Citation: *R.* v. *Marshall*, 2018 YKTC 39

Date: 20181211
Docket: 16-00681A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

MACKENZIE RAE MARSHALL

Appearances:
Leo Lane — Counsel for the Crown
Joni Ellerton — Counsel for the Defence

REASONS FOR SENTENCE

[1] Mackenzie Marshall was convicted after trial of having committed an offence contrary to s. 255(2.1) of the *Criminal Code*. In my Reasons for Judgment, ***R.*** v. ***Marshall***, 2018 YKTC 25, I found that on January 8, 2017, at approximately 6:00 p.m., Ms. Marshall rear-ended the vehicle being driven by Ms. Annette Taylor. Ms. Taylor was stopped, or in the process of stopping, at the intersection of 2nd and 4th Avenue in Whitehorse, as the traffic light was changing from green to red. I found that Ms. Marshall caused the accident.

[2] Ms. Marshall provided breath samples that resulted in blood alcohol readings of 250 and 230 mgs%. While the combination of Ms. Marshall causing the accident and her blood alcohol readings in excess of 80 mgs% were sufficient for the s. 255(2.1)

offence to be made out, I acquitted Ms. Marshall of the s. 255(2) offence, as I found that there was insufficient evidence that the accident was caused by Ms. Marshall being impaired by alcohol.

[3] As a result of the accident, Ms. Taylor experienced general soreness for a couple of weeks and attended at physiotherapy for approximately 10 weeks. Her sleep was interfered with and she continued to experience, at times, some soreness in her arm.

[4] The threshold for what constitutes "bodily harm" is very low; any interference with comfort that is more than transient and trifling is sufficient to constitute bodily harm. Ms. Taylor's injuries were sufficient to meet this threshold.

[5] This said, Crown counsel conceded that the injuries suffered by Ms. Taylor are at the low end of what constitutes bodily harm.

[6] The sentencing hearing proceeded on July 17, 2018 and my decision on sentence was reserved until November 1, 2018. On that date, having been provided prior notice by counsel, additional information was filed with respect to a significant change in Ms. Marshall's circumstances that counsel believed could possibly impact my sentencing decision. Therefore my decision on sentence was reserved until December 11, 2018.

[7] This is my decision on sentence.

Positions of Counsel

[8] Crown counsel submits that an appropriate sentence would be one of four or five months' custody to be followed by a two-year driving prohibition.

[9] Counsel stresses the sentencing principles of denunciation and deterrence.

[10] Counsel for Ms. Marshall submits that an appropriate sentence would be a fine, a period of probation, and a 12 to 18 month driving prohibition.

Circumstances of Ms. Marshall

[11] At the time of sentencing, Ms. Marshall had just turned 23 years of age. She was 21 at the time of the offence.

[12] Ms. Marshall has no prior criminal convictions or involvement with the criminal justice system. Her driving abstract was filed. She was convicted in September 2015 of speeding in a construction zone. She has two subsequent speeding convictions in April and August of 2016.

[13] Ms. Marshall had not had a previous alcohol abuse problem, and has abstained from the consumption of alcohol since the offence date.

[14] By all accounts, Ms. Marshall, who was raised on a farm in the area of Vulcan Alberta, has been a pro-social member of the community, with involvement in numerous athletics and social events. She was a good student and worked to graduate early. She attended Lethbridge Community College and graduated with a certificate in Early Childhood Education.

[15] Ms. Marshall returned to Vulcan from Lethbridge after receiving her Certificate where she worked in a daycare facility for approximately one year. A support letter was provided from a fellow-employee at the daycare centre that was very positive about the commitment to and quality of Ms. Marshall's employment there.

[16] Ms. Marshall left this employment to move to Whitehorse approximately one year before the offence date. She did so to separate herself from a relationship in which her partner was physically and emotionally abusive towards her. There was police involvement in her relationship situation. Her family assisted her in her move to Whitehorse, believing it would be beneficial to her in extricating herself from this relationship.

