

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

REX

v.

ABDELLA KASSIM JEMALLO

Appearances:
Amy Porteous
Jennifer Budgell

Counsel for the Territorial Crown
Counsel for the Defence

This decision was delivered from the Bench in the form of Oral Reasons. The Reasons have since been edited without changing the substance.

REASONS FOR SENTENCE

[1] PHELPS C.J.T.C. (Oral): Abdella Jemallo is before the Court for sentencing on one count, being that:

On or about the 13th day of February in the year 2024 at or near the City of Whitehorse in the Yukon Territory, did operate a motor vehicle on a highway at a unreasonable rate of speed, contrary to Section 137 of the Motor Vehicles Act.

[2] Section 137 of the *Motor Vehicles Act*, RSY 2002, c. 153 (“MVA”) states that:

Despite any speed limit prescribed by or pursuant to this or any other Act, no driver shall drive at any rate of speed that is unreasonable having regard to all the circumstances of the

case, including, without restricting the generality of the foregoing,

- (a) the nature, condition, and use of the highway;
- (b) the atmospheric, or other conditions that might affect the visibility of the driver or the control of the vehicle;
- (c) the amount of traffic there is, or that might reasonably be expected to be, on the highway; and
- (d) the mechanical condition of the vehicle or any equipment of the vehicle.

[3] An Agreed Statement of Facts was filed, including 18 paragraphs which states, as follows:

1. On Tuesday, February 13, 2024, Abdella Kassim Jemallo was operating a taxi in Whitehorse, Yukon.
2. Mr. Jemallo had a valid Class 4 driver's license, which is the class required of taxi drivers, but his Vehicle for Hire permit had expired a week earlier.
3. Shortly before 9:00 a.m., he picked up a passenger in the Riverdale neighbourhood of Whitehorse, crossed the bridge into the downtown area and continued northward along 2nd Avenue, travelling in the right-hand lane.
4. As he drove along 2nd Avenue, the lighting conditions were consistent with the norm for civil twilight, with the surroundings far from dark but with 40 to 45 minutes yet to go before the sunrise time.
5. There were a number of other vehicles on the road.
6. 2nd Avenue is equipped with streetlights as well as signs marking the 40 km/hr speed limit. It contains a significant number of pedestrian crosswalks that are marked with signs and paint but not equipped with lights.
7. The in-car video system shows Mr. Jemallo yawning, rubbing his eyes, blinking slowly and rolling his neck.

8. As he passed Strickland Street, he began to accelerate and was going 60 km/hr by the time he passed the corner of 2nd Avenue and Alexander Street.
9. Virginie Bourque, who was 32 years old, was at Yukonstruct's Northlight Innovation Centre that morning and left the building with her dog as Mr. Jemallo's cab came down the street. She initially walked north along the sidewalk.
10. Ms. Bourque and her dog then stepped into the road in front of the Yukon Centre Mall, with the intention of crossing 2nd Ave from West to East.
11. A reconstruction report established that Mr. Jemallo's car was 214 metres south of Ms. Bourque at the time.
12. Ms. Bourque was between intersections, and not at one of the crosswalks. Her route angled slightly as she crossed the road.
13. Mr. Jemallo did not notice her and continued to accelerate.
14. He hit her while going 67-71 km per hour. At the time of the impact, she was looking away from his vehicle.
15. Her body was thrown at least 35 metres.
16. Mr. Jemallo continued northbound and rear-ended two vehicles that were stopped at the next light, at 2nd Avenue and Ogilvie Street. His vehicle came to a stop 61 metres after the point of impact.
17. Ms. Bourque sustained serious injuries, including fractures to her pelvis and spine and a severe traumatic brain injury that caused permanent neurological damage. She is now incontinent, cannot move her right side and can no longer speak. She communicates via a keyboard, which she has difficulty using with her left hand. She is expected to remain in a care facility for life.
18. The accident reconstructionist found that had Ms. Bourque crossed the road in a perpendicular manner, she would have made it to the sidewalk before Mr. Jemallo's car reached her, despite its

speed. He also found that had Mr. Jemallo been going the speed limit, his car would have still been 86m away from the point of impact when Ms. Bourque reached that point. Both facts are admitted.

