

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. Biondelli*, 2006 YKSC 16

Date: 20060223
Docket No.: S.C. No. 05A-0004
Registry: Whitehorse

Between:

REGINA

Appellant

And

MARTIN BIONDELLI

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Lee Kirkpatrick
André Roothman

Counsel for the Appellant
Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] Martin Biondelli pled guilty to the *Motor Vehicles Act* charges of careless driving and operating a motor vehicle towing a trailer when the trailer was not equipped with adequate brakes.

[2] The offences took place in the afternoon of January 23, 2004, at Rabbit's Foot Canyon in the City of Whitehorse.

[3] Martin Biondelli's trailer crossed the centre line of the highway and collided with the vehicle driven by Dereen Hildebrand. Ms. Hildebrand died from injuries received by her in the collision.

[4] The sentencing judge imposed a fine of \$1,000 on the careless driving conviction. He suspended the passing of sentence on the trailer offence and put Martin Biondelli on probation for six months with the condition that he was prohibited from driving except for purposes of employment.

[5] The Crown has appealed the sentence and seeks a term of imprisonment. I ordered a stay of execution of the sentence pending the hearing of this appeal.

ISSUES

[6] There are two issues to consider:

1. **Did the sentencing judge err in applying the wrong principles or imposing a sentence that is clearly unreasonable?**
2. **If the sentencing judge has erred, what is a fit and proper sentence?**

THE FACTS

[7] The sentencing judge prepared oral Reasons for Sentencing which are very helpful. Although Mr. Biondelli pled guilty to the two offences, there was a one-day hearing for lay and expert evidence on the circumstances of the offences. At that hearing, the Crown called Corporal Thalhofer, a collision reconstruction analyst and Jason Anderson, an expert in automotive mechanics and vehicle inspection. The defence called Lorne Smith, an expert in general motor vehicle mechanics. Mr. Biondelli also testified.

[8] The sentencing judge made the following findings of fact about the accident:

1. On January 23, 2004, Mr. Biondelli drove from Haines Junction to Whitehorse operating a Blazer motor vehicle and towing a trailer carrying a Pathfinder

motor vehicle. I add that Haines Junction is approximately 158 kilometres from Whitehorse.

2. Dereen Hildebrand was driving in Whitehorse in the opposite direction in her Dodge van. She was in her proper lane on the highway in an area known as Rabbit's Foot Canyon.
3. The accident was caused as a result of the trailer and Pathfinder that were being towed by Mr. Biondelli, crossing the centre of the highway into the lane occupied by Ms. Hildebrand.
4. Ms. Hildebrand died from injuries received by her in the collision that occurred between Mr. Biondelli's trailer and Pathfinder and Ms. Hildebrand's vehicle.
5. Mr. Biondelli's trailer was mechanically sound but it was unroadworthy because its brake system was not connected to the towing vehicle and the trailer brakes were therefore inoperative.
6. The sentencing judge concluded that the trailer brakes were incapable of adequately controlling the safe movement of the trailer.
7. In addition to the inadequate trailer brakes, Mr. Biondelli was towing a trailer and load that far exceeded what a prudent operator would have towed behind his Blazer. The trailer was rated to carry 1590 kilograms but the actual weight of the Pathfinder was 1840 kilograms.
8. The Blazer, which was rated for a gross vehicle weight of 2132 kilograms, had a total load including the trailer and Pathfinder of 3770 kilograms. I add that this exceeded the gross vehicle rating by 1638 kilograms.

9. Mr. Biondelli is a mechanic and has experience in operating a tow truck. He was completely careless in setting off from Haines Junction, irrespective of road conditions, and showed no consideration for other users of the highway.
10. Further, the brakes on the Blazer of Mr. Biondelli were so much out of alignment that it was necessary to depress the brake pedal three times in order to have any braking ability. This would have been obvious to anyone driving the vehicle.
11. The sentencing judge was satisfied from the evidence of Corporal Thalhofer that, despite the icy conditions of the roadway, had the brakes of the trailer been properly connected to the towing vehicle, it is much less likely that the trailer would have jackknifed and crossed into the opposing lane. The sentencing judge noted that other vehicles, including a fire truck skidded on the road that day.
12. The sentencing judge had difficulty accepting Corporal Thalhofer's evidence that properly connected trailer brakes would have insured that there would have been no accident.
13. The sentencing judge described the accident as a devastating loss to the Hildebrand family; the loss of a wife for Mr. Hildebrand and a mother for her children.