[17] Ms. Marshall was employed while she was residing in Whitehorse. However, she was struggling with the aftermath of her relationship, and doing so without the family supports that would have been available to her in Alberta. Ms. Marshall was also struggling with significant issues related to anxiety and depression, which were diagnosed in 2014. She is currently taking medication for these issues.

[18] When she was in Whitehorse, Ms. Marshall began to abuse alcohol for the first time in her life.

[19] Since committing this offence, Ms. Marshall has returned home to Vulcan, where she has resumed full-time employment at the daycare centre. Her family supports are located in Vulcan.

[20] As of the date of the sentencing hearing, Ms. Marshall was in the first trimester of a pregnancy. Due to her anxiety issues, Ms. Marshall was being monitored carefully by her physicians during her pregnancy. She had attended at four associated medical appointments in the two weeks prior to the sentencing hearing.

[21] However, I was provided information on the November 1, 2018 date set for decision, that Ms. Marshall had a medical crisis which required surgical intervention and resulted in her pregnancy being terminated. This occurred towards the end of July, 2018.

[22] Ms. Marshall had been meeting regularly with her physician in order to manage her depression and anxiety issues, prior to the medical crisis. The information provided on November 1, 2018 is that Ms. Marshall has been suffering from increased anxiety and depression following the termination of her pregnancy.

[23] The letters of support from Ms. Marshall's co-worker and her grandparents describe this as an out-of-character act and expressed shock at hearing of it.

[24] Ms. Marshall does not have the mitigating factor of a guilty plea. She was, however, cooperative both before and during the investigation.

Analysis

[25] The range of sentence for a s. 255(2.1) offence is from a fine of not less than $1,000, to a period of custody not to exceed 10 years. There is a mandatory driving prohibition of a minimum of one year.

[26] A conditional sentence is no longer a sentencing option for a s. 255(2.1) offence.

Case law

[27] In ***R.*** v. ***Lommerse***, 2013 YKCA 13, a sentence imposed on a first-time offender on a guilty plea to a s. 255(2.1) offence was overturned on appeal.

[28] The circumstances were that Mr. Lommerse and some friends were intoxicated by alcohol in the early morning hours of July 21, 2012. They were in the parking lot of the Marsh Lake Marina. No one else was present at the time. Mr. Lommerse was driving a four-wheel drive recreational vehicle (the "Buggy"), and doing what are called "burnouts" and "doughnuts".

[29] One of the friends was a passenger on the Buggy. The other friends were watching behind boards.

[30] Mr. Lommerse's passenger asked him to slow down but Mr. Lommerse did not do so. Mr. Lommerse lost control of the Buggy and it rolled over, pinning the passenger beneath it. The passenger suffered a broken rib and punctured intestine. Surgery was required and the victim spent six days in the hospital. He had fully recovered from his injuries not long after the accident.

[31] As the sentencing judge, I imposed a $1,500 fine, a period of probation of 18 months and an 18-month driving prohibition.

[32] On appeal, the Court substituted a sentence of four months' custody and maintained the 18-month driving prohibition. In para. 19 the Court stated: "In my view,

the judge understated the risks inherent in Mr. Lommerse's decision to drive while impaired, and consequently, understated the level of moral culpability involved".

[33] In para. 20, the Court further stated: "…the ATV was an inherently unstable vehicle with limited protection for its occupants. Further, the nature of the driving – which was intended to provide thrills for the vehicle occupants – made impaired driving particularly risky".

[34] In paras. 15 and 21, the Court reinforced the general range of sentencing in the Yukon for ss. 255(2) and (2.1) offences as being between four to 10 months' custody.

[35] In para. 16, the Court noted favourably the comments made at the time of sentence as to the role of denunciation and deterrence in sentencing offenders for impaired driving where bodily harm or death results.

