Court of Queen's Bench of Alberta

Citation: R v McNeil, 2019 ABQB 453

Date: 20190619
Docket: 161126958Q1
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Stephanie Sheila McNeil

Accused

Sentencing Decision
of the
Honourable Madam Justice Avril B. Inglis

Introduction

[1] Taylor McKenzie and her parents Joanne McKenzie and Leonard Flese were stopped at a stop sign at Highway 28 near Smoky Lake Alberta in the late evening of July 27th, 2016. As they waited for highway traffic to pass so they could make their turn, Stephanie McNeil's truck failed to follow a curve in the highway, and proceeded straight at the family of three at highway speed. Miss McNeil had fallen asleep at the wheel and her uncontrolled vehicle struck the small sedan Mr. Flese was driving, having no ability to avoid the collision.

[2] Leonard and Joanne were badly injured. Taylor was killed immediately in the crash with Miss McNeil.

[3] After a brief *voir dire*, Miss McNeil entered guilty pleas to dangerous driving causing the death of Taylor, and dangerous driving causing bodily harm to her parents. Sentencing was adjourned for a presentence report. I now have the benefit of that report and of many victim impact statements from the victims and their family members.

The victims

[4] I learned a great deal about Taylor. She was obviously loved by her exceptionally close-knit family. Her parents, grandmothers, aunt and cousin all contributed heartfelt statements to try to convey the impact of the loss of this young woman. They each spoke of their love and memories of Taylor. They told me of their deep grief. I learned of the lasting impact of the trauma of the collision has held for many people. The visceral description of the consequences of Miss McNeil's driving was, repeatedly, painful to read.

[5] Taylor was an animal lover. She was a bright and talented student. She played the fiddle – it is always a mark of a joyful and fun person when they call their instrument a fiddle instead of a violin. She was an only child, yet had cousins that she was so close to they regularly held themselves out as siblings. Her Aunt Shaleen wrote that it was difficult to "capture Taylor's essence" in writing – yet the writings of Taylor's family did help me understand what a special young woman she was. Her young death was tragic and her family has my absolute sympathy for their trauma and grief.

[6] Joanne McKenzie and Leonard Flese were also badly injured in the collision. Mr. Flese suffered four broken vertebrae which continue to cause back pain and leg numbness. Joanne had three broken ribs as well as soft tissue injury to her head and back. They required medical intervention and their physical injuries have affected their lives and ability to work. They will continue to bear these effects of being struck by Miss McNeil along with the psychological trauma they each described.

Details of the offences

[7] On the offence date Miss McNeil left Edmonton for Cold Lake at approximately 10 p.m. She knew that she was very tired, but instead of choosing not to drive on the highway in that state, she consumed an energy drink and put herself into the driver's seat of a Ford F150 truck. According to her statement to the police, she fell asleep momentarily. The expert collision report shows her speed to be likely just under 106 km/h as the truck left the highway and there is no evidence of alcohol or drug consumption. Miss McNeil was dangerous because she drove when exhausted, knowingly creating a risk that she would fall asleep when driving. She drove at highway speeds, at night, alone. She relied on caffeine to keep herself conscious and that single effort failed. The consequences of her choice are obviously terrible.

[8] In ***R v Hundal***, [1993] 1 S.C.R. 867 (SCC.) at para. 35, Cory J. states:

> Thus, it is clear that the basis of liability for dangerous driving is negligence. The question to be asked is not what the accused subjectively intended but rather whether, viewed objectively, the accused exercised the appropriate standard of care.

The accused

[9] Miss McNeil comes before the court with a single, unrelated count on her criminal record for which she received a conditional discharge. I was not informed of her driving record. She is currently 28 years old, is the mother of a nine year-old daughter, and is expecting her second child in approximately two months.

[10] At the time of the collision, Miss McNeil had been a single mother for several years. She was working in Edmonton to support herself and her daughter. She had moved to Buck Lake to live with her parents so that she could focus her attentions on building a more stable career.

