COURT OF APPEAL FOR YUKON

Citation: *R. v. Schinkel*,
2015 YKCA 2

Date: 20150105
Docket: YU742

Between:

Regina

Appellant

And

Teri Lynn Schinkel

Respondent

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Garson
The Honourable Madam Justice MacKenzie

On appeal from: an order of the Territorial Court of Yukon dated August 14, 2014
(*R. v. Schinkel*, 2014 YKTC 42, Whitehorse Registry No. 13-00775A)

Oral Reasons for Judgment

Counsel for the Appellant:	N. Sinclair
Counsel for the Respondent:	K. Hawkins
Place and Date of Hearing:	Vancouver, British Columbia January 5, 2015
Place and Date of Judgment:	Vancouver, British Columbia January 5, 2015

Summary:

Crown appeal from concurrent 60-day intermittent jail sentences with a two-year period of probation following the accused's guilty plea on charges of impaired driving causing bodily harm, dangerous driving causing bodily harm, and refusal to provide a breath sample. Also included was a one-year driving prohibition concurrent on the impaired and dangerous driving causing bodily harm convictions. The Crown contends the sentences are unfit and an appropriate sentence would be a total of six months jail with the one-year driving prohibition to apply concurrently to the refusal to provide a breath sample conviction. Held: Appeal dismissed, except to amend the Driving Order to apply to the third conviction, concurrently with the other two convictions. Otherwise, although the sentences are below the ordinary range for these offences, they were fit for this particular Aboriginal offender. Further, it was open to the judge in the circumstances to impose concurrent sentences for the three offences.

[1] **MACKENZIE J.A.**: The Crown seeks leave to appeal and, if granted, appeals from concurrent 60-day intermittent jail sentences imposed by the Territorial Court of Yukon following Ms. Schinkel's guilty plea to the following offences:

> Count 1: impaired driving causing bodily harm (s. 255(2) of the *Criminal Code*);
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> Count 2: dangerous driving causing bodily harm (s. 249(3) of the *Criminal Code*); and
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> Count 3: refusal to provide a breath sample (s. 254(5) of the *Criminal Code*).

[2] The concurrent sentences included a two-year probation order that bound Ms. Schinkel while serving her sentence intermittently, but when not confined (para. 23). There were other strict terms of the probation order, which the judge described as "not specific" to the 60-day intermittent sentence, that precluded the consumption of alcohol or unprescribed controlled drugs. Also included was a 12-month driving prohibition concurrent on Counts 1 and 2 (paras. 20, 23-24). A victim fine surcharge of $200 was imposed on each count. The reasons for sentence are indexed as 2014 YKTC 42.

[3] The Crown contends the sentences are unfit and an appropriate sentence would be a total of 6 months jail with the one-year driving prohibition to apply

concurrently to Count 3. The Crown also argues the judge erred by imposing concurrent sentences on all counts.

[4] Ms. Schinkel says the sentences are fit based on the application of the principles of sentencing to the circumstances of this offender and these offences. However, Ms. Schinkel concedes the judge erred in failing to order the mandatory driving prohibition on Count 3. She also applies to adduce fresh evidence.

[5] For the following reasons, I would grant leave, but dismiss the appeal except to amend the Driving Order to make it apply concurrently on Count 3. Otherwise, I conclude that although the sentences are below the ordinary range for these offences, they are fit for this particular Aboriginal offender. I also consider it was open to the judge, in the circumstances, to impose concurrent sentences for the three offences. It is unnecessary to consider the application to adduce fresh evidence.

The Offences

[6] The judge described the offences this way:

> [2] The circumstances of the offence are rather egregious. The accused was drinking at a house party. She had an ex-boyfriend who left the party after assaulting her, and she decided that because it was cold outside and he had left, I guess, suddenly without his coat, that she would drive around town looking for him to give him his coat. She knew that she had drunk too much, and she had drunk quite a lot. She asked her brother to do the driving while she went on this mission and her brother declined because he had drunk too much too, but he asked her for a ride home.
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> …
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> [4] When she was seen driving she was seen to be swerving so violently on the road that three young people who were driving in the opposite direction turned around, followed her, phoned 9-1-1, and made observations of her driving, including her striking another vehicle and carrying on.
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> [5] I do not think it is necessary to look at all the details, but at some point she did come across her ex-boyfriend who got into the car and proceeded to assault her again and then leave. She said she was traumatized by that event and out of her mind because of it and took off in the car.