[9] There is some evidence, about which there is no dispute between counsel, that the sentencing judge did not mention in his Reasons for Sentencing:

1. The Blazer's manual warned that pulling a trailer behind the vehicle could cause a loss of control and that if the trailer were too heavy, a serious accident could occur.
2. The Blazer's manual also stated if the trailer weighs more than 1,000 pounds, then it must have its own brakes and they must be adequate. The trailer and Pathfinder weighed 4,056 pounds.
3. Mr. Biondelli knew the trailer brakes were operable and that they and the trailer lights were not hooked up to the Blazer.
4. The trailer straps retaining the Pathfinder to the trailer were worn out and aged.
5. Mr. Biondelli had driven the Blazer and trailer for approximately two hours before the collision.
6. The accident happened on a curve on the highway.
7. When the trailer and Pathfinder hit the Hildebrand vehicle, the tongue of the trailer went beneath the front of the Hildebrand vehicle forcing the integral components of the Hildebrand vehicle into the driver's compartment. This aggravated the amount of damage that resulted.

[10] There is additional evidence to consider:

1. Corporal Thalsofer testified that, in his experience on highway patrol for the RCMP, it seems to be the norm that trailers in the Yukon are not mechanically fit for the road.
2. Mr. Biondelli serviced the brakes on the Blazer six months before the accident with the assistance of Lorne Smith. Lorne Smith stated that

the brakes were in good working condition at that time. Lorne Smith stated that if the brakes on the Blazer were in the condition described by Mr. Anderson, you would park the vehicle.

3. Corporal Thalsofer stated that the road was icy for the entire distance from Whitehorse to the junction of the Alaska and North Klondike highways.
4. Mr. Biondelli stated that he did not know that the road was icy.

THE REASONS FOR SENTENCE

[11] The sentencing judge pointed out that the careless driving conviction provided for a sentence on a first offence of a fine of not less than \$200 and not more than \$1,000, or to imprisonment for 90 days, or both. The conviction for not having adequate trailer brakes carries a sentence of a fine of not more than \$500 or to imprisonment for a term not exceeding six months. A three-month licence suspension may be assessed for each offence.

[12] The sentencing judge was of the view that the Crown, in advocating for a term of imprisonment, was seeking a sentence appropriate for a dangerous driving conviction rather than careless driving, which he described as a non-criminal Territorial offence.

[13] The sentencing judge did not fault the Crown for directing his attention to the aggravating factors. However, he wanted to ensure that the sentence reflected the seriousness of the offence charged.

[14] The sentencing judge stated that this was “a devastating accident” for the Hildebrand family who have lost a wife and a mother. The victim impact statement made it clear that it was a “significant and terrible lost to the family”.

[15] He also stated that the accident has been devastating for Mr. Biondelli who has taken significant counselling and still suffers from “the effects of the devastating accident”.

[16] The sentencing judge then discussed the principles of sentencing:

[15] Nothing that I do today can repair or mitigate that loss. I have few options, all of which must be exercised within a narrow sentencing range. The ultimate purpose of sentencing is to protect the public. That objective is said to be achieved by specific deterrence of the offender, general deterrence of persons who might be like-minded, and the rehabilitation of the offender. Clearly, Mr. Biondelli does not need to be specifically deterred. This tragedy has so adversely affected him and the offence is so out of character that he is unlikely to offend again.

[16] While general deterrence is to be considered, it is much less important in offences of this nature than it is for *Criminal Code* or *mens rea* offences. In offences involving careless driving, mention is frequently made of momentary inattention as the basis for the charge. It is unlikely that a sentence which emphasizes general deterrence will, at some future date, direct the attention of drivers to the task at hand to the point where it could be said that they will no longer momentarily lose focus because of the sentence that this court imposes.

