COURT OF APPEAL OF YUKON

Citation: *R. v. Mitchell*,
2020 YKCA 2

Date: 20200124
Docket: 19-YU857

Between:

Regina

Appellant

And

William George Mitchell

Respondent

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Butler

On appeal from: An order of the Territorial Court of Yukon, dated November 18, 2019 (*R. v. Mitchell*, 2019 YKTC 51, Whitehorse Docket 19-00485).

Oral Reasons for Judgment

Counsel for the Appellant (appeared via teleconference January 24, 2020): P. Battin

Counsel for the Respondent (appeared via teleconference January 24, 2020): A. Steele

Place and Date of Hearing: Vancouver, British Columbia
January 20, 2020

Place and Date of Judgment: Vancouver, British Columbia
January 24, 2020

Oral Reasons by:
The Honourable Mr. Justice Butler

Concurred in by:
The Honourable Mr. Justice Fitch

Dissenting Oral Reasons by:
The Honourable Madam Justice Saunders (p. 13, para. 35)

Summary:

Majority (per Fitch J.A. and Butler J.A.): Crown appeal of a sentence for impaired driving. The respondent drove with a blood alcohol concentration two times the legal limit. He drove off the road and flipped his vehicle on a busy highway in the middle of a summer afternoon. The respondent had previous dated convictions for impaired driving including one in 1990 for impaired driving causing death. The Crown sought a greater sentence pursuant to s. 727 of the Criminal Code. The respondent was sentenced to the statutory minimum term of imprisonment and driving prohibition. Held: Appeal allowed, Justice Saunders dissenting. Custodial sentence increased to nine months and driving prohibition increased to four years. The sentence imposed was demonstrably unfit as it did not adequately reflect the aggravating circumstances of the offender and the offence. Nor did it give sufficient weight to the principles of deterrence, denunciation and public safety. A remarkable feature of the case is that the respondent has not been deterred from drinking and driving despite causing the death of another person while impaired.

Dissent (per Saunders J.A.): The question on this Crown appeal from sentence is whether it is clearly inadequate. It is agreed the period of incarceration is short of what one might expect. However, the record is sparse as to the respondent's circumstances, in part because he was not given the chance to address the judge before sentence, as is required by s. 726 of the Criminal Code. The driving suspension met the requirements of the Code and one cannot say the judge erred, being on the ground in the community, in setting its length.

[1] **BUTLER J.A.**: On November 15, 2019, the respondent, William George Mitchell, pleaded guilty to one count of driving a motor vehicle while impaired contrary to s. 320.14(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C–46. He was sentenced to 120 days' imprisonment and a three-year driving prohibition: *R. v. Mitchell*, 2019 YKTC 51. The Crown applies for leave to appeal the sentence and appeals on the grounds that the sentencing judge made a material error or that the sentence was demonstrably unfit.

Background

[2] In the afternoon of August 9, 2019, the respondent was driving on the Alaska Highway near the Carcross Cutoff when he drove off the road and flipped his vehicle. Passing motorists cut the respondent's seatbelt so he could exit the vehicle. A police officer attended at the scene of the accident and observed signs of alcohol consumption and impairment. The respondent provided two breath samples. The lowest sample registered 160 mg of alcohol in 100 mL of blood.

[3] The respondent was sentenced following a hearing in the Yukon Territorial Court. The Crown gave notice of its intent to seek a greater sentence as required by s. 727 of the *Code*, as the respondent had two previous convictions for impaired driving offences (he had a third conviction that the Crown concedes is not relevant for the purpose of s. 727). Pursuant to ss. 320.19(1)(a)(iii) and 320.24(2)(c) of the *Code*, the minimum sentence the judge could have issued was a 120-day term of imprisonment and a driving prohibition of three years plus the length of the custodial sentence. The judge sentenced the respondent to the minimum term of imprisonment and driving prohibition.

[4] For the reasons that follow, I would grant leave to appeal and would allow the appeal to the extent of increasing the length of the custodial sentence to nine months and the driving prohibition to four years in addition to the custodial sentence.

The Sentencing Decision

[5] After setting out the facts, the sentencing judge reviewed the parties' respective positions. The Crown proposed a term of nine to 12 months' imprisonment and a four- to five-year driving prohibition. The Crown argued that because of the respondent's prior related convictions and the high blood alcohol reading, a sentence greater than the minimum was required: at para. 5.