[4] The excessive speed, the amount of traffic on the road as would reasonably be expected at that time of day, and the use of the highway, which is well known for jaywalkers, violated s. 137 of the *MVA*, specifically ss. (a) and (c).

[5] There was a Victim Impact Statement filed, and it was read on the record by Ms. Busque, Ms. Bourque's partner, who attended court for that purpose. It is clear from her emotion and the contents of the statement that Ms. Bourque is loved greatly and has suffered significant loss.

[6] I note the following excerpts from the Victim Impact Statement:

She was a remarkable friend to so many - always showing up when it mattered most. As a partner, she was caring, supportive, and deeply loving. She was our rock; when she was around, you just knew everything would be okay. There was a calm and comfort about her presence that grounded everyone around her. She was strong. She was beautiful. Ambitious and brilliant. She had already become a director at her company by the age of 31.

That accident stole her voice, her body, her mind, her future. At 33 years old, she depends on everybody for human basic needs, and that's for the rest of her life. She will not walk or talk or eat again.

[7] The statement goes on, and I quote from the second page:

I can't begin to describe the pain she and we've (being family and friends) endured. We've spent the last year going from hospital to hospital, hoping that she would wake up and function again. We've put our career, our incomes, our life aside so she could get the best care and support. Everyday

hurts. It hurts to see her trapped in a body that doesn't work anymore, it hurts to see her suffer, it hurts to see that her young adult years were taken away from her, it hurts to grieve someone who will forever be changed, and it hurts to see our future completely vanished. ...

[8] The sentence that Mr. Jemallo receives from this Court will pale in comparison to the loss suffered by the accident.

[9] The investigation into this incident resulted in charges under the *MVA*, meaning that the evidence reviewed did not amount to criminal conduct. The available sentence is limited to that available for a *MVA* offence. It must also be within the range of sentences given to offenders for similar offences and similar outcomes.

[10] A casebook with three Yukon cases for motor vehicle offences resulting in death were filed, the first one being *R. v. Matta*, 2010 YKTC 128. The facts are briefly set out in that decision at paras. 1 to 4, as follows:

1 Dr. Vivian Matta was convicted after trial of the offence of careless driving contrary to s. 186 of the *Motor Vehicles Act*, R.S.Y. 2002 c. 153.

2 The facts are set out in my Reasons for Judgment and need not be extensively repeated. Suffice it to say that Dr. Matta drove past three cars that were stopped at a marked crosswalk without slowing down or averting to the possibility that there was a pedestrian in the crosswalk. Dr. Matta struck the pedestrian without ever seeing her. The pedestrian, Becky Lynn Shank, who was only 26 years old, was gravely injured and died shortly afterward. Becky was in Whitehorse to be the maid of honour at her best friend's wedding, which was to take place four days after she died.

3 The extensive and heart-rending victim impact statements that were filed reveal just how devastating Becky's death has been to her own family, her common-law partner, her best friend, her friend's family, and many others.

4 Vivian Matta is a medical doctor who practises in Whitehorse. She is 40 years of age, married with two children. Prior to this incident her driving record was unblemished.

[11] The maximum sentence at that time was up to \$1,000 and up to 90 days in custody, or both.

[12] I pause to note that it is now six months in custody, not 90 days, which is the maximum, signalling the Legislature's intent regarding penalty. Ms. Matta was sentenced to \$1,000 and one month custody to be served conditionally.