[11] I accept fully that she has suffered substantially since the offence. She has been grief-and guilt-stricken. Her mental health was so poor that she left her daughter with her parents for most of a year as she was unable to care for her. She was suicidal. I find that she remains suicidal. Miss McNeil stood in court and offered both full acceptance of responsibility for the offences without excuse, as well as sincere remorse for the consequences of her action.

[12] I was struck by Miss McNeil's offer of her own life if it would bring Taylor back to her parents. I accept that she meant that if there were any way to repair the damage done, she would have. What she was saying, however, was the true reality that her statement revealed: there is no repayment that can reverse the losses she caused. That is the simple truth.

Paramount sentencing principles

[13] Reparation is a tenet of sentencing in Canadian criminal law. It is not a potential factor here. Case law regarding dangerous driving offences directs me that there are two key principles to consider as I turn my mind to sentencing: deterrence and denunciation, and the moral blameworthiness of the offender.

[14] I rely on the following description of the former principle from the Alberta Court of Appeal in ***R. v. Innes***, 2008 ABCA 129 at paragraph 10:

> ... General deterrence refers to inducing others tempted to commit this offence not to do so. It is especially important with crimes involving premeditation or planning and persistence, and with crimes which are fairly common. Denunciation refers, in part, to convincing all the public that the offence in question is a true crime, a serious crime, one which respectable people would shun, and not obsolete, technical or minor. It also reassures the law-abiding, and informs everyone that the relationship between crime and punishment is considered, logical, and just.

[15] I turn my attention to the latter factor. I find as a fact that relative to the offences convicted and other similar offenders' conduct, Miss McNeil's moral blameworthiness is very low. This may be difficult to understand as it is easy to confuse the result of an action with its blameworthiness. I recognize the result of driving so tired that Miss McNeil fell unwittingly to sleep here was awful. But the initial act was careless and naïve. Miss McNeil was not malicious or deliberate in any of her actions.

[16] As I consider deterrence and denunciation, I find that specific deterrence has been met by the actual consequences of Miss McNeil's choice. Specific deterrence means I must consider a

sentence that will prevent an accused from continuing with the same criminal behavior. I am satisfied that nothing this court could do will add to that goal.

Counsel recommendations

[17] Crown counsel recommends a sentence of one year in gaol, followed by two years probation and a two year driving prohibition. The sentencing submissions focused my attention to the importance of general deterrence. At the time of this offence, the maximum sentence for dangerous driving causing death was 14 years – the highest sentence available in the *Criminal Code* other than a life sentence. Parliament recently increased the maximum punishment to life imprisonment: *An Act to amend the Criminal Code (offences relating to conveyances)* and to make consequential amendments to other Acts, SC 2018, c 21, s 15. The minimum sentence is a $1,000 fine.

[18] Since 2007, a conditional sentence has not been available for these offences.

[19] This extensive sentencing range is explained by the breadth of moral blameworthiness that can potentially give rise to a conviction for these offences. I note the conduct captured by this offence as well as dangerous driving causing bodily harm varies quite wildly. As such, the range of sentences available is also appropriately very wide – beginning with a monetary fine and ranging to many years in prison. Our Court of Appeal recently noted the futility of establishing a sentencing starting point for this offence, and that the range of appropriate sentences is very broad: ***R v Mbachu***, 2016 ABCA 270 at para 16.

[20] Both counsels highlighted aggravating and mitigating factors.

[21] Some of the aggravating factors addressed were not actually aggravating, but are elements of the offences. That includes the fact that Miss McNeil drove as she was falling asleep. That is a pronounced degree of deviation from driving norms, which is the essence of the offence here. The consequences to the victims are also elements of the offences themselves. They are particularly terrible, but fully caught by the guilty plea and are therefore not aggravating to the offence.

[22] Counsel for Miss McNeil identified that before the changes to the *Criminal Code* to eliminate the availability of conditional sentences, the facts here would most likely have attracted a community-based sentence. He provided cases to support his submission that 60-90 days in custody, served intermittently, is appropriate for this accused in this circumstance.

