Citation: *R.* v. *Marshall,* 2010 YKTC 81

Date: 20091204
Docket: 09-11024
Registry: Dawson City
Heard: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Chief Judge Ruddy

REGINA

v.

LUCY JANE MARSHALL

Appearances:
Bonnie Macdonald — Counsel for the Crown
Emily Hill — Counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): Lucy Marshall is before me for sentencing having entered a plea of guilty to a single count of impaired causing bodily harm. This is one of those rare cases in which there is little relation between the circumstances of the offence and the circumstances of the offender. However, it is also a case in which the impact of the offence upon the victims can only be described as devastating.

[2] The circumstances of the offence arise on July 24, 2009. Ms. Marshall and a friend, both residents of Destruction Bay, had borrowed a vehicle with plans to visit both Dawson City and Whitehorse over the weekend. They arrived in Dawson with the intention of spending the night in the community, sleeping in the vehicle, and planning to

travel on to Whitehorse the following day. Ultimately, and inexplicably, these plans were changed with tragic consequences.

[3] Ms. Marshall and her friend shared a couple of bottles of wine at Diamond Tooth Gerties, then moved to The Pit where Ms. Marshall consumed at least one more glass of wine. The pair then apparently decided to travel to Whitehorse that evening while still under the influence of alcohol. Indeed, Ms. Marshall was sufficiently intoxicated that she has no recollection of leaving The Pit or of driving.

[4] At the same time, two vehicles were headed towards Dawson City, having failed to find accommodation along the Klondike Highway, the first driven by Mr. Mohammed and the second driven by U.S. residents, Lee and Lucinda Spencer. Both vehicles encountered Ms. Marshall driving on the wrong side of the road. When Mr. Mohammed encountered Ms. Marshall, he estimated her speed to be 120 kilometres per hour. He was able to avoid a collision by pulling over and slowing. The Spencers were not so fortunate.

[5] Having narrowly missed Mr. Mohammed, Ms. Marshall continued to drive in the wrong lane towards the unsuspecting Spencers. They encountered Ms. Marshall while coming around a curve on the highway, leaving little time to avoid a collision. Professor Spencer braked and swerved to the shoulder, but was nonetheless struck by Ms. Marshall, causing his vehicle to roll a number of times. Mrs. Spencer was able to exit the vehicle and flag down a passing motorist to seek help for her badly injured husband. Unfortunately, given the remote area, more than an hour passed before assistance arrived.

[6] The Spencer vehicle was damaged to the point that Professor Spencer had to be cut from it before medical care could be administered for his serious injuries. These included five fractured vertebrae in his lower neck and upper back, multiple facial lacerations and bleeding in the brain. Of particular concern, one of the fractures lacerated the dura covering the spinal cord itself. It is only by virtue of the fact that Professor Spencer's dura is apparently thicker than is normal that he was not rendered a quadriplegic.

[7] After being transported to the Dawson nursing station, Professor Spencer was medevaced to Seattle, arriving 18 hours later. What followed has been an ongoing ordeal for the Spencers, involving the use of a halo brace until Professor Spencer was sufficiently stabilized to allow for the extensive surgery required to insert two metal rods in his back. Professor Spencer was 60 years old at the time of the accident.

[8] While medical personnel were addressing Professor Spencer's needs at the scene of the accident, Dawson RCMP entered into an investigation of the circumstances leading to the accident. They located Ms. Marshall and her friend in the borrowed vehicle in a ditch some distance down the road. Ms. Marshall was behind the wheel. The police noted a slight odour of alcohol on her breath and made a demand that she provide a sample of her breath into an approved screening device, which registered a fail. Ms. Marshall was transported to the Dawson nursing station where blood samples were taken three and a half hours after the accident, registering a blood alcohol level of 148 milligrams percent. Expert extrapolation indicates her blood alcohol level would have been 160 milligrams percent at the time of driving.

[9] The offence as described is an extremely serious one, with a number of aggravating factors. These include the horrendous driving pattern, the existence of a passenger in the vehicle, the life-threatening and life-altering injuries suffered by Professor Spencer, the injuries suffered by Mrs. Spencer, and the statutorily aggravating factor of blood alcohol readings of 160.

[10] In terms of mitigating factors, Ms. Marshall has entered an early guilty plea, demonstrates genuine remorse for her actions and concern for the Spencers, has drafted a sincere apology letter, has no prior criminal record, and made immediate restitution of $2800 plus an $800 towing fee to the owner of the borrowed vehicle.

[11] There is absolutely no suggestion that either specific deterrence or rehabilitation are issues for consideration in this case. Indeed, part of what makes this case so difficult is the fact that there is such a gross disparity between the very grave circumstances of the offence and the very positive circumstances of the offender.

[12] Ms. Marshall was born in Birmingham, England, and is now 31 years of age. She comes from a large and supportive family, many of whom have provided letters to the Court attesting to her upstanding character, universally describing her as a caring, generous and responsible young woman. She is university educated with an extensive and varied history of employment and volunteer work. She has spent the last several years working various jobs around the world to support her interest in international travel, an interest which ultimately brought her to the Yukon where she has resided since some time in 2008, working at the Talbot Arms in Destruction Bay.