[17] The Parliament of Canada, in s. 718.2 of the *Criminal Code*, has, among other things, legislated that:

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders. ...

[18] While I know of no comparable legislation in the Yukon, s. 7 of the *Summary Convictions Act*, R.S.Y. 2002, c. 210, in this Territory makes applicable to this case the above provisions of the *Criminal Code*. Even absent that

provision, it would be anomalous for this Court not to proceed on that basis with respect to regulatory and other strict liability offences when required to do so for far more serious offences under the *Criminal Code*.

[17] The sentencing judge concluded that a sentence of imprisonment is not appropriate. He fined Mr. Biondelli \$1,000 on the careless driving charge. He suspended the passing of sentence on the breach of trailer brakes offence and placed Mr. Biondelli on probation for six months.

ANALYSIS

Issue 1: Did the sentencing judge err in applying the wrong principles or imposing a sentence that is clearly unreasonable?

The Standard of Review

[18] It is not appropriate for this court, sitting in appeal, to substitute its opinion on sentence for that of the sentencing judge.

[19] The appropriate standard of review has been succinctly stated in *R. v. C.A.M.*,

[1996] 1 S.C.R. 500 at para. 90:

“Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code*.”

[20] In a further discussion of the deferential standard of review, the Supreme Court found the argument in favour of deference to the sentencing judge to be compelling even where the offender has pleaded guilty because the sentencing judge has the advantage of being able to directly assess sentencing submissions. This has additional

weight in the case before me as the sentencing judge heard expert witnesses and Mr. Biondelli.

Fitness of the Sentence

[21] The principle that the sentencing judge has focussed on, namely that general deterrence is much less important, is set out clearly and expanded on in the unreported decision of Judge Bennett in *R. v. Pekrul*, Port Coquitlam, June 23, 1999, as follows:

“A charge and conviction under the *Motor Vehicle 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. Because the conviction is for an offence under the *Motor Vehicle Act*, I am not sentencing Mr. Pekrul for causing Mr. Dolker’s death. Rather, I am sentencing him for driving without due care and attention. 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. ...

Today, I am sentencing Mr. Pekrul for a moment of inattention while making an unsafe left-hand turn that resulted in a collision, of course, with tragic consequence. I must impose a sentence that will deter Mr. Pekrul and others from committing this sort of offence. Also, I must consider Mr. Pekrul’s rehabilitation and protection of the public. To a lesser extent, the sentence must have an element of denunciation.

...

... 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.”

[22] The essence of the principle enunciated is that careless driving offences are *Motor Vehicles Act* offences and they carry lesser penalties than *Criminal Code* offences. They should not be equated to dangerous driving causing bodily harm or dangerous driving causing death because the offender is not being sentenced for

causing death. In the *R. v. Pekrul* case, the offender was fined \$1,500, on the basis that he had a momentary lapse of attention.

[23] In *R. v. Martinez*, [1996] O.J. No. 544 (Ont. C.A.), the court reviewed a sentence of 90 days incarceration plus probation. In that case, the offender pled guilty to careless driving. The accident occurred in daylight under excellent visibility and very good road conditions. The offender failed to keep a proper look-out and stop at a stop sign. He struck another motorist who died instantly from head injuries received in the accident.

[24] The sentencing judge concluded that the careless driving was of the worst kind and that the death of the other motorist was a relevant factor in the sentencing even though he was not tried for dangerous driving causing death. The driver was a first offender and a model citizen.

[25] The Ontario Court of Appeal stated at para. 11:

In our view, the trial judge in sentencing the appellant was correct in emphasizing the quality of his driving. Further, in assessing the fitness of the sentence, we think it is appropriate to take into account the fact that the appellant's driving caused an accident and Mr. Hardy's death. The appellant's momentary distraction or preoccupation obviously caused him to drive without due care and attention. The consequences of his carelessness were objectively foreseeable and added to his moral culpability in the circumstances.

[26] The court went on to say that the driver was not convicted of dangerous driving causing death and that there was nothing intentional or wilful about his conduct. Thus, the conduct was not a "marked departure" from the prudent conduct required for dangerous driving. Given the mitigating factors, the Ontario Court of Appeal reduced the sentence to time served which was 20 days in custody plus probation.

