

Citation: *R. v. Tibbo*, 2020 YKTC 18

Date: 20200619
Docket: 18-10025
Registry: Watson Lake
Heard: Watson Lake
and Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

CRYSTAL ANNE TIBBO

Appearances:
Lauren Whyte
Joni Ellerton

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

Introduction

[1] CHISHOLM C.J.T.C. (Oral): After trial, I found Crystal Anne Tibbo guilty of three *Criminal Code* charges, namely that: she had care and control of a motor vehicle while her ability to operate it was impaired by alcohol (s. 253(1)(a)); she had care and control of a motor vehicle while her blood alcohol level exceeded the legal limit (s. 253(1)(b)); and she failed or refused, without reasonable excuse, to comply with a demand to provide a sample of her breath into an approved screening device (s. 254(5)). These offences occurred on March 30, 2018, and the Information was sworn on September 11, 2018.

[2] I conditionally stayed the s. 253(1)(a) charge on the basis of the rule against multiple convictions (see *R. v. Kienapple*, 1975 SCR 729).

[3] The Crown proceeded by way of summary conviction in this matter. Ms. Tibbo was not served with a Notice of Intention to Seek Greater Punishment.

Summary of the Facts

[4] This incident occurred approximately 30 kilometres west of Watson Lake. Ms. Tibbo went off the road while driving a motor vehicle on a section of the Alaska Highway with generally light traffic. In fact, having lived in the Yukon for over 20 years, I take judicial notice of the fact that the Alaska Highway is not, in general, what one could qualify as a busy highway, especially in the winter. The police were dispatched to this single vehicle accident. Upon arrival at the scene, the investigating officer noted that Ms. Tibbo was yelling, screaming, and being combative while Emergency Medical Services personnel tried to remove her from the vehicle.

[5] She was transported to Watson Lake by ambulance and ultimately failed to provide a breath sample into an approved screening device. The police later obtained a warrant to seize a blood sample drawn by medical personnel. An analysis of the sample of her blood revealed that her blood alcohol concentration was extremely elevated, approximately five times the legal limit.

Gravity of the Offence

[6] Courts have consistently held that denunciation and deterrence are important sentencing principles in impaired driving cases. In *R. v. Lacasse*, 2015 SCC 64, the

Supreme Court of Canada noted that “the increase in the minimum and maximum sentences for impaired driving offences shows that Parliament wanted such offences to be punished more harshly” (para. 7).

[7] Impaired driving is an inherently dangerous activity and places the lives of other citizens at risk. As stated in *R. v. Van Bibber*, 2010 YKTC 49, at para. 69:

...Impaired driving offences are also unique in the circumstances of the individuals who commit the crime of impaired driving and that many of these offenders come from within the general population and are not restricted to a “criminal element or criminally predisposed offender.” ...

Circumstances of the Offender and her degree of Responsibility

[8] Ms. Tibbo is 45 years of age. She is of Kaska descent and is a member of the Liard First Nation. Although she was a resident of the Lower Post/Watson Lake region for most of her life, she resides in Whitehorse since the commission of the offence.

[9] Ms. Tibbo’s criminal record consists of two prior convictions for drinking and driving offences, one in 1994 for which she received a fine and a four-month driving prohibition, and the other in 1997 when she was sentenced to a 30-day conditional sentence, six months of probation, and a six-month driving prohibition.

[10] The Crown does not dispute that *Gladue* factors are present in this case. Ms. Tibbo’s father attended residential school in Lower Post where he was abused physically, emotionally and sexually. This residential school was notorious for the abuse that its students endured. Although it closed in the mid-70s, its negative impact is nonetheless apparent today.

[11] Ms. Tibbo's father was a violent alcoholic, and she has early memories of getting in between her mother and father when he was physically and verbally abusing her mother. He shot himself in the family home when Ms. Tibbo was eight years old. Regrettably, Ms. Tibbo recalls seeing her father's blood on the walls where he took his own life.