[6] The respondent argued that given his early guilty plea and the considerable gap in his record, a 120-day sentence and a "lower driving prohibition than suggested by the Crown" was appropriate: at para. 6.

[7] The judge was provided with little information about the personal circumstances of the respondent. At the time of sentencing, he was 67 years old, retired, and living in Whitehorse. His criminal record contained a number of driving offences:

> [7] … 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.

[8] The judge reviewed the principles of sentencing found in ss. 718 to 718.2 of the *Code* and relevant case law, noting that a sentence must be proportionate to the seriousness of the offence and the degree of blameworthiness of the offender: at para. 10. The judge noted the gravity of the offence of driving while impaired and the danger drunk drivers pose to the public: at para. 13.

[9] The judge then discussed the aggravating and mitigating factors. He dealt with the aggravating factors briefly:

> [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.

[10] As mitigating factors, the judge found the respondent had cooperated with police and entered a guilty plea early in the proceedings. The judge found the respondent had accepted responsibility for the offence. Further, the judge considered the gaps in the respondent's criminal record, as there were no convictions between 1980 and 1990 and no conviction since 2000: at paras. 15–18.

[11] The judge expressed concern that this was the respondent's second conviction for impaired driving since his conviction for impaired driving causing death in 1990: at para. 25. He noted that the respondent's actions put "the safety of the public at risk": at para. 23. Nonetheless, as the respondent had not been before the courts since 2000, the judge concluded that any punishment greater than the minimum would result in double-punishment for the 1990 conviction. The judge sentenced the respondent to 120 days' imprisonment and a three-year driving prohibition.

<u>On Appeal</u>

[12] The Crown raises three grounds of appeal. First, it argues that the sentencing judge failed to give sufficient weight to the circumstances of the offence and of the

respondent. Second, it argues that the judge failed to impose a sentence that reflected the statutory aggravating factor of elevated blood alcohol concentration, as the judge made only a passing reference to s. 320.22(e) of the *Code*. Third, the Crown argues that the judge prioritized the gap principle over all other sentencing principles. It argues that periods between convictions are not necessarily indicative of rehabilitative efforts and that more emphasis ought to have been given to the moral blameworthiness of the respondent. The Crown draws the Court's attention to *R. v. MacLeod,* 2004 NSCA 31, a case with some similarities where Cromwell J.A., as he then was, found that the sentencing judge gave too much weight to the gap principle at the expense of the principles of deterrence and denunciation.

[13] While the Crown advances the above grounds as errors in principle, it says that the errors cumulatively led to a sentence that is demonstrably unfit and warrants appellate intervention. It says that a custodial sentence of nine to 12 months should be imposed and that the driving prohibition should be extended to five years.

[14] The respondent argues that the sentencing judge appropriately weighed the relevant factors and circumstances. He argues the sentencing reasons make it clear that the judge was aware of the significance of the principles of denunciation, specific deterrence, and general deterrence. In addition, the judge referred to s. 320.22(e) of the *Code* and found the respondent's blood alcohol content to be an aggravating factor, contrary to the Crown's submission. Finally, the respondent argues that the judge did not overemphasize the gap principle. He says the *MacLeod* decision is not instructive as the gap in his own criminal record is longer than the offender in *MacLeod* and the circumstances of the offences in *MacLeod* are different because, unlike that offender, the respondent was not convicted of impaired driving causing bodily harm.

The Legal Principles

[15] An appellate court can only intervene in a sentencing decision if there was an error in law or in principle that impacted the sentence or if the sentence is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64 at para. 11; *R. v. Joe*, 2017 YKCA

13 at para. 36. A sentence will be demonstrably unfit if it is “clearly unreasonable” or “clearly excessive or inadequate”: *Lacasse* at para. 52. An appellate court must accord considerable deference to how the sentencing judge weighed the relevant factors and must not intervene merely because it would have weighed the factors differently: *Lacasse* at para. 49.