[13] Despite her interest in travel, Ms. Marshall has remained close to her family,

returning home as and when necessary to provide support. In particular, she has in the past and hopes in the future to provide support and assistance to her parents, as her father struggles with heart problems, including surgery to perform a triple bypass. In fact, it had been Ms. Marshall's intention to return home to England in September as her father has suffered a recurrence of his heart problems. I am advised that he was very recently admitted to hospital.

[14] Ms. Marshall's plans were necessarily changed due to her actions on July 24th. She has lost her return plane ticket home, has had to deal with immigration issues arising from an expired visa, and of course cannot be there with her family during this difficult time, something which is clearly very difficult for her.

[15] Overall, the circumstances of Ms. Marshall as an offender are highly unusual to see in our criminal courts, demonstrating once again that impaired driving offences are the one category of criminal offences which cut across all socio-economic lines, bringing otherwise law-abiding, responsible citizens routinely before the courts, and while Ms. Marshall presents as a sympathetic offender, one cannot forget the devastating impact of her actions on the Spencers.

[16] They have taken the time to provide the Court with a very thorough, thoughtful and eloquent Victim Impact Statement describing the profound effects that Ms. Marshall's actions have had on their lives. They have detailed the emotional trauma of the accident and its aftermath, noting that Professor Spencer was in such severe pain that he actually prayed that God would just let him die. They write of the extensive and invasive medical treatment required, with all of its complications, and the difficult road to

recovery characterized by daily pain and interference with or interruption of normal daily activities previously taken for granted.

[17] Mrs. Spencer has only recently been able to work because of the need to attend to Professor Spencer's care needs, and she has experienced ongoing problems with her own injuries including a daily "pins and needles" sensation in left foot. Professor Spencer has been able to return to his employment as a university professor for only a couple of hours once or twice a week. Both have experienced ongoing post-traumatic stress symptoms which, like their injuries, have greatly interfered with their day-to-day enjoyment of life.

[18] In addition to these physical and emotional impacts, the accident has had an equally devastating financial impact on the Spencers. They have lost their truck, which had been specifically modified for field research, along with thousands of dollars worth of field equipment, which they believe will not be covered by insurance. The medical bills for care in Canada and in Seattle are in excess of $320,000.

[19] Notwithstanding all that has happened to them as a result of Ms. Marshall's actions, the Spencers demonstrate a generosity of spirit in their attitude towards her, noting that they have no desire for revenge on Lucy Marshall for what has happened. "We simply want her to clearly understand that she must never again drive under the influence of alcohol or drugs."

[20] It is now my unenviable task to determine the appropriate disposition on the circumstances of this offence and of this offender. Counsel are agreed, as am I, that of those principles of sentencing set out in s. 718 of the *Criminal Code*, only general

deterrence and denunciation are applicable in this case. Crown suggests that these principles can be achieved by a custodial term of eight to 12 months. Defence suggests a range of 30 to 60 days. Due to recent amendments, a conditional sentence is not available.

[21] This case is further complicated by the fact that Ms. Marshall will be returning to England upon completion of her sentence, thus a probationary term to follow any custodial sentence is not practical, and while a driving prohibition will necessarily be ordered, it is likely to have little impact on her, applying, as it does, only to the extent of Canada's borders.

[22] A number of cases have been filed before me to illustrate the appropriate sentencing range. At the low end is *R.* v. *Weisgerber,* [2009] S.J. No. 546, where the offender was sentenced to pay a fine of $2,000. At the high end is *R.* v. *Fletcher*, [1999] Y.J. No. 51, in which the offender received a sentence of ten months in jail. However, three of the cases at the extreme low end of the range, *R.* v. *Weisgerber*, along with *R.* v. *Fineday*, [2007] S.J. No. 59 and *R.* v. *Biernat*, [2009] O.J. No. 2483, both resulting in 90-day intermittent sentences, all arise in other jurisdictions and are therefore less persuasive to me in determining the appropriate sentencing range in this jurisdiction.

[23] The five Yukon decisions before me denote a range of four to ten months. At the upper end, in *R.* v. *Fletcher*, the accused, who had two prior convictions for impaired driving, was driving with a blood alcohol level of 330 milligrams percent when she ran a stop sign, striking another vehicle. All three passengers in that vehicle suffered serious injuries, at least two requiring major surgery. Noting Ms. Fletcher's impressive record of

post-offence counselling and treatment, Faulkner J. declined to grant her a curative discharge and sentenced her to ten months in jail to be followed by two years probation and a three-year driving prohibition.

[24] In *R.* v. *McGinnis*, [1998] Y.J. No. 33, Lilles J. sentenced the offender to serve seven months in prison for injuring three individuals, though arguably the injuries were less serious than those in the case before me. However, like *Fletcher*, McGinnis had two prior convictions for impaired driving. His blood alcohol reading was 180 milligrams percent and, like Ms. Marshall, he was driving his vehicle in the wrong lane, resulting in a head-on collision.