> [6] She drove for quite a considerable period of time in a busy part of the Alaska Highway and Whitehorse. She was all over the road; driving with one flat tire; at high speeds, 130 to 140 kilometres per hour; in the wrong lane; going through stop signs; and hitting medians. When she was coming down the hill into Whitehorse, she hit another car and that car was pushed off the road and across the median and over a bank. The person in that car was injured fairly badly, although has recovered, generally, but it was a difficult time after that for the young woman who was injured, and a difficult time for her family because the only car the family owned was totalled.
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> [7] The accused was in such a state that she was very difficult to deal with for the paramedics, and she has apologized to the paramedics today. She was thrashing and kicking around and accusing them of things and making quite a difficult situation for them to do their duty in this major car accident. And then she continued this conduct in the hospital, shouting and having to be restrained, all in the earshot of the person who had been genuinely injured.

[7] As the Crown points out, the offences had a significant effect on the young victim, a 16-year-old woman, who suffered serious physical and emotional injuries, as well as property and income loss. With respect to the physical injuries, she sustained a severe head injury, which was a flap laceration that needed 15 stitches and a major concussion, whiplash and bruises. With regard to the emotional injuries, the victim suffered, amongst other things, shock, distress, fear, aggravation, anxiety, and depression. The victim continues to suffer from recurring headaches that preclude normal activities and which require three types of medication. Finally, her family vehicle was “totalled” in the collision.

The Judgment

[8] The Crown’s position at sentencing was that although a global jail sentence in the range of nine months was appropriate in light of the aggravating factors, it could be reduced to six months considering the “*Gladue* factors” (see *R. v. Gladue*, [1999] 1 S.C.R. 688). The Crown relied principally on *R. v. Lommerse,* 2013 YKCA 13, in which this Court substituted a sentence of a moderate fine and probation for four months imprisonment, which it said was at the “low end” of the usual sentencing range for the offence of impaired driving causing bodily harm (para. 23).

[9] The position of the defence was that a suspended sentence with a two year probation order and a $2000 fine was a fit sentence, taking into account the

principles espoused in *Gladue*, *R. v. Ipeelee*, 2012 SCC 13 and *R. v. Nasogaluak*, 2010 SCC 6.

[10] The judge considered the principles in *Gladue* required the court to give greater weight to restorative and rehabilitative opportunities (para. 12). He said that consistent with all cases, the court had to use a reasonable alternative, if one was available, to arrive at a fit sentence:

> [13] But the mistake that we make is that there is always an alternative to any jail sentence unless there is a minimum sentence, so it is not what *Gladue* really meant. It meant if there is a reasonable alternative, given all the considerations and principles of sentencing, that a court has to use it in order to come to a fit sentence, Aboriginal offender or not. And in this case, there is a need to impose a sentence that has a deterrent and denunciatory effect.

[11] While the judge determined Ms. Schinkel to be rehabilitated, he concluded that impaired driving particularly calls for denunciation and deterrence (paras. 14-15). Accordingly, he imposed a sentence for that offence he considered addressed the principles of denunciation and deterrence but which could be "married with" a rehabilitative sentence (para. 19. As mentioned, he thus imposed incarceration of 60 days to be served intermittently, together with a two-year probation order to address the rehabilitative aspects he considered so necessary in the circumstances (paras. 14–20), and a Driving Order prohibiting Ms. Schinkel from operating a motor vehicle for one year on Counts 1 and 2 concurrently.

The Fresh Evidence

[12] Ms. Schinkel applies to adduce fresh evidence consisting of her own affidavit and that of her supervising probation officer. Her probation officer deposes to Ms. Schinkel having successfully served the custodial portion of her sentence intermittently for 10 consecutive weekends, from August 22, 2014 to October 27, 2014, and having reported satisfactorily on her probation order.