[16] As the Court in *Lacasse* emphasized at para. 40, with reference to *R. v. Shropshire*, [1995] 4 S.C.R. 227, an appellate court should intervene only where it is of the view that the sentence imposed was clearly unreasonable:

> [40] In this regard, Iacobucci J. explained in *Shropshire* that consideration of the fitness of a sentence does not justify an appellate court taking an interventionist approach on appeal:
>
> > An appellate court should not be given free rein to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable. [para. 46]

[17] The proper approach for an appellate court to follow when considering whether a sentence is demonstrably unfit was explained in *Lacasse*:

> [52] It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is "demonstrably unfit": "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure" (*R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.), at p. 720). All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence.
>
> [53] This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the Criminal Code, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be

> reconciled for a sentence to be proportionate: s. 718.2(*a*) and (*b*) of the *Criminal Code*.
>
> [54] The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the Criminal Code and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. This Court explained this as follows in *M. (C.A.)*:
>
> > It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime... . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. [para. 92]

[18] The fundamental objectives of sentencing include protection of society, denunciation, specific deterrence, general deterrence, and the promotion of a sense of responsibility in offenders: *Code*, s. 718. In impaired driving offences causing bodily harm or death, courts have frequently held that deterrence and denunciation must be emphasized to convey society's concern and condemnation of these offences: *Lacasse* at para. 5.

[19] Those objectives are also the most important sentencing principles for impaired driving offences generally, including where no one was injured. Courts have frequently referred to the comments of Associate Chief Justice MacKinnon, in *R. v. McVeigh* (1986), 22 C.C.C. (3d) 145 (O.N.C.A.) at 150, where he highlighted the need for sentences for the "so-called lesser offences in this field" to be increased. He observed that the public should not have to wait until others are killed before the court's repudiation of the conduct is made clear, and that general deterrence should be the predominant concern.

[20] Parliament has recognized the harm caused by impaired driving offences by increasing the minimum and maximum sentences for impaired driving: *Lacasse* at para. 7. In addition, in recognition of the fact that the greater the level of impairment the more likely it is that others will be harmed, the *Code* was amended in 2018 to

deem driving with a blood alcohol level of 120 mg of alcohol in 100 mL of blood or higher as a statutory aggravating factor.

Analysis

[21] As I am of the view that the sentence imposed is demonstrably unfit, I need not consider the separate errors in principle alleged by the Crown.

[22] In sentencing, a judge must weigh a number of factors while considering the circumstances of the particular offender and the particular offence. In this case, the relevant aggravating factors include the respondent's conviction record (three previous impaired driving convictions including one for impaired driving causing death); his high blood alcohol concentration (twice the legal limit); and the circumstances of the offence (he lost control of his vehicle in the afternoon at a busy intersection on a highway). The mitigating factors were the respondent's early guilty plea and the gaps in his criminal record (from 1980 to 1990 and 2001 to 2019). While the judge was clearly alive to the relevant factors, in my view, the sentence imposed does not reflect an appropriate weighing of those factors and the sentence is demonstrably unfit. The sentence fails to give adequate effect to the principles of denunciation, deterrence and protection of the public. It does not appropriately take into account the respondent's moral culpability. Accordingly, I am of the view that the sentence imposed was clearly inadequate.

[23] I do not arrive at this conclusion lightly. The judge acknowledged the relevant sentencing principles and referred to the identified aggravating and mitigating factors. The judge also appeared to take note of the circumstances of the offence and the offender. However, in my view, the sentence does not reflect those circumstances. As the appellant argues, this is not the case of a driver being found to be slightly over the legal limit at a roadside check. The respondent was highly intoxicated with a blood alcohol concentration that was twice the legal limit and well in excess of the deemed aggravating level of 120 mg. The accident took place in the middle of the afternoon on a busy highway near a major intersection. It was simply good fortune that no one was harmed. The respondent's personal circumstances

included three previous convictions for drinking and driving including the 1990 conviction for impaired driving causing death. It is a remarkable feature of this case that the respondent has not been deterred from drinking and driving despite causing the death of another person while in an impaired state.

[24] In these circumstances, a sentence at the statutory minimum of 120 days in custody does not adequately reflect the aggravating circumstances of the offender or the offence. I agree with the appellant's submission that Parliament lowered the statutorily aggravating blood alcohol concentration level from 160 mg% to 120 mg% because of the increased risk associated with higher blood alcohol concentrations. Yet the sentence imposed, at the statutory minimum, does not appear to have taken the respondent's high blood alcohol concentration into account.