[12] On the day of the offence before the Court, Ms. Tibbo visited the family of an ex-partner of hers who had just died suddenly and unexpectedly. She consumed alcohol prior to seeing the family and continued to do so subsequent to that meeting.

[13] Alcohol abuse has plagued Ms. Tibbo from an early age. She has also struggled with suicidal ideations for much of her life. She suffers from a high level of anxiety.

[14] I am advised that since the incident before the Court, she has sought assistance from Alcohol and Drug Services for underlying issues, and has abstained from the consumption of alcohol. She has learned that her struggles with alcohol were a coping mechanism for her early childhood trauma. She is committed to maintaining her sobriety and attends Alcoholics Anonymous, when necessary, to obtain additional support.

[15] As a result of the matter before me, she experienced a temporary breakdown in her relationship with her adult son. However, she has worked to successfully repair that relationship. On another positive note, she is a recent grandmother.

[16] Until early April of this year, she was gainfully employed as an office administrator in the private sector. She was laid off as a result of the COVID-19

pandemic, but has been informed that her employer may be able to rehire her in the near future.

[17] In February 2020, Ms. Tibbo suffered a minor stroke and has been advised that she is at a higher risk of experiencing another. Also, she has recently been pre-diagnosed with sleep apnea which can elevate the risk of stroke or heart attack. Her husband suffers from type 1 diabetes, and Ms. Tibbo assists him in his maintenance and care. Mr. Tibbo describes their relationship as a strong one and he is very supportive of his wife.

[18] Ms. Tibbo is remorseful for her actions and has apologized to the first responders who assisted her at the scene of this incident.

Sentence

[19] The Crown seeks a global sentence of five months imprisonment and a three-year driving prohibition, whereas the defence seeks a conditional sentence in the range of three to five months, plus a period of probation, and a one to two-year driving prohibition.

[20] The principle of proportionality is central to the sentencing process (*R. v. Nasogaluak*, 2010 SCC 6, at paras. 40 and 41). Section 718.1 of the *Code* mandates that a sentence be “proportionate to the gravity of the offence and the degree of responsibility of the offender”.

[21] It is also important to consider the principle of parity, that offenders in similar circumstances who commit similar offences should receive similar sentences.

[22] Nonetheless, sentencing is a highly individualized process that takes into account the nature of the offence and the offender, as well as the principles of sentencing (see *Lacasse*, at para. 54; *R. v. Proulx*, 2000 SCC 5, at para. 82; *Nasogaluak*, at para. 43; and *R. v. Suter*, 2018 SCC 34, at para. 4).

[23] Also, pursuant to (s. 718.2(e)), I am bound to consider all available reasonable alternatives to incarceration, with particular attention to Ms. Tibbo's circumstances as an Aboriginal offender.

[24] The Court in *R. v. Ipeelee*, 2012 SCC 13, at para. 59, reminded us that:

...s. 718.2(e) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. ...

[25] The sentence for the offence before me must express denunciation and deterrence. It must not only deter Ms. Tibbo from offending again, but must send a message to those in the community that this type of offence will not be tolerated and will be dealt with severely. I must emphasize that Ms. Tibbo's blood alcohol reading was dangerously high, at between 411 and 436 mg%.

[26] As the same time, the principle of rehabilitation is still of significant importance.

The Court, in *Lacasse*, reiterated this sentencing principle at para. 4:

One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in

the world, and it helps the courts impose sentences that are just and appropriate.

[27] Rehabilitation is not to be swept aside solely because the offence is of a serious nature. In *R. v. Joe*, 2017 YKCA 13, a drinking and driving case, the Court of Appeal reduced the sentence of a repetitive impaired driving offender. It stated at paras. 87 and 88:

87 In my view, the judge erred in his consideration of the objective of assisting in the rehabilitation of Mr. Joe (*Criminal Code*, s. 718(d)). The sentencing judge on this aspect of the matter concluded so (at para. 10):

Without any doubt whatsoever the principles of sentencing applicable to these cases are denunciation, deterrence and separation from society. Rehabilitation takes a back seat and is of little concern except insofar as it may piggy-back on specific deterrence.