[23] In mitigation I find that Miss McNeil is a relatively youthful offender. She has the benefit of a strong upbringing and continued family support. She has shown significant and meaningful remorse, and has suffered serious personal consequences for her actions. She has also shown significant efforts to change her way of life – to be more aware and deliberate than she was before. She strives to continue to be a pro-social member of society.

Consideration of the accused's advanced pregnancy

[24] Miss McNeil's second child will be born in August. I understand that if Miss McNeil delivers her child while in custody, the infant will be apprehended by Child and Family Services immediately. Visitation between mother and child will be restricted to a few hours a week. I am informed the same rules will apply to offenders serving intermittent sentences as well.

[25] I turned my attention to how I could or should consider that factor when approaching sentencing. Some courts have shown leniency where exceptional personal circumstances, usually health-related, make incarceration unmanageable or inappropriate: ***R v Paradee***, 2013 ABCA 41 at para 18.

[26] In ***R v Dochniak***, [1980] AJ No 150, 25 AR 187 (Alta CA), the Alberta Court of Appeal lowered the pregnant offender's sentence for trafficking in heroin from two years less a day to 90 days intermittent. The Court held at para 6 that the principle of general deterrence, which is normally compelling in drug offences, "must be weighed [against] the societal loss of a well established and happy family group," and that "destruction of the family group might be an end result." The Court was unanimous that they "must go beyond the normal principles of sentencing and exercise a measure of compassion": at para 7.

[27] More recently, the Court of Appeal dismissed the Crown's appeal of an 18-month conditional sentence for cocaine trafficking in ***R v Bergen***, 2009 ABCA 69. The accused was five months pregnant at the time of the appeal. The Court emphasized in its conclusion at para 7 that "her impending motherhood is a critical factor here" and noted it, as well as the offender's efforts to turn her life around, made the circumstances "extremely unusual" and dismissed the Crown's appeal to increase the sentence.

[28] The accused's pregnancy was raised unsuccessfully by defence counsel in the dangerous driving causing bodily harm case of ***R v Hindes***, 1999 ABPC 91, varied 2000 ABCA 197. The original sentencing judge remarked that the accused "became pregnant while awaiting a sentencing she full well knew could result in a lengthy custodial term": at para 27. In the result, the Court ordered a custodial sentence of 15 months for the dangerous driving charge, and 12 months consecutive for leaving the scene.

[29] On appeal, even though Ms. Hindes had already delivered her child, this sentence was reduced to a 12-month conditional sentence for dangerous driving causing bodily harm and 6 months consecutive for leaving the scene. The Court emphasized the stigma that would attach "for this mother of young children in a community": at para 42, citing ***R v Proulx***, 2000 SCC 5 at para 105. It is not explicit that the sentence was reduced due to the accused's pregnancy however it was a significant and repeated factor cited by the Court of Appeal.

[30] I find that there is sufficient authority to consider the impact of a custodial sentence on the pregnancy of an offender when determining what is fit and proper in a particular circumstance.

Consideration of related sentencing cases to determine the appropriate range

[31] I was provided ***R v Mbachu***, cited above, from our Court of Appeal. That offender ran a stop sign and killed a driver of an oncoming vehicle. He had a significantly poor driving history and the sentencing judge put a great deal of weight on that history of correctional intervention. The offender drove without the accompaniment of a fully-licensed driver which was required by his learner's permit. On appeal the original sentence of two years in jail was upheld. The driver was found highly culpable for ignoring the requirement that he only drive with supervision, particularly after he had been sanctioned in the past for the same activity. The Court reiterated that the primary sentencing goals for these kinds of situations are deterrence and denunciation.

[32] I also considered the case of ***R v Grenke***, 2012 ABQB 198. In that case the driver had a record for speeding. The circumstances leading to the collision which caused death and bodily harm included his voluntary consumption of alcohol and deliberate speeding. My brother Justice Germain noted that a common sentence for dangerous driving causing death is 3-4 years. In this case he directed a sentence of 4.5 years total. He specifically noted that had he not had positive reports of the accused's prospects and pro-social efforts that sentence would have been 6 years.