[13] The second case filed is *R. v. McBride*, 2010 YKTC 136. Mr. McBride was in the Yukon and was suffering at the time from a lack of sleep, in part due to the constant daylight at the time of year in question. He consumed two glasses of wine in the early evening. He was out with co-workers until 2:30 a.m. When he was driving on the Alaska Highway near the Whitehorse Weigh Station, he fell asleep and drove head on into another vehicle. The driver of the other vehicle died and two passengers in that vehicle were also injured.

[14] The circumstances of Mr. McBride are set out in the decision at para. 16, as follows:

The circumstances of Mr. McBride are that he is 50 years old, he has a Grade 12 education, and has been residing in Kelowna, British Columbia, for about the last 13 years. He has been married twice, has two adult children from his first marriage and one grandchild. Also he has two step-children. He has been an employee of the Brick for over 25 years, and a letter from his employer dated November 24, 2010, was filed with the Court indicating that if he continues to perform at or above expectations that he would continue to be

employed by that company, and that they are aware of the matter before this Court.

[15] Justice Gower, sitting as a Territorial Court judge at the time, reviewed the law on sentencing for this type of offence, noting at para. 6 of the decision, as follows:

This is quite correctly characterized by Crown counsel as a difficult and contentious case. In *R. v. Biondelli*, 2006 YKSC 16, Justice Veale, at para. 21, quoted Judge Bennett in *R. v. Pekrul*, Port Coquitlam, June 23, 1999, as follows:

“A charge and conviction under the *Motor Vehicles Act* carries with it less moral blameworthiness, less of a social stigma, and, certainly, less of a penalty than a conviction for a *Criminal Code* offence.”

The judge continued (and I am paraphrasing here), that because the conviction is for an offence under the *Motor Vehicle Act* [as written], he was not sentencing Mr. Pekrul for causing the death of the victim, but rather that he was sentencing for driving without due care and attention. The quote continues:

“This is a very important difference in the law, although I can understand how the public may be critical of what appears to be a form of legal hairsplitting. ...”

[16] The decision goes on regarding general deterrence at para. 8, where Justice Gower states:

In the case of *R. v. Uphill*, 2007 BCPC 478, Gill Prov. J. said at para. 15:

“Sentencing for matters such as these is a very difficult thing. While there must be a consideration of the consequences of the careless driving in this case, in other words, that it did indeed result in the death of a human being, I must not place undue weight on it. Clearly, any act causing the death of a human

life must be treated with the utmost of seriousness, but to be clear, the purpose of this sentencing is not to compensate with respect to that loss.”

[17] Finally, in relation to general deterrence, I note Justice Gower’s comments at para. 32, as follows:

... With respect to general deterrence, that is a factor that I must still be alive to for the reasons specified in *Cameron* at para. 10, where the judge quoted again from the *Pekrul* decision:

“Deterring others from having momentary lapses of attention is, however, a strong consideration as there is a high standard of safety required of all drivers at all times.”

[18] The sentence ultimately imposed by Justice Gower was a \$1,000 fine, 30 days’ custody to be served conditionally in the community, and a two-month probation period, which included the requirement to complete a defensive driving course.

[19] I note that the maximum probation period under the *Summary Conviction Act*, RSY 2002, c. 10, is two years.

[20] In the third case filed, *R. v. Ramage*, 2015 YKTC 14, the facts are set out at paras. 4 and 5, as well as para. 7, as follows:

4 On the date in question, the sun was shining from the south and would have made it more difficult to see the lights. As Mr. Ramage drove north, a pedestrian, 69-year-old William Lagimodiere, was walking on the sidewalk on the west side of Fourth Avenue. He stopped at the pedestrian crosswalk in question, pressed the button, and after waiting for the traffic to clear, proceeded across Fourth Avenue in

the crosswalk. Fourth Avenue is a four-lane roadway. When Mr. Lagimodiere had reached the outside or easternmost northbound lane, he was struck by Mr. Ramage's vehicle. Mr. Lagimodiere suffered catastrophic injuries and died soon afterward.