[27] The court also stated at para. 14 that “the trial judge correctly noted that an appropriate sentence should be responsive to the principles of general and specific deterrence, protection of the public and the rehabilitation of the appellant”.

[28] The significant distinction between the above cases and the one before me is that the conduct of Mr. Biondelli cannot be described simply as a “momentary lapse of attention”.

[29] He was not convicted of driving without due care and attention but rather “driving without reasonable consideration for persons using the highway”. The facts which constituted the offence were Mr. Biondelli’s driving for two hours in winter conditions with brakes that had no braking abilities until depressed three times.

[30] Similarly, the offence of driving without trailer brakes hooked up is not a case of a “momentary lapse of attention” but rather a decision to pull an overloaded trailer for two hours in winter conditions without trailer brakes.

[31] In my view, the sentencing judge erred in making the statement that “general deterrence is much less important in offences of this nature” by which he meant careless driving offences based upon driving that amounts to “momentary inattention”.

[32] The sentencing judge may have a point when he says that it is unlikely that a sentence emphasizing general deterrence will ensure that drivers will no longer momentarily lose focus. That would be an unrealistic expectation. But when dealing with the facts constituting Mr. Biondelli’s offences, which are careless in the extreme, and not incidents of “momentary inattention”, general deterrence remains an important sentencing principle.

[33] I am also of the view that the death of a person is a matter to be taken into consideration. I do not suggest that Mr. Biondelli intentionally caused Ms. Hildebrand's death. However, her death was a consequence of his carelessness that was objectively foreseeable and adds to his moral culpability.

[34] It is well recognized that every case is different on its facts and aggravating circumstances can be taken into consideration in sentencing. There is a continuum within careless driving from the morally innocent driver who has a momentary lapse to the driver who is more careless, or as the sentencing judge said "completely careless", in the act of driving or the condition and safety of the equipment he puts on the highway. It is for this reason that the *Motor Vehicles Act* provides a range of sentence from a fine to imprisonment.

[35] I conclude that the sentencing judge erred in finding that general deterrence was "much less important" in this offence and the fact that little or no weight at all was given to the principle of denunciation. The result, in my view, is a sentence that is unreasonable in the circumstances of this case.

Issue 2: If the sentencing judge has erred, what is a fit and proper sentence?

[36] I do not take issue with the sentencing judge concluding that Mr. Biondelli does not need to be specifically deterred. The sentencing judge observed him on the witness stand and took into account the mitigating factors of the guilty plea and no prior record. He has clearly suffered from this tragic event which his social worker describes as "psychologically devastating" leaving him with "an intense sense of despair and hopelessness as well as a loss of meaning, purpose and order to his life."

[37] However, the aggravating circumstances must be taken into account: the fact that the trailer was grossly overloaded, and the fact that there were winter driving conditions, which means that it would be reasonable to anticipate slippery or icy conditions. I also take into account the fact that the Pathfinder was not safely secured, with the result that it impacted the driver's side of Ms. Hildebrand's vehicle.

[38] As for general deterrence, I take into account Corporal Thalhofer's evidence that, in his experience on highway patrol for the RCMP, it seems to be the norm that trailers in the Yukon are not mechanically fit for the road.

[39] In my view, a \$1,000 fine and a suspended sentence with probation is not a fit sentence. It is a sentence more appropriate for the model citizen who is a first offender, who had a momentary lapse of attention, and where bodily harm or death do not occur.

[40] The sentencing judge stated that he had few options that must be exercised within a narrow sentencing range. He did not specifically refer to the availability of a conditional sentence of imprisonment, presumably because he concluded that imprisonment was not appropriate. It was one of the options considered by the probation officer in the pre-sentence report.

[41] The Crown has forcefully advocated for a jail sentence to satisfy the fundamental sentencing purposes of denunciation and general deterrence.