[25] I am also of the view that the judge failed to consider the full context of the offence and the respondent's personal circumstances such that he gave too much weight to the gap in the respondent's conviction record. While the gap principle can be an important factor in sentencing, it cannot be afforded undue weight at the expense of other sentencing principles. As explained by Saunders J.A. in *R. v. Georgiev*, 2014 BCCA 246 at para. 22, it is necessary to examine the entire context before treating a gap in offending as a mitigating circumstance:

> [22] I do not consider the statement by Madam Justice Southin in *Mulvahill* as indicating that a gap in prior offences must be viewed as a mitigating factor, or in the least neutral, when sentencing for subsequent offences. It seems to me that the effect of a gap in a criminal record depends on the context. For example, the nature of the offences, the circumstances of the offender, and any intervening events that render the record more or less relevant will affect the weight given to a prior criminal record. While I acknowledge a significant gap in offending may have the effect recognized by Madam Justice Southin, it is not invariable and the effect of a "gap" on the appropriate sentence is fact intensive.

[26] The relevant context here includes that this is the respondent's fourth impaired driving offence. While there are large gaps between convictions, he does not appear to have changed his behaviour. There was no evidence before the Court about the respondent's efforts, or lack thereof, towards rehabilitation, nor to explain the reason for his continued drinking and driving. Indeed, the fact that the

respondent’s convictions for impaired driving span four decades indicates that he has not learned from his past mistakes. In my view, the statutory minimum does not adequately consider the respondent’s persistent record of impaired driving convictions.

[27] In *R. v. Moreau*, 2007 BCCA 239, the offender had been given a three-year sentence for impaired driving. He had eight previous convictions for impaired driving with gaps of 11 and seven years preceding the conviction in question. In dismissing the appeal, Lowry J.A. rejected the appellant’s argument that the sentence was unfit given those gaps. He observed, at para. 12, that the periods of time between his convictions are not necessarily indicative of any real prospect of rehabilitation and that the need to protect the public was paramount. Even though the circumstances here are somewhat different, those observations are apposite.

[28] The circumstances here are also somewhat different from those in *MacLeod* where the offender had previously been convicted of impaired driving causing death and was given a conditional sentence on a charge of impaired driving causing bodily harm and leaving the scene of the accident. He had a 13-year gap between impaired driving convictions. On appeal he was given custodial sentences of 18 months for the impaired charge and six months for leaving the scene of the accident. Justice Cromwell found that the sentencing judge failed to give sufficient weight to the demands of denunciation and general deterrence and improperly discounted the significance of the prior convictions. While the gap in this case is longer, I would make similar observations; the sentence does not give sufficient weight to the demands of denunciation and deterrence and discounts the significance of the prior conviction for impaired driving causing death.

[29] The judge referred to the decision in *R. v. Van Bibber*, 2010 YKTC 49, to outline the sentencing range for repeat drunk driving offenders in the jurisdiction. He noted that the factors usually taken into account are the number of prior convictions, the time between convictions and the presence of aggravating factors: at para. 19. He also referred to *R. v. Gill*, 2001 YKTC 46, *R. v. Stone*, 2004 YKCA 11, and *R. v.*

Mulholland, 2013 YKTC 52. I agree with the Crown’s submission that those cases are distinguishable because they do not involve offenders with prior convictions for impaired driving causing death and because Mr. Van Bibber and Mr. Mulholland were indigenous offenders.

[30] The decision in *Stone* is, however, instructive. The offender had five prior impaired driving convictions beginning more than 20 years before the offence for which he was again before the courts. None of the charges involved driving causing bodily harm or death. He was sentenced to nine months in prison and given a five-year driving prohibition. In *Stone*, the appellant did not appeal his sentence of nine months and the Court upheld the driving prohibition of five years. In doing so, the Court thoroughly reviewed the sentencing range for cases of offenders with multiple convictions for impaired driving. It is not surprising that the range of sentences for offenders with multiple convictions is broad. Sentences range from three to 36 months’ imprisonment with driving prohibitions of up to 15 years: at paras. 15–18. The cases are necessarily dependant on the specific circumstances and, in particular, the relevant aggravating and mitigating factors.