[13] The fresh evidence reveals that Ms. Schinkel has recently been accepted into Yukon College where she expects to take courses in English and Math and to secure funding for her General Studies Program. She is also working on an

application for a welding program at UA Piping Industry College of British Columbia. In addition, Ms. Schinkel awaits a response from a job skills program that could provide her with some income and training.

[14] The fresh evidence also demonstrates Ms. Schinkel remains connected to Alcohol and Drug Services as an outpatient where she expects to continue meeting with her regular counsellor for alcohol counselling and support.

[15] Ms. Schinkel only intended to rely on the fresh evidence to support her application for a stay of any additional jail term this Court might be inclined to order. As will become evident from my proposed disposition of this appeal, the fresh evidence would not affect the outcome in this case. It is therefore unnecessary to address it.

Discussion

1. Is the Sentence Unfit?

[16] The determination of a fit sentence is entitled to deference. The standard of review of the fitness of a sentence is unreasonableness: *R. v. Shropshire*, [1995] 4 S.C.R. 227 and *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500. Thus, an appellate court may only intervene if it can be said the sentence is “clearly unreasonable” (*Shropshire* at para. 46). A sentence is demonstrably unfit or clearly unreasonable if the judge erred in principle by employing an irrelevant factor, overlooking or overemphasizing a relevant factor, or imposing a sentence in “substantial and marked departure” from the range of sentences imposed for similar offences and similar offenders (*Shropshire* at para. 50; *M. (C.A.)* at paras. 90 and 92).

[17] It is not open to an appellate court to interfere with a sentence simply because it would have weighed the relevant factors differently. The question is whether the trial judge, in weighing the factors, exercised his or her discretion unreasonably: *Nasogaluak* at para. 46.

[18] Where the appellant establishes an error of principle and/or that the sentence is in "substantial and marked departure" from the range of sentences imposed for similar offences and similar offenders, he or she must still establish this resulted in an unfit sentence: *R. v. Johnson* (1996), 112 C.C.C. (3d) at para. 37 (B.C.C.A.); *Nasogaluak* at para. 44.

[19] Although the judge imposed concurrent sentences, the Crown's appeal focuses on the impaired driving causing bodily harm (the dangerous driving arose largely from the impaired driving and resulted in a concurrent sentence in any event). The Crown contends the sentence on the impaired driving causing bodily harm offence is unfit because it fails to address the principles of parity, denunciation and deterrence set out in ss. 718 and 718.2 of the *Criminal Code* and because it falls below the range of sentences imposed for similar offenders committing similar offences, which it contends starts at four months jail. In particular, the Crown contends the judge over-emphasized Ms. Schinkel's rehabilitation.

[20] Ms. Schinkel, on the other hand, submits the sentence properly balanced the objectives of sentencing, sufficiently considered the impact of the offences on the victim, and was fit in all the circumstances.

[21] The Crown again relies principally on *Lommerse*, where this Court concluded the judge understated the risks inherent in Mr. Lommerse's decision to drive while impaired and consequently, understated his level of moral culpability (para. 19). This Court also noted the emphasis the British Columbia Court of Appeal placed in *R. v. Smith*, 2013 BCCA 173, on deterrence and denunciation as important goals in sentencing for impaired driving offences, which are often committed by normally law-abiding individuals with sympathetic backgrounds. But this Court also observed it is those very individuals who must be deterred, so custodial sentences are the norm for impaired driving causing bodily harm and impaired driving causing death (para. 21).

[22] Significantly, this Court in *Lommerse* noted, "[t]he parties accept that the ordinary range of sentence for impaired driving causing bodily harm in Yukon starts

at four months", and determined the moderate fine and probation with limited conditions imposed in that case was an unfit sentence (para. 22). Thus, as mentioned, this Court substituted a sentence of four months imprisonment - a sentence at the "low end" of the usual sentencing range (para. 23).

