SUPREME COURT OF YUKON

Citation: *R.* v. *Butler*, 2011 YKSC 21

Date: 20110221
Docket: 08-AP009
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

v.

RANDY WADE BUTLER

Appellant

Before: Mr. Justice L.F. Gower

Appearances:
Terri Nguyen — Counsel for the Respondent
Karen Wenckebach — Counsel for the Appellant

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is a summary conviction appeal from a sentence imposed by a Justice of the Peace in the Territorial Court on October 22, 2008, for two charges; one, evading a police officer under s. 249.1(1), and the second being a charge of operating a motor vehicle over the legal limit, contrary to s. 253(b) of the *Criminal Code*.

[2] On the former charge, the Justice of the Peace imposed a 14-day jail term to be served behind bars, and on the latter she imposed a $2,000 fine, plus a $300 victim fine surcharge, as well as an 18-month driving prohibition. She allowed the jail term to be served intermittently, commencing December 1, 2008, deeming the appearance of the

appellant in court on October 22nd as the first day of the sentence.

[3] There were originally three items of relief sought in the Notice of Appeal: (1) that the 14-day jail sentence be set aside; or in the alternative, (2) that the $2,000 fine and $300 surcharge sentences be struck; and (3) such other relief as this Court may deem just. Subsequent to the filing of the Notice of Appeal, the appellant, by consent order, abandoned item (1) of the relief sought relating to the 14-day jail sentence. That simply leaves the issue of the $2,000 fine, and the related surcharge. There are two aspects to that issue: (1) whether the $2,000 fine was demonstrably unfit in the context of s. 687(1) of the *Criminal Code*; and (2) whether the Justice of the Peace erred by failing to consider a relevant factor on the sentencing.

[4] The position of the appellant is firstly that the Justice of the Peace erred in imposing both the 14-day jail term and the maximum fine for the offence under s. 253(b) of the *Criminal Code*. Rather, says the appellant, the appropriate sentence would have been 14 days imprisonment for the s. 249.1 offence and one day of imprisonment, concurrent, for the conviction under s. 253(b). There is no quarrel with the 18-month driving prohibition.

[5] Secondly, the appellant takes the position that the Justice of the Peace erred by failing to make any inquiry as to the appellant's ability to pay before imposing the maximum fine, contrary to the common law and s. 734(2) of the *Criminal Code*.

[6] The Crown's position is firstly that the 14-day jail sentence, coupled with the $2,000 fine, viewed as a global sentence, is within the range for these types of offences. Secondly, the Crown argues that because defence counsel made submissions at the

sentencing hearing that a fine in the range of $1,200 would be an appropriate global sentence, and that the appellant could likely afford to pay a $1,200 fine within two to three months, there was no further need for the Justice of the Peace to canvass the appellant's ability to pay.

[7] The offences occurred on May 5, 2008. The appellant was 19 years old at the time and was employed as a labourer in the oilfields in Alberta. He had no adult criminal record and his youth record was short and unrelated. He pled guilty to both offences and indicated through his counsel that his intention to do so came at a relatively early stage in the proceeding. The appellant had a blood alcohol level of 160 millilitres of alcohol per 100 millilitres of blood. When the police attempted to pull him over, he fled.

[8] The appellant was first seen at Robert Service Way and Fourth Avenue and was driving his vehicle erratically, swerving between the turning lane and the northbound lane. The vehicle then continued down Fourth Avenue onto Alexander Street and then onto Fifth Avenue. Next it was seen travelling southbound on Fourth Avenue. The appellant had one passenger in the car with him. At different times, he was travelling at speeds between 30 to 50 kilometres per hour and 70 to 80 kilometres per hour. It appears that the duration of the flight from the police vehicle was not long. After being stopped by the police vehicle, the appellant was noted to be aggressive and verbally abusive to the RCMP.

[9] At the sentencing, the Crown prosecutor asked for a global sentence of 30 to 60 days incarceration. Defence counsel sought a fine, as I have indicated, in the range of $1,200. Crown counsel also submitted at the sentencing hearing, and I am referring to

page 7 of the transcript, that it would be unfair, from the totality perspective, for the Justice of the Peace to impose the 30 to 60 day custodial term and then to apply a fine to the impaired charge. It was clearly Crown counsel's intention that the 30 to 60 day suggested range was in the nature of a global sentence for both counts.

[10] I am cognizant of the principles governing a sentence appeal such as this. I refer to the case of *R.* v. *Nasogaluak,* [2010] 1 S.C.R. 206, where LeBel J. said this with respect to the standard of review on sentence appeals at para. 46:

> "Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. In *M.(C.A.),* Lamer C.J. cautioned that a sentence could only be interfered with if it was "demonstrably unfit" or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor."

LeBel then went on to refer to Laskin J.A. in *R.* v. *McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.) and explained that:

> "...this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently:"

He then quotes Laskin J.A. from *McKnight* specifically, and part of that quote includes the following:

> "Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground (that) the trial judge erred in principle."

