

COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *HMTQ v. Tsandaya*,
2004 YKCA 3

Date: 20040121
Docket: YU00504

Between:

Her Majesty the Queen

Appellant

And

Raven Tsandaya, also known as Beverly Smith

Respondent

Before: The Honourable Mr. Justice Hall
The Honourable Mr. Justice Low
The Honourable Mr. Justice Lowry

Oral Reasons for Judgment

K. Drolet

Counsel for the (Crown)
Appellant

S. Wellman

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia
January 21, 2004

[1] **LOW, J.A.:** The Crown seeks leave to appeal sentences imposed in Whitehorse by McGivern PCJ upon the respondent on 22 August 2003 for one count of dangerous driving causing bodily harm and three counts of breach of recognizance. The judge sentenced the respondent to 15 months for the dangerous driving offence to be served conditionally and ordered a driving prohibition until 20 months after the expiration of the conditional sentence. On each of the three breaches of recognizance he sentenced the appellant to one day in jail after taking into account what appears to be 24 days the appellant spent in jail on remand following the third breach of recognizance.

[2] The dangerous driving offence occurred on 22 May 2001 and the three breaches of recognizance occurred in April, June and July of 2003. They were for breaches of a bail recognizance to which the respondent was subject after being charged with the dangerous driving offence and later failing to appear in court as required. The first breach was for failure to report to a bail supervisor. The second one was for failure to abide by a curfew and abstain from non-prescription drugs. The third breach was for failure to abstain from the use of non-prescription drugs.

[3] The dangerous driving conviction arose out of a serious head-on motor vehicle collision on a main thoroughfare during daylight hours and good driving conditions. The respondent was driving about 30 kilometres per hour in excess of the 50 kilometre per hour speed limit approaching a curve and a school zone. She crossed the centre line of the road and collided with an oncoming vehicle as a result of taking her attention away from her driving in order to attempt to locate a bottle for her two year old daughter.

[4] McGivern PCJ found that this was more than a "momentary glance away" and it is implicit in his reasons that this constituted a marked departure from the norm. The respondent saw the vehicle with which she collided for only a moment before the collision and she did not see a preceding oncoming vehicle at all. The driver of the first vehicle managed to swerve and accelerate to avoid the vehicle of the plaintiff as it was crossing the centre line of the road.

[5] The collision had tragic consequences to the woman driving the other vehicle. She was near the end of a pregnancy and lost the foetus. She also had a broken leg and wrist and suffered internal injuries. The respondent was also injured in the collision.

[6] The sentencing judge gave brief reasons for the sentences he decided to impose. Without elaborating further he simply said that it was appropriate under all the circumstances to impose a conditional sentence on the dangerous driving conviction. He followed the Crown's suggestion that he sentence the respondent to time served and the three counts of breach of recognizance by imposing one day concurrent on each of them.

[7] The Crown's position on appeal is that a conditional sentence for the dangerous driving offence did not meet the need for denunciation and deterrence and was made without a determination that a conditional sentence would not endanger the safety of the community. The Crown says that the respondent's history of breaching her recognizance made her an unsuitable candidate for a conditional sentence. It suggests a prison sentence of 15 months.

[8] The Crown says community endangerment is found in the respondent's failure to adhere to the orders of the Court and making her a danger to the community in a general way. I do not accept that submission. In my opinion, the endangerment issue is addressed by the driving suspension, which the respondent seems to be obeying both while on recognizance pending trial and while serving the conditional sentence under

appeal. Her substance abuse problems are more harmful to herself than anybody else. She has shown some unreliability as to reporting requirements and the like but I do not see that these shortcomings support the Crown's position that there is an endangerment to the community that cannot be addressed by a conditional sentence.

[9] As to deterrence and denunciation, it was said by the Supreme Court of Canada in **R. v. Proulx** (2000), 140 C.C.C. (3d) 449 (S.C.C.), that a conditional sentence in appropriate cases can adequately address these factors. This was seen to be the case in this Court's decision in **R. v. Bhalru; R. v. Khosa** (2003) BCCA 645, a case in which the driving was much more serious than in the present case. I am not persuaded that the conditional sentence for the dangerous driving offence was unfit.

[10] The Crown's alternative position is that the terms of the conditional sentence are not adequate. The sentencing judge said this with respect to the terms:

[4] The length of the sentence will be 15 months. The statutory conditions I will bring now to your attention:

1. You are to keep the peace and be of good behaviour;
2. You are to appear before the court when required to do so by the court;

3. You are to report to a supervisor at or before four o'clock on Monday August 25, 2003, and thereafter as directed by your supervisor;

4. You shall remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor;

5. You are to notify the court or your supervisor, in advance, of any change of name or address;

6. You are to promptly notify the court or the supervisor of any change of employment or occupation.

[5] In addition to these statutory conditions, there will be a curfew imposed on you for the next five months. The curfew will be from eight o'clock in the evening through to eight o'clock in the morning, unless you have obtained written permission from your supervisor or the court.

[11] In particular, the Crown says there should be house arrest, community service and compulsory treatment of the respondent's substance abuse problems. It is suggested that these problems are related to mistreatment the respondent suffered as a child.

[12] I am not persuaded that there is any useful purpose to be served by extending the house arrest beyond the curfew provisions imposed for the first five months of the conditional sentence. Nor am I persuaded that there is any useful purpose to be served by the imposition of one or more community service provisions. However, I think that the

sentencing judge erred in principle by not addressing his mind to the substance abuse problems of the respondent. I would therefore amend the conditions to add that the respondent will abstain absolutely from the consumption of alcohol and the use of non-prescription drugs, that she will provide a blood or urine sample to a peace officer upon demand and that she will take such substance abuse counselling and treatment as directed from time to time by her conditional sentence supervisor.

[13] Although the Crown has appealed the other three sentences it does not now seek a variation of any of them. I would grant the Crown leave to appeal and I would allow the appeal only to the extent of amending the conditions on the basis that I have outlined, otherwise I would dismiss the appeal.

[14] **HALL, J.A.:** I agree.

[15] **LOWRY, J.A.:** I agree.

[16] **HALL, J.A.:** The appeal is allowed to the extent set out in the reasons of my colleague, Mr. Justice Low.

"The Honourable Mr. Justice Low"