[23] The Crown submits the judge failed to explain the reason for departing from the four-month start of the range established by *Lommerse*, and did not address that case. The Crown says he imposed the lowest sentence in recent years for impaired driving causing bodily harm and that the facts in this case are more aggravating and serious than those in *Lommerse*. In support, the Crown cites these cases: *R. v. Craft*, 2006 YKTC 19, 14 months jail conditional sentence; *R. v. Coldwell*, 2008 YKTC 59, 7 months jail; *R. v. Marshall*, 2010 YKTC 81, 5 months jail; *R. v. Dickson*, 2013 YKTC 27, 5 months jail; *R. v. Vallee*, 2012 YKTC 92, 90 days jail intermittent with a $2000 fine; *R. v. William*, 2012 YKTC 35, 6 months jail; and *R. v. Tom Tom*, 2014 YKTC 22, 6 months jail.

[24] In my view, the flaw in the Crown's approach and in particular, its strict reliance on *Lommerse* is that it fails to adequately recognize both the high degree of deference appellate courts give a sentencing judge and the significance of the systemic *Gladue* factors and proportionality. In particular, s. 718.2(e) of the *Criminal Code* provides:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
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> …
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> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[25] In *Ipeelee*, the Court summarized the principles set out in *Gladue* as follows:

> [59] The Court held, therefore, that s. 718.2(e) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of

> analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

[26] In *Ipeelee* the Court also discussed the fundamental principle of proportionality and the wide discretion accorded to sentencing judges:

> [37] The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing —the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. … Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.
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> [38] Despite the constraints imposed by the principle of proportionality, trial judges enjoy a broad discretion in the sentencing process. The determination of a fit sentence is, subject to any specific statutory rules that have survived *Charter* scrutiny, a highly individualized process. Sentencing judges must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender. Appellate courts have recognized the scope of this discretion and granted considerable deference to a judge's choice of sentence. …
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> [Emphasis added.]

[27] With respect to the relationship between the *Gladue* factors and proportionality, the Court in *Ipeelee* stated:

> [87] The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also

> result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention. [Emphasis added.]

[28] As Ms. Schinkel contends, s. 718.2(e) of the *Criminal Code* and *Gladue* (at para. 93) and *Ipeelee* (at paras. 78-79) may require a judge to depart from a formalistic approach to parity.

[29] The transcript excerpts confirm the following submission in Ms. Schinkel's statement, which I consider captures persuasively the particular circumstances of this Aboriginal offender:

> 4. The Respondent submits that the sentence imposed by the sentencing judge is not unfit merely because it falls outside of a sentencing range. At the sentencing hearing the learned sentencing judge received into evidence lengthy Gladue and Pre-Sentence Reports. The Accused had suffered much abuse and neglect during her formative years and in her subsequent relationships with men (Transcript at 15-18; Gladue Report at 3-4 and 9-17), and had been diagnosed with chronic severe post-traumatic stress disorder (Transcript at 26 II 39, Letter of Rebecca Hanson, AB at 86). The Accused gave evidence, by way of Affidavit, that she had been violently assaulted by choking on two occasions over the course of the evening of the offence, and was being assaulted at the time that some of the poor driving was observed (Affidavit of Teri Lynn Schinkel at paras. 16 and 25-30; Transcript at 23 II 27-25 II 24). The Accused took full responsibility for the offence and entered guilty pleas at an early stage. The Accused stopped drinking immediately following the offence, had completed residential alcohol treatment prior to sentencing, and continued to receive outpatient counselling and attend Alcoholics Anonymous (Transcript at 21 II 2-22 II 28). Numerous support letters made clear the Accused's commitment to sobriety, her extreme remorse, and her determination to care for her son as a single mother. Defence counsel engaged in a full review of how section 718.2(e) of the *Criminal Code*, *Gladue*, and *Ipeelee* applied specifically to the Accused's case (Transcript at 35 II 2-41 II 1).

