Citation: *R. v. Mitchell*, 2019 YKTC 51

Date: 20191118
Docket: 19-00485
Registry: Whitehorse

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

REGINA

v.

WILLIAM GEORGE MITCHELL

Appearances:
Paul Battin — Counsel for the Crown
Mark Chandler — Counsel for the Defence

REASONS FOR SENTENCE

[1] CHISHOLM C.J.T.C. (Oral): Mr. William George Mitchell drove a motor vehicle near the City of Whitehorse while his blood alcohol concentration exceeded the legal limit.

[2] The Crown proceeded by Indictment. Mr. Mitchell elected to be tried in this Court and entered a guilty plea on November 15, 2019. The Crown filed a Notice of Intention to seek greater punishment pursuant to s. 727 of the *Criminal Code*.

[3] Counsel for the Crown and Mr. Mitchell made their respective submissions regarding sentence on that date. As Mr. Mitchell required some minor medical attention following the sentencing hearing, the matter was adjourned until today for my decision.

Facts

[4] Counsel filed an Agreed Statement of Facts which may be summarized as follows:

> Late in the afternoon of August 9, 2019, Mr. Mitchell was driving a vehicle that left the South Klondike highway a few kilometres south of the intersection of the Alaska and South Klondike highways, commonly referred to as the Carcross cutoff.
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> At approximately 4:50 p.m., another vehicle was proceeding cautiously through a dust cloud on this highway when the driver and his passenger noted a red sedan off the road and on its roof, with its wheels still turning. These two individuals went to the overturned vehicle and located Mr. Mitchell in the driver's seat. The driver of the second vehicle cut Mr. Mitchell from his seatbelt. He noticed that Mr. Mitchell had trouble standing and had a smell of alcohol emanating from him.
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> Another passerby called 911 around this time. When the police arrived, the investigating officer spoke to Mr. Mitchell after he exited an ambulance. The officer observed signs of alcohol consumption and made an approved screening device demand. Mr. Mitchell complied and a "fail" reading resulted. The officer made a further breath sample demand.
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> Ultimately, Mr. Mitchell provided two samples of his breath with the lowest reading registering 160 milligrams of alcohol in 100 milliliters of blood. The police charged Mr. Mitchell for drinking and driving offences. He first appeared in court on September 25.

Position of the Parties

[5] The Crown suggests that the appropriate penalty in this case is nine to 12 months of imprisonment, followed by a driving prohibition of four to five years, noting Mr. Mitchell's prior related antecedents and the high blood alcohol reading, an aggravating factor pursuant to s. 320.22(e) of the *Code*. The Crown points to the preamble to Bill C-46, which speaks to the unacceptability of drinking and driving and the need for deterrence. The Crown submits that Mr. Mitchell has not learned from earlier

convictions for drinking and driving, including an impaired driving causing death conviction.

[6] Counsel on behalf of Mr. Mitchell argues that considering Mr. Mitchell's early guilty plea and the gap in his record, the minimum 120-day sentence, plus a lower driving prohibition than suggested by the Crown is the appropriate penalty in this case.

Personal Circumstances

[7] Mr. Mitchell is 67 years of age. He is retired, lives in Whitehorse and makes due on his monthly pension payments. His criminal history includes a number of driving offences. In 1979, a court convicted and fined him for driving while his blood alcohol level exceeded the legal limit. In 1990, a court sentenced him to two years' imprisonment for impaired driving causing death and six month consecutive for failing to stop at the scene of an accident. In 1994, he received a 20-day jail sentence for driving while disqualified. In 2000, a court sentenced him to a high fine, probation and an 18-month driving prohibition for driving while his blood alcohol level exceeded the legal limit. There have been no subsequent convictions of any nature since 2000.

Sentencing Principles

[8] Sections 718 to 718.2 of the *Criminal Code* set out the purpose and principles of sentencing, including:

> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society where necessary;
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> (d) to assist in rehabilitating offenders;
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> (e) to provide reparations for harm done to victims or the community; and
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> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[9] As stipulated in *R. v. Ipeelee*, 2012 SCC 13, and *R. v. Gladue*, [1999] 1 S.C.R. 688, a sentencing court must impose a sentence that fits the offence, the offender, the victim, and the community.

[10] A sentencing court must consider all relevant sentencing principles in determining an appropriate sentence. The fundamental principle of sentencing is set out at s. 718.1 of the *Criminal Code*. It stipulates that a sentence is to be proportionate to the seriousness of the offence and the degree of blameworthiness of the offender. The Court in *R. v. Swaby*, 2018 BCCA 416, found that a "sentence should be proportionate to the circumstances of the offence, including its gravity, and the circumstances of the offender" (para. 69).

[11] A sentencing principle that applies in any sentencing is the principle of restraint. In this vein, s. 718.2(d) states that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances".

