Date: 20020111
Docket: S.C. No. 01-00561C
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

JOHN MARTIN MOSES

ELIZABETH BELLEROSE — For the Crown

NILS CLARKE — For the Defence

MEMORANDUM OF SENTENCE
DELIVERED FROM THE BENCH

[1] HUDSON J. (Oral): In this matter the accused has plead guilty to a charge of over .08 under s. 253(b). The exacerbating aspect to the matter is his record for these types of offences and it is lengthy. There are many considerations to be observed in sentencing in such a matter and the priorities vary from case to case.

[2] In this case, the record of drunk driving offences, being 14 in number, dictate that general and specific deterrence had a high priority and perhaps an equal importance in determining what is the appropriate sentence.

[3] MR. CLARKE: My Lord?

[4] THE COURT: Yes?

[5] MR. CLARKE: I think I must have just forgotten something and it is only in -- technically in law. With respect to what happened in 1995, they are, in law, discharges -- the entries.

[6] THE COURT: Yes. All right. What did I say? Fourteen?

[7] MR. CLARKE: So that the last conviction that Mr. Moses has is from 1990.

[8] THE COURT: I did not say anything different.

[9] MR. CLARKE: No, just to point out. I don't know if I did that in my submissions, but the discharge -- they are discharges.

[10] THE COURT: Yes.

[11] MR. CLARKE: Yes. Thank you.

[12] THE COURT: I count them and it comes to 16, I think.

[13] MR. CLARKE: No, I don't think so.

[14] MS. BELLEROSE: If you include the drive while disqualified, I have 18.

[15] THE COURT: Including this one today. Anyhow, his record discloses somewhere from 13 to 14 offences, including that for which he is being sentenced today. The last that was pointed out to me was in May of 1990, with a driving while disqualified in 1995. However, it has to be pointed out that during that period of time, unless there was a community sentence, which I doubt, of those six or seven years he was serving sentences totalling approximately two and a half years, none of which affects the circumstance. I regard this as a case in which both specific and general deterrence must have a high priority in my considerations.

[16] I believe that the accused, and perhaps several undefined people, are most fortunate that the accused's driving and drinking habit have not resulted in serious injury or death.

[17] I refer to the judgment in the case of *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145 (Ont.C.A.), which was a more serious case than that which we have here due to the result of the offence, but nonetheless the contents of the judgment have many meaningful comments, one of which is:

> The public should not have to wait until members of the public are killed before the courts' repudiation of the conduct that lead to the killing is made clear. It is trite to say that every drinking driver is a potential killer.

[18] We are all concerned with respect to how we can establish a circumstance in which Mr. Moses will not drive when he has been drinking. He has not shown in the

past a highly unsuccessful rate of attendance at proceedings which are intended to help him in recovering from these abberations and this illness, and I have to take that into consideration in sentencing.

[19] I also would refer at this time, to remind not only the people here but others who might be reading this, that the current *Code* speaks very clearly as to what I am about.

> The fundamental purpose of sentencing [of s. 718] is 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;

[20] That is relevant.

> (b) to deter the offender and other persons from committing offences;

[21] That is relevant.

> (c) to separate offenders from society, where necessary;

[22] That has relevance but it may be, and the argument is made that it has limited relevance in that any extended period of incarceration cannot be seen to have the necessary affect with respect to his driving and drinking habits and that other alternatives should be considered.

> (d) to assist in rehabilitating offenders;

[23] That is relevant here and it is relevant to see what can be done to rehabilitate him rather than to punish him.

> (e) to provide reparations for harm done...

[24] There are no victims in this particular one except the safety of the community.

(f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims...

[25] Well, the first part of that is relevant, "to promote a sense of responsibility in offenders," and the comment must be made here that the previous history of Mr. Moses does not indicate a very high understanding of his responsibility as he sits behind the wheel and perhaps affecting the lives of all those people who come in close contact with him as he proceeds down the highway.

[26] Now, I have a variety of considerations here. The driving did not result in injury and, in fact, was not extravagantly undertaken by him; the move to the right to the curb and then the crossing of two lanes of traffic, perhaps three actually, perhaps four.