[30] I disagree with the Crown that the judge failed to address *Lommerse* or explain why he did not impose a more severe sentence. Instead, the judge did consider *Lommerse*, noting it "was not an Aboriginal case" and "really is not very similar" except in that it involved impaired driving causing bodily harm (para. 11). He referred to Ms. Schinkel's position based on *Gladue*, discussing the reasonable alternatives to jail in the context of the historic treatment of Aboriginal peoples and their disproportionate overrepresentation in penal institutions. As mentioned, he

observed this should cause a court to give greater weight to restorative and rehabilitative opportunities (paras. 11-12). Nonetheless, concluding there must be a strong but balanced response to these offences, the judge determined there was no reasonable alternative to jail in this case that addressed the required principles of sentencing, notably denunciation (paras. 15-19).

[31] I consider the judge's discussion of *Gladue* reflected he was alive to its principles. In particular, the judge recognized and gave significant weight to Ms. Schinkel's healing and rehabilitation. He determined, on hearing from various speakers, including Ms. Schinkel herself, that she was rehabilitated. He identified the importance of her role in healing her family, which for generations had experienced systemic Aboriginal suffering.

[32] The Crown also argues the judge failed to consider the offences had a significant impact on the young victim, but it seems to me the judge addressed this issue. As mentioned, he found she was injured "fairly badly" but had "recovered generally", and that it was a "difficult time after [the accident]" for her and her family, especially because their only car was destroyed (para. 6). He made his own assessment, based on what he heard at the hearing, and balanced it in the overall deterrent and denunciatory sentence.

[33] I conclude the judge imposed thoughtful, balanced sentences that addressed the fundamental principle that a sentence must be proportionate to the offence and to the offender's moral culpability. While considering the *Gladue* factors, he recognized a proportionate sentence required that deterrence and denunciation be properly addressed, given the nature and seriousness of the offences. He also found those principles important to Ms. Schinkel's own accountability.

[34] In summary, in light of the circumstances of this particular Aboriginal offender and the high degree of deference required, I am not persuaded the sentences are demonstrably unfit.

2. Did the Judge Err by Making the Sentences Concurrent?

[35] Although the Crown did not address this issue in oral submissions, in its statement it says, relying on *R. v. Taylor*, 2010 MBCA 103 at paras 11-12, 15 and 18, that, generally, consecutive sentences must be imposed for separate matters. While conceding the convictions for impaired and dangerous driving causing bodily harm could be considered as having occurred at the same time, so as to attract concurrent sentences, the Crown argues the conviction for refusal to provide a breath sample is a separate matter that requires a consecutive sentence.

[36] As this Court said in *R v. Maxwell-Smith*, 2013 YKCA 12:

> [16] … The test for imposing a concurrent sentence for an additional offence is "whether the acts constituting the offence were part of a linked series of acts within a single endeavour": see *R. v. G.P.W.* (1998), 106 B.C.A.C. 239, as affirmed in *R. v. Li*, 2009 BCCA 85.

I conclude it was open to the judge to consider Ms. Schinkel's refusal to provide a breath sample as arising from her intoxication and agitated state, and sufficiently linked to the impaired and dangerous driving offences in these particular circumstances to justify concurrent sentences. As Ms. Schinkel puts it, the breath sample demand was sufficiently interrelated to the other events to permit a concurrent sentence.

[37] Therefore, I would not give effect to this ground of appeal.

3. Did the Judge Err by Failing to Impose a Mandatory Driving Prohibition for Count Three?

[38] Although in addressing the terms of her probation order, the judge "suspended", or prohibited Ms. Schinkel's right to drive for one year, he failed to order the mandatory driving prohibition attaching to the conviction under s. 254(5) (Count 3), and pursuant to s. 259 of the *Criminal Code*. Ms. Schinkel concedes this error. I would therefore order the one-year driving prohibition also apply to the conviction for refusal to provide a breath sample. It will be concurrent to the prohibition order on Counts 1 and 2.

Disposition

[39] In the result, I would grant leave to appeal but dismiss the appeal except to the extent of amending the Driving Order to make the one-year driving prohibition apply concurrently to Count 3.

[40] **KIRKPATRICK J.A.**: I agree.

[41] **GARSON J.A.**: I agree.

[42] **KIRKPATRICK J.A.**: The appeal is dismissed except to the extent that the Driving Order is amended to apply concurrently to Count 3.

"The Honourable Madam Justice MacKenzie"