[11] It is a further generally accepted principle that appellate courts should intervene to minimize any disparity between a sentence imposed by a trial court and any earlier

sentencing precedents only where the sentence in question is a substantial and marked departure from sentences customarily imposed for similar offenders committing similar crimes. That principle is effectively codified in s. 718.2(b) of the *Criminal Code* which reads:

> "(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;"

[12] There is little evidence of the range of sentence for s. 253(b) offences standing alone or in combination with a charge of evading a police officer. However, I will refer to some of the authorities that have been provided to me. The first is *R.* v. *Dibdin*, 2009 BCPC 298. In that case, the offender pled guilty to charges of impaired and failing to stop at the scene of an accident. At para. 3 of the decision, Skilnick P.C.J., stated:

> "Under s. 255(1)(a) of the *Code,* a person sentenced for a first offence of impaired driving is subject to a minimum fine of $1,000. Section 259(1)(a) also provides for a mandatory driving prohibition of between one and three years. The typical sentence for an impaired driver with no prior record is a fine and a one year driving prohibition. The amount of the fine and the length of the prohibition will typically depend on the circumstances of the offence and the offender. Factors such as the blood alcohol reading, the presence or absence of an accident and the post-offence conduct of the offender are among the considerations that come into play in determining the sentence."

[13] The particular circumstances of *Dibdin* were as follows. The offender was noted to be urinating near his vehicle in a severely intoxicated condition. He got into his vehicle and drove away, and in doing so caused a minor collision. He failed to stop his vehicle after that collision. When the police eventually caught up to him and approached him in his vehicle, he yelled, "Fuck you, pig" at the constable and the two struggled for the keys to the vehicle, while the offender set the vehicle in motion, dragging the

constable for a distance of about 30 feet. At some point he actually drove the vehicle over the constable's left elbow. He then became stuck on a meridian and a second police vehicle arrived, taking the offender into custody. His blood alcohol readings were 250 milligrams percent. The offender had no criminal record. He was 26 years old with a Grade 11 education. The judge noted that he had expressed no remorse or concern for the constable.

[14] After referring to the general principles of sentencing, Skilnick P.C.J. sentenced the offender on the impaired driving charge to a fine of $2,000, plus probation for two years. On the failure to stop at the scene of an accident, the offender was sentenced to a fine of $1,500, and was prohibited from driving for a period of three years.

[15] I digress by indicating that in the case at bar, at the time of the sentencing, I believe the minimum fine was $600.

[16] In *R.* v. *Watson*, 2008 ABPC 68, the offender pled guilty to one count of evading a police officer under s. 249.1, as well as a charge of operating a vehicle over 80 milligrams, contrary to s. 253(b) of the *Criminal Code*. The Crown sought a period of incarceration of four months in jail, plus an 18-month driving prohibition. Defence counsel was seeking a conditional sentence order in the range of 12 to 18 months, plus a one-year driving prohibition.

[17] The facts in that case were that the offender was seen making a U-turn with his vehicle. This was on Christmas Eve at about 2:30 in the morning. The police followed, saw him weave in his lane, crossing over the white line on several occasions. Police activated their emergency lights, but the offender continued driving for about 300

metres. He then suddenly sped up and a police pursuit began. The offender was travelling at speeds of about 140 to 150 kilometres per hour in zones where the speed limit ranged from 60 to 100 kilometres per hour. At some point he appeared to toss out a beer can, which struck the police vehicle. He then made a sudden move onto the highway, changing directions at the last second. Ultimately, a spike belt had to be employed in order to bring the offender's vehicle to a halt. He ultimately provided samples of his breath with readings of 140 and 130 milligrams percent.

[18] The offender was noted to be young, at 20 years of age. He had entered guilty pleas and had accepted responsibility for his conduct and had no criminal record. Dunnigan P.C.J. imposed a global sentence, at para. 25 of the reasons, of a 15-month conditional sentence order with a 12-month driving prohibition, without further specification as to how that sentence was applied to each of the two offences.

[19] In *R.* v. *Charlie*, 2002 YKTC 86, the offender pled guilty to a charge of operating a vehicle while impaired, as well as a *Motor Vehicles Act* charge of operating a vehicle without a licence. The Court noted that he had been given previous breaks by the police officer. On the occasion at issue, the offender offered a number of insults to the police officer during the investigation. He had a significant prior criminal record, including prior related convictions for drinking and driving. Counsel there made a joint submission for a 30-day conditional sentence, which the trial judge felt was wholly inadequate. He imposed a conditional sentence of 120 days, plus an 18-month driving prohibition.

[20] In *R.* v. *Porter*, 2003 YKTC 101, the offender pled guilty to one count under s. 253(b) of the *Criminal Code*. He was seen on Hamilton Boulevard in Whitehorse,

attempting to pull out to pass another vehicle, crossing a solid line. The police pursued and eventually stopped both vehicles. The offender had previously been disqualified from driving under the *Motor Vehicles Act*. He blew readings of 220 and 230. He had no related record, but the Court indicated, as it was bound to do, that the readings in excess of 160 milligrams were statutorily aggravating. He entered an early guilty plea and the Justice of the Peace imposed a $900 fine, as well as a victim fine surcharge of $135, and a driving prohibition for a period of one year.