[42] In my view, however, a conditional sentence should be considered. Section 742.1 of the *Criminal Code* sets out four criteria that must be considered before imposing a conditional sentence:

- (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;

- (2) the court must impose a term of imprisonment of less than two years;
- (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and
- (4) a conditional sentence would be consistent with a fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code*.

[43] There is no dispute that criteria 1 and 3 are met. With respect to the second criterion, counsel for Mr. Biondelli points out that once a judge has excluded incarceration, there is no requirement to consider a conditional sentence.

[44] I find that a term of imprisonment is appropriate for the purposes of denunciation and general deterrence which are important principles in these circumstances. These principles are appropriate for offences that arise where conscious choices are made that seriously endanger public safety. A fine and suspended sentence with probation gives insufficient weight to these principles.

[45] The fourth criterion to consider is whether a conditional sentence is consistent with the fundamental purpose and principles of sentencing as set out in ss. 718 to 718.2 in the *Criminal Code*.

[46] In *R. v. Proulx*, 2000 SCC 5, the court found that a conditional sentence facilitates both of Parliament's objectives of reducing the use of incarceration and giving greater prominence to restorative justice. I quote from para. 99:

“... It affords the sentencing judge the opportunity to craft a sentence with appropriate conditions that can lead to the rehabilitation of the offender, reparations to the community, and the promotion of a sense of responsibility in ways that jail cannot. However, it is also a punitive sanction. Indeed, it is the punitive aspect of a conditional sentence that distinguishes it from probation. As discussed above, it was

not Parliament's intention that offenders who would otherwise have gone to jail for up to two years less a day now be given probation or some equivalent thereof.”

[47] I find that a fit sentence for Mr. Biondelli is a fine of \$1,000 and a conditional sentence of three months imprisonment to be served in the community. I apportion the fine and one month imprisonment to the careless driving charge and two months imprisonment to the failure to have trailer brakes charge.

[48] I order that Mr. Biondelli comply with the following conditions:

1. to keep the peace and be of good behaviour;
2. appear before this court when required to do so;
3. to report to a conditional sentence supervisor within two working days and after that as required by the conditional sentence supervisor in the manner required by the supervisor;
4. to remain within the Yukon unless written permission to go outside the Yukon is obtained from the court or your conditional sentence supervisor;
5. to notify the court or your conditional sentence supervisor in advance of any change of name or address and to notify the court or your conditional sentence supervisor of any change of employment or occupation;
6. to remain under house arrest which means you must remain inside your residence at all times, except as set out below;
7. you must answer all telephone calls at your residence so that your supervisor or the RCMP can check that you are inside your residence.

Your must also answer your door so that your supervisor or the RCMP can check that you are abiding by these conditions;

8. Your condition of house arrest is subject to the following exceptions:
 - (a) you may be away from your residence for employment purposes between the hours of 8:00 a.m. to 6:00 p.m. and for call-outs for oil delivery or tow truck calls at any time. On each occasion that you are away from your home between 6:00 p.m. and 8:00 a.m. or for call-outs or tow truck calls, you must travel directly to your place of work or call-out and return to your home;
 - (b) you may meet with your supervisor when required;
 - (c) you may obtain medical treatment for yourself or your family;
 - (d) you may attend religious services at a specific place and time specified in writing by your supervisor;
 - (e) you may shop for groceries for one hour twice each week;
 - (f) you may attend professional counselling as recommended in writing by your supervisor;
 - (g) whenever you are permitted to leave your home for a specific purpose, you must travel directly to and from your permitted destination without stopping to have coffee, visit someone or shop;
 - (h) you must carry a copy of this Conditional Sentence Order at all times as well as any written permission from your supervisor and produce it for an RCMP officer at any time requested to do so;

9. You must not drive any motor vehicle except for employment purposes, shopping, religious services, or medical treatment and medical emergencies;
10. You must not consume alcohol, non-prescribed drugs or other intoxicating substances.

[49] I am going to ask your counsel to discuss these conditions with you so that you are sure to understand them. I must advise you that if you breach any condition of your Conditional Sentence Order, it may result in your going to jail for the rest of your sentence.

[50] I ask Crown counsel to provide a copy of the Conditional Sentence Order to the RCMP in Haines Junction.

VEALE J.