[27] While it is a breach of several rules of the road and sections of the *Motor Vehicle Act*, and is probably a criminal act under the *Criminal Code* by itself, it does not rank in the height of seriousness that one frequently sees in these matters. On the other hand, the reading was very high.

[28] The accused did not come to the attention of the authorities for 15 months since he was arrested. He must be presumed to have not breached this particular law at that time. I do so. He has the record to which I have already referred and which we have discussed for similar offences. It is significant that one of these -- in 1990 he received a term of two years less a day imprisonment. It would appear to me that no long-lasting lesson was learned by him as a result of this.

[29] He has, in the past, been a worker and has been a useful member of society, from all that I have been told and heard, and he has recently suffered the loss of loved ones. I cannot regard this as a salutory thing because as one gets older these losses do occur. That does not refer to the loss of his daughter recently, which, of course, is an extraordinary occurrence, but does it have any basis for considering a reason or an excuse for his conduct? I have to say that it does not.

[30] He has not, in my finding, seriously attacked his problem, his illness, his alcoholism. He does, however, in his attendance here today and his words to me, he does appear contrite and I do take that into consideration. I am aware that -- well, nobody submitted that he is entitled to the special consideration under s. 718.2(d), but I can take it from his birthplace and the dates and then question that he is First Nation. Am I wrong in that?

[31] MR. CLARKE: No. He is, My Lord. Yes.

[32] THE COURT: Yes, and I do take that into consideration.

[33] A concern the Court must have when one considers all that I have said, when a record such as this appears is for the public interest combined with an effort to ensure that there is fairness to the accused in the circumstances.

[34] Taking all that has been said in considerations and my deliberations, I sentence the accused to imprisonment for a period of 18 months, thereafter to be on probation for three years commencing upon his release. The terms of that probation will be that he report forthwith upon his release to a probation officer; that he report to that probation officer weekly for the first two months of his release and thereafter as directed by the probation officer; that he keep the peace and be of good behaviour; that he not drive an automobile and - and this is the one that I want him to be aware of - that he not ride in the front seat of an automobile. In that way it will always be in his mind as to why it is he is in the back seat. I think that is important. And also if police officers are doing checks he will find himself in the back seat and be safe from any suggestion of breach.

[35] He will attend for alcohol counselling at the direction of the probation officer, and he will do so as and when so directed; he will not consume alcohol to excess, and I define excess as being .05 under the .08 scale; 50 milligrams in 100 millilitres of blood; that he supply a sample of his breath or blood on demand of a peace officer; and that he will inform the probation officer at all times where he resides.

[36] He will be prohibited from driving for a maximum term of three years under the *Criminal Code*. Anything else under the probation order?

[37] MS. BELLEROSE: Victim fine surcharge to be waived?

[38] THE COURT: Sorry?

[39] MS. BELLEROSE: Victim fine surcharge to be waived?

[40] THE COURT: I think that is appropriate. The purpose of this is where the Crown has sought two and a half years and probation, I am giving weight to the evidence of Mr. Ernoff. I am aware of how long he is actually incarcerated, to some limits it is up to him, and how he spends that time is up to him.

[41] I certainly recommend, sir, that any opportunity that may present itself for you to receive counselling and to understand your problem better than you do now is most advisable. I certainly recommend that you take alcohol counselling where offered. Anything else?

[42] MS. BELLEROSE: No, just if s. 253(a) and s. 145 haven't been withdrawn or stayed at this point, the Crown would ask that they be withdrawn.

[43] THE COURT: Withdrawn? All right. They are withdrawn.

Thank you.

[44] THE CLERK: My Lord, may I just clarify one point? Is the -- the driving order is a separate part? It is not included --

[45] THE COURT: That's right.

[46] THE CLERK: -- in the --

[47] THE COURT: It is under the *Criminal Code*; 258, is it?

[48] THE CLERK: So then the term in the probation order is just not to drive a motor vehicle and not to ride in the front seat of an automobile?

[49] THE COURT: Mm-hmm.

[50] THE CLERK: Thank you, My Lord.

[51] THE COURT: Thank you.

HUDSON J.