[33] ***R v Zinter,*** 2018 BCSC 1837 involved as well the voluntary consumption of alcohol and distracted driving. The accused was driving in the rain, swerved into oncoming traffic, and refused a breath sample. He had a bad criminal record for driving and he callously fled the collision scene. The Court found his moral culpability to be very high and found that a fit sentence was 6 years.

[34] In ***R v McLennan,*** 2016 ONCA 732, the accused had a moderate record for speeding and alcohol was a factor in an accident where he missed a turn and killed his passenger, his own son. He was sentenced to 9 months in gaol and 2 years probation. The Court of Appeal of Ontario noted that this sentence was at the very low end of the range based on the culpability of the offender.

[35] In ***R v Shoyoye*** 2015 MBQB 72 the accused hit the gas pedal while driving an unfamiliar car and ran through a hair salon killing one person and injuring another. The sentencing Court there properly noted that "the function of a court is not to exact revenge." The sentencing judge "must assess the moral blameworthiness involved in each case," and "it is not sufficient to look only at the tragic consequences when determining the seriousness of a crime": at para 2, citing ***R v Eckert***, 2006 MBCA 6 at paras 15-16.

[36] The driver was found to have low moral blameworthiness and he was sentenced to 90 days served in jail intermittently, followed by probation which included community service work.

[37] In ***R. v. Carleton*** 2012 MBPC 54 there was evidence of erratic, pre-collision driving. The accused drove past a line of stopped cars at a pedestrian crossing and caused the death of a young woman. The court held that "a serious driving error, made in mere seconds, difficult to fathom, has led to the loss of [the deceased's] life and a criminal conviction for [the accused]. There is no basis for concluding that [the accused] intentionally decided to risk anyone's life when he made the fateful error" (at para 12). Prior to sentencing the accused to 30 days in gaol and probation, the Court stated that "it has been said that the sentence should constitute the minimum necessary intervention that is adequate in the circumstances. Sentences of imprisonment should be imposed only where necessary": at para 108, citing ***R v Priest***, [1996] OJ No 3369, 30 OR (2d) 538 (Ont CA).

[38] The only case provided to me by counsel that involved a driver deliberately driving while sleepy and then falling asleep at the wheel is ***R v Smith,*** 2008 ABQB 68. In that case the accused caused the death of an RCMP officer and caused bodily harm to another. The driver was operating a five-ton truck and drove it despite his fatigue. My brother Justice Macklin emphasized that the sentence must denounce that conduct, describing the conduct as a "driving time bomb," and deter the accused from taking the same risk again. He made lengthy comments about the lack of intention and imposed a conditional sentence of two years.

[39] The very recent Alberta Court of Appeal decision in ***R v Chowdhury***, 2019 ABCA 205 involves a guilty plea to one count of dangerous operation causing bodily harm. The accused attempted to pass a truck and struck an oncoming motorcyclist, who suffered an ankle fracture and concussion symptoms. The accused was a chartered accountant without a criminal record and a clean 20-year driving record. The sentencing judge refused to grant a conditional discharge. The Court granted the accused's request for a conditional discharge, noting at para 23 that this was a "rare and exceptional case where a conditional discharge [was] appropriate," and that this disposition was "in Mr. Chowdhury's best interests and not contrary to the public interest." Notably, the Court of Appeal held at para 11 that the sentencing judge erred in "over-emphasizing general deterrence and denunciation." I consider the following quote from paras 12-13 to have significant application to my considerations:

> We agree that general deterrence and denunciation are the primary objectives in determining a sentence for dangerous driving. However, general deterrence and denunciation are not the sole considerations.
>
> Objectives do not govern the sentence. Objectives provide guidance, particularly as to ordinal proportionality, assist in identifying a starting point or range and help define a framework for the sentence, but they do not compel a result. It is an error to assume that a certain sentence necessarily follows from the identification of the primary objectives in any particular case. It is over-simplification to assume that the objectives of denunciation and deterrence are only served by severity; conversely, that the objective of rehabilitation is only served by lenience.