88 "Takes a back seat" in respect of the potential for rehabilitation is the same phrase used by this sentencing judge in *R. v. Menicoche*, 2015 YKTC 34. On appeal (2016 YKCA 7), this Court found that in so concluding, the judge failed to give proper or adequate weight to the sentencing objective of rehabilitation and that this was an error in principle (para. 55). I so conclude in this case as well.

[28] It must also be noted that a successful rehabilitation process may, in some cases, be responsive to the principle of specific deterrence (*R. v. Walsh*, 2011 ONCA 325, at para. 13; and *R. v. Mathieson*, 2018 YKSC 49, at para. 34).

[29] As I will expand upon below, Ms. Tibbo has made significant efforts to deal with her abuse of alcohol and the reasons underlying it. It must also be noted that her last conviction was 21 years prior to the matter before the Court. Although her two previous convictions were also drinking and driving offences, they were close in time and can be

distinguished from the offender in *R. v. Mitchell*, 2020 YKCA 2, whose criminal history of drinking and driving spanned four decades.

[30] In summary, the aggravating factors in this case are Ms. Tibbo's extremely high blood alcohol level; the fact that the blood alcohol concentration was well above the then statutorily aggravating blood alcohol level of 160 mg%; and her criminal record consisting of two drinking and driving offences.

[31] The mitigating factors include the changes that Ms. Tibbo has made in her life since this incident, namely her sobriety and the counselling in which she has engaged. She also expresses a desire to continue to work on her personal issues through treatment and counselling. She not only accepts responsibility for the offences, but is remorseful for her actions.

[32] On balance, in the circumstances of this offence and offender, I am in agreement with counsel that a period of incarceration is warranted. In my view an appropriate sentence is in the range of four to five months' imprisonment plus a period of probation.

Appropriateness of a Conditional Sentence

[33] I now turn to Ms. Tibbo's request for a conditional sentence. Certain pre-conditions must be met for an offender to be eligible for a conditional sentence. In this case, as notice has not been filed, the offence is not punishable by a minimum term of imprisonment. A court must also consider whether the safety of the community would be endangered by the offender serving a sentence in the community, and whether a

conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in subsections 718 to 718.2.

[34] In terms of the safety of the community, the fact that Ms. Tibbo is no longer consuming alcohol is an important factor. She is also making efforts to explore and overcome the underlying factors that led to her struggles with alcohol. She is motivated to remain sober. Additionally, Ms. Tibbo will be subject to a driving prohibition, and importantly, has never been convicted of contravening an order of the Court. I am satisfied that if Ms. Tibbo continues with counselling, which can be a requirement of a conditional sentence, the safety of the community would not be endangered by the imposition of a conditional sentence.

[35] Turning to the next criterion, the question to be answered is whether a conditional sentence for this offence and this offender would be consistent with the fundamental purpose and principles of sentencing. As mentioned, I am cognizant of the principle of proportionality. The Supreme Court of Canada has stated that “determining a proportionate sentence is a delicate task” (*Lacasse*, at para 12).

[36] That pronouncement is evident in the matter before me, since the circumstances of the offence are very serious, while at the same time, the moral blameworthiness of Ms. Tibbo is reduced. This reduction is because her alcohol addiction, which is inextricably linked to the offence that she committed, is rooted in intergenerational trauma that stems from the residential school system.

[37] In *R. v. Fordyce*, 2004 YKSC 36, the Court considered the appeal of a repeat drinking and driving offender who sought to have the Court overturn a jail sentence and replace it by a conditional sentence served in the community.

[38] Veale J. (as he then was) spoke to the principle of denunciation:

28 I have no difficulty accepting the principle that denunciation is an important factor when dealing with drinking and driving offences. I fully agree with the statement that every drinking driver is a potential killer.