[21] Both counsel have individually filed the case of *R.* v. *McLeod*, 2003 YKSC 70, a decision I rendered. At paras. 17 and 28 I referred to the aggravating circumstances and, in my view, those circumstances clearly take this case out of the range for the type of offender and offence on this appeal.

[22] I will turn now to what the Justice of the Peace said in her reasons for sentence. At para. 3 she acknowledged that:

> "...the defence has pointed out that certain factors of the *McLeod* case are much more aggravating. I agree with a lot of defence submissions regarding that case."

Then she goes on to refer to some of the distinguishing, aggravating circumstances in *McLeod.*

[23] At para. 6 she referred to the offender as a very young man with no adult criminal record, who had taken responsibility by his guilty plea. At para. 7 she referred to another case that she had decided earlier in the day, *R.* v. *Hutton* (no citation). That case was discussed by the Justice of the Peace and Crown counsel during the course of the submissions. Apparently, Ms. Hutton was noted to have hit two vehicles and

driven all the way to Porter Creek in Whitehorse. However, she was similar in age to the appellant and had no criminal record. The sentence imposed in that case was a non-custodial sentence. She also had readings which were higher than Mr. Butler's.

[24] The Justice of the Peace went on to impose the sentence on the appellant at paras. 8 and 9:

> "With regard to the impaired driving matter I am going to deal with it by way of a fine. The fine will be a $2,000 fine. There will be a $300 victim fine surcharge.
>
> With regard to the s. 249.1(1) charge, an extremely aggravating charge, being impaired while driving a vehicle, the police activating their lights to have you stop and you continue to, basically, flee from them, I agree with Crown that a period of custody is warranted with regard to that matter. In terms of the length of custody, I am not in agreement that it should be for the period suggested, and I am imposing a period of 14 days."

[25] After the total sentence was imposed, including the victim fine surcharge and the driving prohibition, the Justice of the Peace then engaged in a discussion with the offender and his counsel in an attempt to accommodate the offender's employment. There was some concern that if the offender had to begin serving his prison sentence immediately, he would lose the prospect of continuing employment in Alberta. The upshot of those discussions was that the Justice of the Peace allowed the jail sentence to be served intermittently with the first day being the date of that hearing and the balance of the sentence to commence December 1, 2008. However, all of those comments and discussions came after the sentence was imposed by the Justice of the Peace for the s. 253(b) offence.

[26] In coming to the conclusion I do, I want to say that I clearly recognize the hurly

burly of the busy dockets in Territorial Court, and I am not expecting any standard of reasons approaching perfection. Having said that, I conclude that the maximum fine of $2,000 for a first offence of this kind by this offender, that is a young person of 19 years of age with no prior criminal related record and a person who had taken responsibility by an early intention to plead guilty on these facts, coupled with the already significant jail sentence of 14 days, does significantly and markedly exceed the range for both the s. 253(b) offence standing alone, and for the two offences in combination.

[27] I also note that the Justice of the Peace failed to engage in any analysis whatsoever of the rationale or justification for combining the two sentences as she did, which is somewhat surprising, given that the Crown's position, as I stated earlier, is that it would be unfair to add a fine to the suggested jail sentence, and that the Crown was only seeking a global sentence for the two offences.

[28] I would also observe that the Justice of the Peace did not give adequate regard to the appellant's ability to pay before imposing the maximum fine of $2,000. I acknowledge that the offender's ability to pay was raised by defence counsel, but there is a significant difference between the $1,200 fine he proposed and the ultimate fine of $2,000 which was imposed, roughly 66 percent higher. Yet, there is not the least reference by the Justice of the Peace, in her reasons, to the appellant's ability to pay, and I find that to be an error.

[29] In conclusion, then, I agree with the appellant's counsel that the appropriate disposition in this case would be to vary that imposed for the s. 253(b) offence to one of one day of imprisonment concurrent, already deemed served. That will result in a

corresponding change to the victim fine surcharge. As I read s. 737(2)(b) of the *Criminal Code*, if no fine is imposed on the offender for the offence, in the case of a summary conviction offence, there is a $50 surcharge. Am I correct on that, Madam Crown?

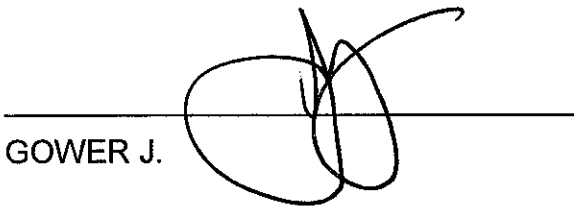
[30] MS. NGUYEN: Yes.

[31] THE COURT: All right. So I will make that order. Is there anything else that I have omitted?

[32] MS. WENCKEBACH: I don't believe so.

[33] MS. NGUYEN: No, sir.

[34] THE COURT: Thank you to both counsel.



GOWER J.