[36] In my original sentencing in ***Lommerse***, I cited several authorities in which custodial dispositions were not imposed in cases where an impaired driving offence resulted in bodily harm, and where fines and probation orders were instead imposed (***R.*** v. ***Henderson***, 2012 MBCA 9; ***R.*** v. ***Audy***, 2010 MBPC 53; and ***R.*** v. ***Riddell***, 2011 SKQB 378).

[37] The Court of Appeal, in overturning the sentence imposed in ***Lommerse***, did not address these cases where non-custodial dispositions were imposed, focusing rather on the extent to which I understated Mr. Lommerse's moral culpability in imposing a non-custodial disposition.

[38] However, notwithstanding the general range of custodial disposition for s. 255(2.1) offences, non-custodial dispositions remain an available option in appropriate circumstances. Counsel for Ms. Marshall provided several cases in support of non-custodial dispositions:

[39] ***R.*** v. ***Weisberger***, 2009 SKPC 107; ***R.*** v. ***Murray***, [1997] O.J. No. 6196, (Ont. Ct. J. Gen. Div.); ***R.*** v. ***Riddell***, 2011 SKQB 378; ***R.*** v. ***Rowan*** (2004), 190 O.A.C. 342; ***R.*** v. ***Sittingeagle***, 2016 ABPC 97; and ***R.*** v. ***Banta*** (1996), 77 B.C.A.C. 28 were all cases in which non-custodial dispositions were imposed for impaired driving cases in which bodily harm resulted.

[40] In ***R.*** v. ***Voong***, 2015 BCCA 285, the Court noted in para. 43 that:

> …Thus, imposing conditions for the protection of the community may have a deterrent and denunciatory effect in addition to a rehabilitative effect. Put another way, a condition need not be punitive in order to achieve deterrence or denunciation. …

[41] The Court had been commenting in paras. 39-42 on the deterrent effect of the "*Sword of Damocles"* hanging over the offender's head when a suspended sentence is imposed, a sentence no longer available for a s. 255(2.1) offence. However, the comments in para. 43 were considered applicable to terms attached to a probation order regardless of whether it is attached to a suspended sentence or not.

[42] ***Lommerse*** cannot stand for the proposition that an offender's moral culpability in deciding to drive while impaired is sufficient, <u>in and of itself</u>, to require that a custodial disposition be imposed in all cases where bodily harm results, and that a non-custodial disposition cannot or should not be imposed. Such a proposition would result in the

creation of a sentencing starting point in which a custodial disposition is required, and effectively nullify the availability of non-custodial dispositions that remain a legislative option in the *Code*.

[43] In ***Lommerse*** the Court found that it was the particularly risky thrill-seeking nature of the driving while impaired that made a non-custodial disposition inappropriate.

Application to Ms. Marshall

[44] The only aggravating circumstance in this case is the very high blood alcohol reading of Ms. Marshall.

[45] Mitigating circumstances are found in the fact that this is her first criminal offence and she was cooperative at the scene of the offence.

[46] I do not have the mitigating factor of a guilty plea. This said, given the potential consequences of a conviction to ss. 255(2) and (2.1) offences, even on a guilty plea, including the lack of availability of a conditional sentence, and in light of her personal circumstances, I am not surprised that Ms. Marshall chose to take the matter to trial in order to advance a *Charter* argument.

[47] Further, I found that the evidence did not support a finding that the accident resulted from Ms. Marshall's impairment. Notwithstanding her high blood alcohol readings, there was little in her conduct or appearance that indicated she was impaired by alcohol. The circumstances were such that momentary inadvertence could have been an explanation for the accident. While Ms. Marshall did not testify at trial, and thus I heard no evidence from her explaining the cause of the accident, in her sentencing

submissions counsel for Ms. Marshall stated that her client's explanation was that the traffic signal was green. She momentarily turned her head to look away and when she looked back the light had changed and she was unable to stop in time. This said, the accident was clearly caused by Ms. Marshall's improper and inattentive driving. I was unable to determine, however, that the accident was caused by Ms. Marshall being impaired. This may seem odd, given the high blood alcohol readings. However, on the evidence before me I was unable to be satisfied beyond a reasonable doubt, as required, that the impairment of Ms. Marshall caused the accident.