5 There is no evidence that Mr. Ramage slowed his vehicle, applied the brakes, or took any evasive action whatever before striking Mr. Lagimodiere.

...

7 Accident reconstruction revealed that at the time of the collision Mr. Ramage was travelling 41 to 42 kilometres per hour. The reconstruction has also found that the roadway was straight and that there were no obstructions that would have prevented Mr. Ramage from seeing the pedestrian. Indeed, the pedestrian was in the crosswalk for some 10 seconds before he was struck, and Mr. Ramage had more than ample time to see the deceased, react, and stop.

[21] The judge in *Ramage* noted a pre-existing condition at paras. 12 and 13, as follows:

12 It also develops that around 2005, Mr. Ramage's employer became concerned about Mr. Ramage's ability to operate machinery and drive a motor vehicle as his job required. Apparently there had been a number of what were termed "near misses."

13 An assessment of Mr. Ramage's abilities to drive was done, and that revealed, in the course of testing, that Mr. Ramage was making what were termed "attention-related errors" in his driving. Nevertheless, Mr. Ramage did not lose his licence but ultimately did lose his job in 2007 due to these and perhaps other difficulties.

[22] There was also a note of poor driving in previous incidents set out in para. 16, as follows:

Moreover, it appears that in the month prior to the fatality, Mr. Ramage was involved in two other motor vehicle

accidents, at least one of which was clearly his fault. In hindsight, it is clear that there were issues and that Mr. Ramage should not have been driving a motor vehicle.

[23] Given the aggravating circumstances noted, there was a three-month conditional sentence imposed, plus 18 months' probation. Again, as in the previous two cases, the maximum sentence at the time was 90 days' custody, being the three months imposed.

[24] I also take note of an unreported case of Karen Kennedy in 2020, involving the striking and killing a pedestrian in a crosswalk on Second Avenue. The road conditions and sun positioning in that case caused what was referred to as a "solar glare condition" that contributed to the collision. The sentence imposed was a \$1,000 fine and one month of jail to be served conditionally. That was put forward by way of a joint submission.

[25] Mr. Jemallo, through his counsel, acknowledged that this was a tragic accident. She indicates that he pled guilty to the offence which goes to show his remorse. He is 52 years old, born in Ethiopia, and moved to Canada in 1995. He became a Canadian citizen in 2008 and moved to the Yukon in 2009. He is married with children, ages 12, 9, and 7. He had been a taxi driver for 15 years prior to this incident. His vehicle for hire permit has been on pause since the incident. He currently drives for Whitehorse Shuttle, primarily transporting individuals from hotels to and from the airport. He is also responsible for driving his kids to school and to extracurricular activities. He has no indicated criminal record and only one prior *MVA* infraction for not wearing a seatbelt.

[26] The Crown position on sentencing was for a period of custody of three weeks and the Crown was not opposed to it being served conditionally, in which case they would submit that community work service would be appropriate. They did not seek any period of probation and they did not seek a driving suspension.

[27] I note that, based on the submission, I take the three-week position to reflect real jail, not adjusted to reflect the conditional sentence because that was not part of the submission before me.

[28] The defence position on sentencing is the imposition of a \$500 fine and a 60-day probation order as well to include community work service and a preference to either a minimal driving suspension or none at all.

[29] Mitigating factors on sentencing for Mr. Jemallo are:

- his age and lack of record;
- his job history;
- his current family circumstances;
- the guilty plea and remorse reflected in the guilty plea, and I note, that he has been driving since the incident without any new infractions.

[30] The aggravating factors on sentencing are that:

- Mr. Jemallo was a professional driver with the added responsibility to ensure safety of his passenger on the date in question;

- he should not have been driving a taxi at the time, particularly with a passenger, given his permit status;
- he was travelling between 67 and 71 km/hr in a 40 km/hr zone, which, as a professional driver, he would have been aware of;
- he was accelerating up to the time of the collision;
- he continued beyond the location of the accident and rear-ended two vehicles stopped at the traffic light 61 metres further from the point of the accident; and
- he had 214 metres to travel before striking Ms. Bourque and he failed to see her throughout that entire distance of travel.

