1995 NSCA 223

Clarke, C.J.N.S., Matthews and Pugsley, JJ.A.

BETWEEN:

MARIE LOUISE IZZARD, (also known as MARIE LOUISE CARVERY)	)	Warren K. Zimmer for the Appellant
Appellant	)	William D. Delaney for the Respondent
- and -	)	
HER MAJESTY THE QUEEN	)	
Respondent	)	Appeal Heard: November 21, 1995
	)	Judgment Delivered: November 21, 1995

THE COURT: Appeal allowed by striking the order issued under s. 741.2 but in all other respects the appeals are dismissed per oral reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Pugsley, J.A. concurring.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

The reasons for judgment of the Court were delivered orally by:

MATTHEWS, J.A.:

After trial before a provincial court judge the appellant was convicted of three offences, all of which occurred on December 4, 1994 at Halifax:

1. Robbing J. P., s. 344 of the **Code**.

2. Uttering a threat to J. P. to cause his death, s. 264.1(1)(a) of the **Code**.

3. Committing a sexual assault on the person of J. P., s. 271(1)(a) of the **Code**.

The trial judge sentenced her to a period of three years imprisonment on the first count and two years on each of the other counts to be served concurrently with the first sentence. He also sentenced her to a period of three months imprisonment, to be served consecutively, in respect to an unrelated charge of theft.

Further, pursuant to s. 741.2 of the **Code** he ordered that she serve one-half of the sentence for the robbery before being eligible for full parole.

The appellant appealed from both conviction and sentence. But, in oral submission before us, appellant's counsel withdrew those appeals.

However, the appellant maintains her appeal in respect to the order under s. 741.2 of the **Code**. That section reads:

> 741.2 Notwithstanding subsection 120(1) of the **Corrections and Conditional Release Act**, where an offender is sentenced, after the coming into force of this section, to a term of imprisonment of two years or more on conviction for one or more offences set out in Schedules I and II to that Act that were prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offences and the character and circumstances of the offender, that the expression of society's denunciation of the offences 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, c. 20, s. 203.

Counsel for the Crown and defence agree:

1. The Crown did not request that an order under s. 741.2 be made by the trial judge.

2. Defence counsel was not given an opportunity to speak to the issue as to whether such an order should be made.

3. The trial judge simply pronounced the order.

4. The trial judge failed to articulate his reasons for making the order.

5. The Crown concedes that in the circumstances the order cannot be justified.

It is now clear that there is a right of appeal from an order under s. 741.2. See **Joseph Leslie Chaisson v. R.** (S.C.C. judgment dated July 20, 1995, not yet reported).

A trial judge must grant counsel an opportunity to be heard when such an order is considered and must articulate reasons for making such an order. See **R. v. Danki** (1993), 86 C.C.C. (3d) 368 (Que.C.A.); **R. v. Warren** (1994), 95 C.C.C. (3d) 86 (Sask. C.A.); and **R. v. Goulet** (1995), 97 C.C.C. (3d) 61 (Ont.C.A.).

We allow the appeal by striking the order issued under s. 741.2. In all other respects the appeals are dismissed.

J.A.

Concurred in:

Clarke, C.J.N.S.

Pugsley, J.A.