[40] I considered other cases that specifically included a driver falling asleep while operating a motor vehicle to be the main cause of the dangerous driving. Many included other aggravating factors such as alcohol or drugs contributing to the driver's fatigue: ***R v Nahnybida***, 2018 SKCA 72; ***R v O'Brien***, 2001 BCSC 1453; ***R v Fleming***, [1995] OJ No 3055, 28 WCB (2d) 550; ***R v Currie***, 2018 ONCA 218; ***R v Whalen***, BCJ 1228, 10 WCB (2d) 169 (BCCA); ***R v Whitford***, [1985] AJ No 566, 37 MVR 51 (Alta CA). Many, like ***Smith***, above, are out of date as the offenders were sentenced to conditional sentence orders that were available to them at the time of sentencing: ***Smith,*** above; ***R v Buchanan***, [2002] OJ No 3115, 55 WCB (2d) 42 (Ont Sup Ct J); ***R v Reyes***, [2002] OJ No 5879, 53 WCB (2d) 24 (Ont Sup Ct J); ***R v Luk***, [2001] OJ No 841, 49 WCB (2d) 283 (Ont Sup Ct J); ***R v Boyle***, 2016 ONCJ 337.

[41] An Alberta case that did not include other criminal or serious aggravating factors, nor a conditional sentence is ***R v Marona,*** 2010 ABQB 588. The accused pled guilty to one count of dangerous driving causing death and one count of dangerous driving causing bodily harm. At the time of the offence, he was fatigued due to a lack of sleep and long work hours. However, that offender had an extensive history of disobeying court orders which made him ineligible for a conditional sentence order. The Court surveyed previous cases and noted that in general, sentences for offenders guilty of dangerous driving causing death received conditional sentences if their moral culpability was low. There, the accused received a gaol sentence totalling two years.

[42] An exceptional sentencing case, notably not binding on me, is ***R v Friesen***, 2011 BCPC 418. The accused pled guilty to dangerous driving causing death. Given the absence of any aggravating features, high level of remorse, and lack of a prior criminal or driving record, the Court agreed with both parties' joint submission of a $1,500 fine rather than incarceration. I find

the facts are very similar to those here, particularly regarding the low culpability of the drivers involved and the extreme impact on each of these offenders. I adopt the statement of Judge Hicks:

> Sentences in cases like this usually involve the balancing of concerns the community has for deterrence both general and specific, and denunciation, which often argue for a custodial sentence, balanced against rehabilitative and restorative principles which usually argue for a sentence served in the community but with proper attention to acknowledgement of harm done and acceptance of responsibility.

[43] I am also statutorily bound to consider whether the circumstances require me to deprive Miss McNeil of her liberty, or whether less restrictive sanctions may be appropriate: *Criminal Code,* s 718.2(d).

Conclusion

[44] No sentence, punishment or any other justice system response can change what has happened. The sentence I impose is not a measure of Taylor's life. It does not quantify the impact of the collision on Taylor, her parents or the rest of her family. It cannot return Taylor to her family, or mend her family's trauma. In passing this sentence I can only acknowledge her loss and the pain of her loved ones.

[45] Deterrence and denunciation are the paramount sentencing principles for these offences. They are not the only considerations. I find that rehabilitation is not a necessary factor for me to consider, as Miss McNeil is pursuing any rehabilitation she may require. Reparation of the loss is not available. I must consider mitigating and aggravating factors, including the moral blameworthiness of the offender. I must ensure that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. As well, I note that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and that all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or to the community are to be considered.

[46] An appropriate sentence recognizes all of the consequences of Miss McNeil's actions, but also balances the true culpability of Miss McNeil. While her choice to drive while deeply fatigued is the only identified cause of the collision, the end result does not measure her culpability. Causation is not the same as blameworthiness. I find that her culpability is in fact very low. She did not deliberately speed, or choose to impair herself with drug or alcohol. She made a judgment call about her own ability to make the drive and she was very wrong when she did so. I suspect she was careless and naïve and those factors were driven by her youthfulness and some self-focus. However, at no time did she make her choices out of malice or deliberation.