[25] In *R.* v. *Coldwell*, [2008] Y.J. No. 63, Cozens J. sentenced a 19-year-old offender to six months for impaired driving causing bodily harm to his two passengers. The injuries, which included two fractured ribs and bruising, were significantly less serious and the readings were on the lower end at 100 and 110. However, Mr. Coldwell had been convicted for impaired driving just four months before, and was disqualified from driving at the time of the offence.

[26] At the low end are the cases of *R.* v. *Stacey Jackson aka Stacey Porter*, 2009 Y.K.T.C. 114, and *R.* v. *Campen*, [1998] Y.J. No. 15. Both involved offenders who did not have prior related records and both resulted in sentences of four months in custody. In *Jackson*, a single vehicle accident left a passenger with multiple fractures to her femur, humerus, clavicle and L-2 area of her spine. Ms. Jackson's blood alcohol content was 187 milligrams percent. In *Campen*, the injuries are described as serious and life-threatening and the offender did not accept full responsibility for causing the

accident. The blood alcohol reading was not disclosed in the sentencing decision.

[27] Each of these cases illustrates the increasing seriousness with which impaired driving offences are viewed by the courts, given the disturbing prevalence of these offences and the extreme danger impaired drivers represent. In *McGinnis*, Lilles J. noted:

> The offence contrary to s. 255(2) is a very serious offence. I acknowledge that the case law indicates a wide range of possible dispositions. But consistently, the dispositions imposed for drinking and driving where bodily harm results, are today much more significant than they were a decade ago. This is primarily a result of less tolerance in our society for drinking and driving and the direction given by the Courts of Appeal that general deterrence is to be considered an important sentencing principle for these kinds of offences. That is to say, I must impose a sentence today that not only will deter Mr. McGinnis, but will also send a message to others in the community who drink and drive.

[28] This increase in sentencing echoes legislative amendments over recent years, with Parliament having increased mandatory minimum sentences for impaired driving offences on two separate occasions. It is against this backdrop that I must sentence Ms. Marshall.

[29] It is clear to me that Ms. Marshall appreciates the seriousness of her conduct and is genuinely remorseful such that a custodial term is not necessary to deter her from like conduct in the future. She is at very low risk to reoffend. I also recognize that any length of time in custody will have a significant impact on her, particularly given her father's current medical status. However, sentences in cases of impaired driving causing bodily harm are very much driven by the consequences flowing from the act of driving while impaired. Ms. Marshall's moral culpability in getting behind the wheel

while under the influence of alcohol in this case is no different than it would be in the case of impaired simpliciter for which one could receive a fine. As noted by the Ontario Court of Appeal in *R.* v. *McVeigh* [1985] O.J. No. 207:

> No one takes to the road after drinking with the thought that someone may be killed as a result of his drinking.

[30] What differs between the two scenarios are the consequences. The impaired simpliciter driver presents a serious risk to the safety of the public. For the impaired driver causing bodily harm or death, that risk has been tragically realized. The sentence must reflect the gravity of the consequences to the Spencers. Furthermore, the case law is clear that in order to achieve the principles of general deterrence and denunciation in such cases, the sentence must be of sufficient length to make it unattractive for others to get behind the wheel when intoxicated. While I do not believe that it can be said that the deterrent impact of a sentence exponentially increases in relation to the length of a sentence, I am of the view that to have a general deterrent effect the sentence must be of sufficient length to be viewed as something more than a slap on the wrist.

[31] When I consider the range of sentences for similar offences in Yukon I am simply not satisfied that the objective of general deterrence would be achieved with a sentence of 30 to 60 days. I would, however, place Ms. Marshall toward the lower end of the identified range of four to ten months, coming before the Court as she does with no prior record for anything, let alone impaired driving, unlike those offenders in the cases at the higher end of the range. But noting the seriousness of the injuries resulting from her conduct, I would not place her at the very low end of that range.

[32] In all of the circumstances, I am satisfied that the appropriate sentence would be one of five months or 150 days. As Ms. Marshall elected to enter custody on Monday in anticipation of a custodial term, she has already begun to serve her sentence and is entitled to credit for the five days spent in remand. The practice in this jurisdiction is to allow credit for remand at a rate of one and a half to one. In this case, I will credit her for eight days spent in remand, leaving a remaining 142 days still to be served.

[33] There will also be a driving prohibition of two years, though, as stated earlier, a driving prohibition will likely have little to no impact on Ms. Marshall, given her stated intention to return home to England. It nonetheless must serve as part of the overall deterrent message to be sent to other potential impaired drivers.

[34] It is with considerable difficulty that I pass sentence in this case, recognizing the impact it will have on Ms. Marshall and her family, and knowing full well that it will do little to repair the harm that has been suffered by the Spencers. I can only hope that the parties can move forward from this tragedy in some meaningful and positive way.

[35] Victim fine surcharge?

[36] MS. MACDONALD: The Crown is not opposed to it being waived in the circumstances.

[37] THE COURT: I will waive it, given her custodial status. The remaining counts?

[38] MS. MACDONALD: Crown enters a stay of proceedings.

[39] THE COURT: Thank you.

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RUDDY C.J.T.C.