[12] And s. 718.2(e) states that:

> all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Gravity of the Offence

[13] The offence of driving a vehicle with a blood alcohol level greater than the legal limit is a serious matter. The caselaw in this area stresses that drunk drivers are a danger to the public (*R. v. McVeigh* (1985), 11 O.A.C 345; and *R. v. Schmidt*, 2012 YKSC 17).

Aggravating and Mitigating factors

[14] Despite Mr. Mitchell's prior convictions of a similar nature, he engaged in this dangerous activity when his blood alcohol level was two times the legal limit.

[15] On the other hand, he cooperated with police during their investigation and entered a guilty plea, thereby accepting responsibility for this offence, at a very early stage of the proceedings. Counsel for Mr. Mitchell indicates that his client wished to deal with this matter sooner, but that the Crown convinced him that he should retain a lawyer.

[16] Additionally, I take into account the gaps in his criminal record. There were no convictions between 1980 and 1990, and as mentioned, no convictions since 2000. As stated by the Court in *R. v. Mohla*, 2012 ONSC 30, at para. 182:

> The gap principle has emerged over time as a foundational consideration in sentencing. Where the principle is relevant, it is error for the sentencing court to fail to apply it: *R. v. Nembhard*, 2010 ONCA 420, at paras. 3-6. …

[17] The gap principle has been codified with respect to certain crimes (i.e. ss. 273(3), 279.1(2.1), 344(2), 346(1.2)), where a 10-year gap period has been specifically implemented.

[18] As Justice Hill stated in *Mohla*, "…[i]gnoring the gap principle, where applicable, or unreasonably discounting its significance, may raise an inference of intended double-punishment or at lease such an effect" (para. 183).

Appropriate Sentence

[19] The decision in *R. v. VanBibber*, 2010 YKTC 49, speaks to the sentencing range for repeat drunk driving offenders in this jurisdiction. Cozens, J. stated at para. 52:

> General sentencing ranges have been established in the Yukon over the years for repeat impaired driving offenders. The number of prior convictions, the time between convictions and the presence of aggravating factors other than the prior criminal history are all important factors.

[20] One of the cases cited in *Vanbibber* is *R. v. Gill*, 2001 YKTC 46[1]. The offender had 11 prior convictions for drinking and driving offences. The Court sentenced him to six months' jail for a refusal to provide a breath sample, followed by three months consecutive for a driving while disqualified charge.

[21] In *R. v. Stone*, 2004 YKCA 11, the Court reviewed the sentencing decision of a s. 253(b) offence for which Mr. Stone received a penalty of nine months incarceration and

[1] When this decision was given in Court, the incorrect name and citation of this case were provided.

a five-year driving prohibition. It should be noted that Mr. Stone appealed only the driving prohibition. His blood alcohol level at the time of driving was approximately twice the legal limit. Mr. Stone had a criminal record which included five prior drunk driving convictions between 1978 and 1997. The offence before the Court of Appeal occurred in 2002. The Court upheld the length of the driving prohibition.

[22] In *R. v. Mulholland*, 2013 YKTC 52, the Court sentenced the defendant to 120 days' jail and a three-year driving prohibition for driving with an elevated blood alcohol level. The Court also sentenced him to a consecutive 45-day jail term for driving while disqualified. Mr. Mulholland's blood alcohol concentration was 200 milligrams percent and he was transporting passengers in his vehicle. He had three prior convictions for drunk driving, in 1994, 1997, and 2011, respectively and a driving while disqualified conviction in 2012. The Court described the presence of *Gladue* factors for this offender.

[23] In the matter before me, Mr. Mitchell's actions put the safety of the public at risk. It is fortuitous that his driving only resulted in a single vehicle accident where nobody was injured or worse.

[24] The principles of specific and general deterrence, as well as denunciation, are of significance in this matter. As indicated, Mr. Mitchell has three prior convictions for drinking and driving offences. Although one of those convictions involved the death of a person, Mr. Mitchell was sentenced for this matter 29 years ago.

[25] It is troubling that this is Mr. Mitchell's second conviction for drunk driving since that tragedy. Yet, I cannot lose sight of the fact that he has not been before the courts since 2000.

[26] I am mindful of the fact that sentencing is a highly individualized process which reflects the circumstances of the offence and of the offender (see *Ipeelee* at para. 38 and *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at para. 92). Sentencing is a "profoundly contextual process" wherein the judge has a broad discretion (*R. v. L.M.*, 2008 SCC 31, at para. 15; see also *R. v. Lacasse*, 2015 SCC 64, at para. 11).

[27] In all the circumstances, the appropriate sentence in this matter is a jail term of 120 days plus a three-year driving prohibition. I am of the view that a more severe penalty would result in double-punishment for Mr. Mitchell's 1990 conviction.

[28] Pursuant to s. 320.24(10), I order that Mr. Mitchell may be registered in an alcohol ignition interlock device program after having served one year of the driving prohibition.

[29] I impose a victim surcharge of $200 and allow Mr. Mitchell 12 months' time to pay.

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CHISHOLM C.J.T.C.