[48] A further consideration is the low level of bodily harm that resulted. Certainly, it would not at all be unusual for cases where the bodily harm is at the low end of the threshold, such as here, for there to be a guilty plea to an impaired driving simpliciter conviction (see ***R.*** v. ***Hagwood***, 2017 YKSC 48). As counsel for Ms. Marshall pointed out, she was initially only charged with impaired driving simpliciter and it was later that the more serious charges that included the element of bodily harm were laid.

[49] I consider the circumstances to be different than in ***Lommerse***. As the Court of Appeal noted, Mr. Lommerse embarked on a dangerous pattern of driving on an inherently unstable recreational vehicle. He deliberately chose to drive in a manner that exposed the victim to the risk of serious injury, and ignored the victim's entreaties to slow down. It was in such circumstances that the Court of Appeal stated that Mr. Lommerse's moral culpability was sufficiently high that a custodial disposition was required.

[50] Those are not the circumstances in the case before me. Every individual who commits a s. 255(2.1) offence is morally culpable for deciding to drive a vehicle after consuming alcohol in a quantity that results in the individual's blood alcohol level being in excess of 80 mgs%. Ms. Marshall certainly has a significant level of moral blameworthiness in deciding to drive after consuming enough alcohol to have the high blood alcohol level that she did. Her moral culpability is higher than it would be if her blood alcohol readings had been significantly lower. However, I consider her moral culpability to be less than that of Mr. Lommerse. Ms. Marshall did not engage in a deliberate pattern of driving that exhibited reckless indifference to the risks associated with the driving.

[51] I have considered the personal circumstances of Ms. Marshall, before, at, and after the time of the offence. I am satisfied that this was an out-of-character offence not in keeping with the pro-social life she led before this day. The offence occurred in a time of significant stress for Ms. Marshall and in an environment where she lacked the support that would have enabled her to deal with her stressful situation in a more appropriate way. Since the offence, Ms. Marshall has taken positive steps to ensure that she maintains her mental and emotional health. Based upon her actions, I do not consider her to be a risk for the commission of further offences.

[52] I am satisfied that, in accord with the purpose and principles of sentencing, including the need to denounce and deter Ms. Marshall and others from impaired driving offences, that in these circumstances a custodial disposition is not required. If one is not required then one should not be imposed.

[53] I had concluded, prior to being provided the information regarding Ms. Marshall's change in circumstances, that a custodial disposition was not required in this case. While I am aware that the medical crisis in Ms. Marshall's life is significant in its impact on her, this change does not lead me to conclude otherwise.

[54] Ms. Marshall will be subject to a fine in the amount of $2,000 dollars plus a fine surcharge of $600. She will have 12 months' time to pay this amount.

[55] She will be placed on a probation order for a period of two years. The terms of the probation order will require her to:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Notify the Probation Officer, in advance, of any change of name or address, and, promptly, of any change in employment or occupation;

4. Report to a Probation Officer immediately and thereafter, when and in the manner directed by the Probation Officer;

5. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;

6. Attend and actively participate in all assessment and counseling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer for any issues identified by your Probation Officer, and provide consents to release information to your Probation Officer regarding

your participation in any program you have been directed to do pursuant to this condition;

7. In the event that you choose not to take medication in the manner that has been prescribed for you by a physician for the treatment of depression and anxiety you are to inform your Probation Officer within 48 hours.

8. Upon request, you will provide your Probation Officer with consents to release information from your medical practitioner in regard to any treatment you have been, or are receiving, for depression and anxiety.

9. Perform 40 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate. Any hours spent in programming may be applied to your community service at the discretion of your Probation Officer. This community service work is to be completed within nine months of the commencement of this order.

[56] Ms. Marshall will also be subject to a driving prohibition for a period of 15 months. I consider this to be appropriate in consideration of her residency and other personal circumstances.

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COZENS T.C.J.