[31] I am of the view that a fit sentence that gives sufficient weight to the principles of deterrence, denunciation and protection of the public is in the range sought by the Crown. I would allow the appeal and impose a sentence of nine months in custody with a driving prohibition of four years. A longer custodial sentence is needed to give adequate effect to the objectives of denunciation and deterrence. A lengthier driving prohibition than that imposed by the judge is necessary for the protection of the public. In my view, this sentence is proportional when considered on the individual basis, given the respondent’s record and the circumstances of the offence, and when considered in comparison to sentences imposed for similar offences with similar circumstances. There is no need to vary the one-year time period before which the offender may be registered in an alcohol ignition interlock device program pursuant to s. 320.24(10).

Conclusion

[32] In summary, I would grant leave to appeal and allow the appeal. I would increase the custodial sentence to nine months and impose a four-year driving prohibition in addition to the custodial sentence.

[33] **FITCH J.A.**: I agree.

[34] **SAUNDERS J.A.**: The appeal is allowed. The custodial sentence imposed on Mr. Mitchell is increased to nine months and the driving prohibition to which he is subject is increased to four years.

“The Honourable Mr. Justice Butler”

Dissenting Oral Reasons for Judgment:

[35] **SAUNDERS J.A.**: I have listened carefully to the reasons of my colleague Mr. Justice Butler. The issue is, as he says, the fitness of the sentence. On that we owe the judge deference as explained in numerous cases, including *Lacasse*, referred to by my colleague. On a Crown appeal, this deference on the issue of fitness requires us to find that the sentence is "clearly inadequate".

[36] There are two parts to the sentence appealed, the period of incarceration and the length of the driving prohibition. It is the incarceration portion of the sentence that is aimed most directly at the important principles of deterrence and denunciation. Mr. Mitchell received a sentence of four months' (120 days') incarceration. That length is quite short of an expected sentence given Mr. Mitchell's record, albeit dated, of impaired driving, and I do not disagree with my colleague that a sentence of nine months would be a fit sentence. I note, however, that the record of Mr. Mitchell's circumstances is sparse. Apart from knowing he is 67 years old, he is retired with a modest income, and he attempted immediately to plead guilty, we do not know anything about Mr. Mitchell, and the court did not comply with s. 726 of the *Criminal Code* by asking Mr. Mitchell whether he had anything to say before sentence was imposed. I recognize that failure to comply with s. 726 has been held not to invalidate a sentencing hearing: *R. v. Senek* (1998), 130 C.C.C. (3d) 473 (Man. C.A.), but it seems to me the failure to accord Mr. Mitchell his right to speak directly to the judge weighs against interfering to his disadvantage, with the period of incarceration imposed. It is part of the reason the record is impoverished.

[37] The other aspect of the sentencing, the driving prohibition, is aimed primarily at public safety, although its application no doubt has denunciatory and deterrent effect also. Here, I do not agree that the three-year period of driving prohibition imposed on Mr. Mitchell is "clearly inadequate". In my view, to lengthen the prohibition period from three years to four years is to engage in the prohibited reasoning discussed in the passage from *R. v. Shropshire* referred to by my colleague in his quotation from *Lacasse*.

[38] The term of the driving prohibition crafted by the judge fully complies with the mandatory prohibition provisions of s. 320.24(2)(c) of the *Criminal Code* and I would defer to the judge's view, from Whitehorse, that the mandated period meets public protection needs in the circumstances of this offender, his record and the community.

[39] I would mention in particular the gaps in the record. The prior convictions are dated. One has only to subtract 29 years from present age, to understand how long that gap is. So too the gap of 19 years is well beyond the gaps usually discussed in the jurisprudence. While the presence of a gap is not bound to rule the day, as my colleague has correctly noted, it seems to me that, in general terms, the impact of a gap is a proper consideration for the sentencing judge and is not a matter with which we should lightly interfere. I consider it would have been an error had the judge, in these circumstances, failed to give effect to the gaps to some degree.

[40] Looking at the prohibition in the round, I cannot say that the judge, being on the ground in the community as it were, so mistook the effect of a three-year driving prohibition as compared to four-year driving prohibition, that he imposed in this aspect, a clearly inadequate prohibition.

[41] In all these circumstances, I would not interfere with the sentence.

"The Honourable Madam Justice Saunders"