[31] I simply note the obvious that these distances are indicated in metres and these are significant distances that are being quoted of travel both prior to the accident and after the accident, which are aggravating in nature.

[32] As already noted, I am limited by the offence as to the sentence I can impose. This sentence I impose cannot undo the tragedy that occurred. No sentence can end the pain of Ms. Bourque, her partner, her friends, and her family. It can, with hope, denounce the nature of the driving in the circumstances and that others will take more care.

[33] The sentence is in line with the case law reviewed. It acknowledges the increase to the maximum sentence available passed by the Legislature. It accounts for the

mitigating and the aggravating circumstances noted, and it has been adjusted to account for the position of Crown counsel on the driving suspension.

[34] Mr. Jemallo, I sentence you today on this count to two months of custody that can be served conditionally in the community to be followed by six months of probation.

[35] The terms of the conditional sentence order will be as follows. You will:

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 your Supervisor today, and thereafter, when required by your Supervisor and in the manner directed by your Supervisor;
4. Remain within the Yukon Territory unless you have written permission from your Supervisor;
5. Notify your Supervisor in advance of any change of name or address, and promptly of any change of employment or occupation;
6. Reside as approved by your Supervisor and not change that residence without the prior written permission of your Supervisor;
7. Remain inside your residence or on your property at all times except with the prior written permission of your Supervisor, which can include transportation of your children and attending to the necessities of life and except for the purpose of employment, including travel directly to and directly from your place of employment; and

8. Not drive a motor vehicle except for the purpose of employment or as approved in writing by your Supervisor.

[36] That will be for the two-month conditional sentence order, which is followed by the probation order, as noted, for six months with the following terms. You will:

1. Keep the peace and be of good behaviour;
2. Appear before the court required to do so by the court;
3. Notify your Probation Officer in advance of any change of name or address, and promptly of any change in employment or occupation;
4. Remain within the Yukon Territory unless you have the written permission of your Probation Officer;
5. Report to your Probation Officer immediately upon the completion of your conditional sentence, and thereafter, when and in the manner directed by your Probation Officer;
6. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;
7. Attend and actively participate in all programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, including programming for Defensive Driving or such other related program 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;
and

8. Perform 80 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate.

This community service is to be completed no later than 45 days before the end of this order. Any hours spent in programming may be applied to your community service at the discretion of your Probation Officer, to a maximum of 30 hours.

[37] Those are the conditions of the probation order.

[38] Starting with the conditional sentence order, are there any submissions by counsel, any concerns?

[39] MS. BUDGELL: The not to drive a motor vehicle condition, Your Honour, that is except for the purposes of employment or as approved in writing by your Supervisor?

[40] THE COURT: That is correct.

[41] MS. BUDGELL: Would Your Honour make a similar recommendation or suggestion that that could include transportation of his children?

[42] THE COURT: Yes.

[43] MS. BUDGELL: Thank you.

[44] THE COURT: Madam Clerk, the clause will read, “Not drive a motor vehicle except for the purpose of employment or as approved in writing by your Supervisor, which can include transportation of your children.”

[45] With respect to the probation order, any comments?

(NO REPLY)

[46] Count 2 on the Information?

[47] MS. PORTEOUS: It can be stayed, please, Your Honour.

[48] THE COURT: Stayed. Thank you.

[49] All right, Mr. Jemallo, it is a total of eight months of conditions that you are going to be on, but they do, as you have heard, and your counsel can help you go through the terms, they do account for your current needs with respect to caring for your family and your current livelihood, which I understand would be important to you. I do wish you the best of luck on this order and hope that it does not result in any further complications for you in the future.

PHELPS C.J.T.C.