29 However, I am also of the view that incarceration is not the only means to denounce drinking and driving and deter others from drinking and driving. In my view, the sentencing Judge has erred by not considering the particular circumstances of this offender and this offence when he assessed the safety of the community and the fundamental purpose and principles of sentencing.

[39] Mr. Fordyce had appealed the term of imprisonment imposed by the sentencing judge. He had an unenviable record, with five related drinking and driving offences. Those convictions spanned a period of 17 years, between 1973 and 1990. The Crown proceeded summarily, did not file a Notice to Intention to Seek Greater Punishment, and proposed a four to six-month custodial sentence.

[40] On appeal, the Court recognized that Mr. Fordyce, like Ms. Tibbo, had remained sober since the date of the offence. He had also become active in Alcoholics Anonymous, and was motivated to remain sober.

[41] In granting the appeal, the Court relied on the decision in *Proulx*, in rejecting the notion that certain offences are presumed to be ineligible for a conditional sentence.

[42] Veale J. stated at para. 31:

Mr. Fordyce has in fact made some significant efforts to change his life-style. Incarceration, unfortunately, does nothing to create the Alcoholics Anonymous support system that he and the safety of this community so badly need.

[43] In *Proulx*, Lamer C.J. stated at para. 105 and 106:

105 The stigma of a conditional sentence with house arrest should not be underestimated. Living in a community under strict conditions where fellow residents are well aware of the offender's criminal misconduct can provide ample denunciation in many cases. In certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison.

106 The amount of denunciation provided by a conditional sentence will be heavily dependent on the circumstances of the offender, the nature of the conditions imposed, and the community in which the sentence is to be served. ...

[44] I take judicial notice of the fact that serving a conditional sentence in the Yukon attracts a substantial level of supervision and intervention. I am also mindful of the principle that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances (s. 718.2(d)).

[45] In my view, despite the seriousness of these offences, denunciation, as well as specific and general deterrence can be achieved through the imposition of a conditional sentence with strict conditions.

[46] In the result, Ms. Tibbo, for both the refusal and over .08 offences, I sentence you to concurrent terms of imprisonment of five months, however those sentences will be served conditionally. The terms of the conditional sentences are as follows:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Report to a conditional sentence Supervisor within two working days, and thereafter, when required by the Supervisor and in the manner directed by the Supervisor;
4. Remain within the Yukon unless you have written permission from the Supervisor;
5. Notify the Supervisor, in advance, of any change of name or address, and promptly, notify the court or the conditional sentence Supervisor of any change of employment or occupation;
6. Take such alcohol assessment, counselling and treatment, including attendance at Alcoholics Anonymous as directed by the conditional sentence Supervisor, including any residential treatment if so directed; and provide consents to release information to your Supervisor regarding your participation in any program that you have been directed to do pursuant to this condition;
7. Not possess or consume alcohol or marijuana or illegal drugs that have not been prescribed for you by a medical doctor;
8. Not to attend any premises whose primary purpose is the sale of alcohol, including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;

9. Remain in your residence or on your property at all times; except with the prior written permission of your Supervisor; except for the purposes of employment including travel directly to and directly from your place of employment; except for medical appointments. You must answer the door or the telephone to ensure you are in compliance with this condition. Failure to do so during reasonable hours will be a presumptive breach of this condition;
10. Not drive a motor vehicle at any time.

[47] Following the completion of the conditional sentence of imprisonment you will be subject to a probation order for a period of seven months.

[48] The statutory terms of a probation order apply. All other conditions will be the same as outlined in the conditional sentence order, except that there will be no house arrest condition.

[49] Additionally, I impose a two-year driving prohibition. I order that Ms. Tibbo may be registered in an alcohol ignition interlock device program after having served one year of the driving prohibition.

[DISCUSSION WITH RESPECT TO CONDITIONS]

CHISHOLM C.J.T.C.