[47] Miss McNeil entered a guilty plea, accepted full responsibility and expressed significant remorse. I also find that she, too, will continue to suffer for the choices she made and damage she has done.

[48] I further find that gaol is not required to meet the goals of sentencing despite gaol being the typical result in cases of dangerous driving causing death even when moral culpability is low. In ***R v Summerton***, 2015 ABQB 326 at para 55 Madam Justice Pentelechuk (as she then was)

held that "... [a] properly crafted conditional sentence order can achieve the punitive aspect of sentencing so as to address the need for denunciation and deterrence." ***R v Knott***, 2012 SCC 42 (S.C.C.) addressed probation orders at para 43:

> The sentencing objectives set out by Parliament in ss. 718 to 718.2 of the Criminal Code are best achieved by preserving — not curtailing — a sentencing court's arsenal of non-custodial sentencing options. Probation orders, where available and appropriate, serve that purpose well.

[49] Taking those cases into account, the sentencing judge in ***R v Bassendowski***, 2018 ABPC 53 sentenced a young offender to probation for a break and enter into a dwelling house, noting the sentence to be exceptional for that type of offence.

[50] When I measure her moral culpability against those of the offenders in the authorities before me, I find that Miss McNeil would normally serve a sentence within the high intermittent range as recommended by defence counsel followed by probation. If it were available, a non-custodial sentence would also be appropriate and meet all of the goals of sentencing.

[51] However, in light of her pregnancy and imminent delivery, I exercise my discretion and sentence her at the very low range of fit sentences for her level of culpability despite the seriousness of her offences. In this particular instance a custodial sentence is not suitable here. I recognize that this is an exceptional finding in a case where the accused is guilty of causing both death and bodily harm while driving dangerously. Potentially separating this mother from her newborn will only add to the ongoing terrible consequences of this crash and not achieve any sentencing goals.

[52] General deterrence and denunciation can be achieved in these exceptional circumstances other than a gaol term. Miss McNeil's sentence should have the effect of punishment and restriction of her liberties; it should also require that she serve the public in an effort to repay in some small way for the harm done. That repayment should attempt to focus on the actual circumstances of this case.

[53] Miss McNeil I suspend the passing of sentence on you. You shall serve a period of three years' probation which will include the following terms. If you fail to complete the terms of your probation satisfactorily, you can be charged with additional criminal offences and/or brought back before me to be re-sentenced for these original offences.

[54] The terms of your probation are the following:

- keep the peace and be of good behaviour;
- appear in court when ordered by the court;
- tell the court or probation officer about any change of name, address or job;
- you will live only at an address and with those approved by your probation officer
- report to probation services within 48 hours of this order;
- report to a probation officer on a regular basis as directed and, in the manner, directed;
- attend and complete counselling as directed;
- for the first 12 months of your probation you will have a curfew of 8 p.m. to 8 a.m. daily. The only exceptions are for work or to meet other conditions of your probation with advance permission in writing from your supervisor, or for

medical emergencies. You must notify your probation officer within 24 hours of any medical emergency that removed you from your home outside of those hours;
- your supervisor has the discretion to make other exceptions on a case-by-case basis if requests are made in advance;
- you shall perform 200 hours of community service work within the first 30 months of this order; and
- you will not be found behind the wheel of any motorized vehicle for the first 24 months of this order.

[55] I recommend but do not require that the community service work should include public speaking to young people and other members of the public about these offences and the consequences of the choices you have made. That is the way in which I hope you are able to provide repayment to the community, if possible, to prevent others from making the same decision you made Miss McNeil. The restrictions on your liberty will affect your life and family for a lengthy period of time, and shall serve as the denunciatory part of your sentence.

[56] I also accept the Crown's submission that a two-year driving prohibition is appropriate, and that a DNA order is not.

Heard on the 30th day of May, 2019.
Dated at the City of Edmonton, Alberta this 19th day of June, 2019.

Avril B. Inglis
J.C.Q.B.A.

Appearances:

Euan Gilmour
for the Alberta Crown Prosecution Service

Ike Ulasi
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