C.A.C. No. 133174

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Parker, 1997 NSCA 93

Hallett, Pugsley and Bateman, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	Stephanie Cleary
	)	for the Appellant
Appellant	)	
	)	
	)	
- and -	)	
	)	
	)	Joel Pink, Q.C.
	)	for the Respondent
	)	
RALPH DOUGLAS ROSS PARKER	)	
	)	
Respondent	)	
	)	
	)	Appeal Heard:
	)	April 15, 1997
	)	
	)	Judgment Delivered:
	)	May 5, 1997
	)	
	)	
	)	

THE COURT: The appeal is dismissed, per reasons of Bateman, J.A., Hallett and Pugsley, JJ.A. concuring.

BATEMAN, J.A.:

This is a Crown appeal from the sentence imposed upon the respondent, Ralph Douglas Ross Parker, in relation to his conviction for four offences - two of dangerous driving causing death and two of dangerous driving causing bodily harm.

Background:

Mr. Parker was tried by judge and jury, Justice Michael MacDonald presiding. The facts of the offence are set out in the sentencing judgment:

> On the 28th day of June 1996 a Supreme Court jury convicted the defendant of two counts of dangerous driving causing death and two counts of dangerous driving causing bodily harm. The charges stem from a horrible car crash that occurred on the 20th of July, 1995 on Portland Street in the City of Dartmouth.
>
> On this beautiful summer evening, the defendant was operating his powerful 1995 Dodge Stealth automobile along Portland Street. At that time there were many people out and about in this normally busy area. As he proceeded, the defendant drove his high-performance machine in an erratic manner, attempting several passing manoeuvres at speeds exceeding the posted limit. At the time it was also clear from the evidence that Mr. Parker was not experienced enough to handle such a vehicle, which, in the circumstances, could only be described as a lethal weapon.
>
> After attempting a passing manoeuvre, Mr. Parker allowed this vehicle to swerve out of control. It left the highway, jumped the curb and continued at high speed over a church lawn.
>
> Tragically, at this time, four young teenagers were sitting on this lawn, in the path of the speeding car. They were innocently waiting for a bus near a designated bus shelter. All four were struck violently. Danielle Joeanne Orichefsky and Renee Lee Orichefsky suffered massive skeletal and internal injuries. They died shortly thereafter. Their two friends, Adam William Butt and Charles Dennis Donner, in addition to permanent emotional scaring, suffered serious bodily injury.
>
> In convicting the accused, the jury concluded that the defendant's driving on the evening in question was

> dangerous in that it constituted a marked departure from that of a reasonable driver facing similar circumstances.

Justice MacDonald could not conclude that alcohol was a contributing factor.

Relying upon the new sentencing provisions of the **Criminal Code**, Justice MacDonald imposed a conditional sentence in relation to all offences. He sentenced Mr. Parker to concurrent sentences of two years less a day on each count of dangerous driving causing death, and one year on each count of dangerous driving causing bodily harm. The judge ordered that the sentence be served in the community under the required statutory conditions. In addition, he placed Mr. Parker under house arrest for the entire two year term. He was prohibited from leaving his residence but for the purpose of attending school or work, securing treatment, and performing 240 hours of community service, which was a part of the sentence. The judge ordered that, during the period of house arrest, Mr. Parker not receive friends into his residence; that should any person, not a member of his immediate family, be present in the home he should isolate himself from that person; that he refrain from consumption of alcohol or non-prescription drugs and that he not drive a motor vehicle. The house arrest is followed by a probationary period of two years. In addition, pursuant to **s. 259** of the **Criminal Code**, the judge suspended Mr. Parker's driver's licence for a period of 10 years. Mr. Parker was specifically ordered, as part of his community service, to speak to designated groups about the consequences of dangerous driving.

In imposing this sentence Justice MacDonald considered the background of the offender and the victim impact statements. In regard to the latter he said:

> I have received victim impact statements from all immediate family members. They have candidly, but eloquently, portrayed the suffering endured as a result of this tragedy. I, like Crown counsel, Mr. Bychok, will refrain from quoting from those in order to preserve the privacy of these individuals. However, they very vividly portray the suffering that has occurred.

I will refer to the statements and submission provided by Elaine MacInnis of the Stillwater Center of Care Stress Management and Wellness Clinic. Dealing with the Orichefsky family (and not at all to minimize the impact on the Butt family and the Donner family), I quote from page 7 of the MacInnis report:

> I view both Mary Louise and Joseph at high risk to severe depression, anxiety and panic attacks, post traumatic shock syndrome as a result of severe trauma, and serious physical health problems. It is my opinion they will most likely require treatment extending over a period of many years.
>
> The impact of the tragic deaths of Renee-Lee and Danielle have had a significant impact on Michelle and Richard Orichefsky. They, like their parents, have not been able to internalize and experience the impact of what has happened. Both children have become involved in activities outside the home as a means of 'working through' their grief, this will take a long period of time. I recommend an intensive program of loss and grief counselling for the children as well as the parents.

In her report, Ms. MacInnis goes into quite a bit of detail about the trauma a parent goes through upon the loss of a child. One cannot begin to imagine the horror in dealing with the loss of two children.

This court, in passing sentence today, is troubled with a deep sense of helplessness, knowing there is very little that I can do to relieve the anguish which must be constant. This feeling of helplessness, I sense, is shared by the community generally...by those who want to share the grief...by those who want to share the pain, only to realize that it is impossible to imagine let alone share this anguish. This sense of helplessness is deepened when one considers the way these unnecessary and inexcusable deaths occurred. I asked, when considering this matter, "What could be more innocent than four young teenagers - in effect, four young children - waiting for a bus near a designated bus shelter?" They were not anywhere near the road. They were on the grass of a church lawn. All parents, because of this case, are left to wonder, "What more can we do to protect our children?"

In respect to Mr. Parker's background, the judge was furnished with a detailed and lengthy presentence report. I will summarize some of the relevant information. At

the time of the accident Mr. Parker was 20 years old. He is the middle of three brothers. Mr. Parker's family life while growing up can be appropriately described as chaotic and dysfunctional.

The relationship between Mr. Parker's parents was tumultuous. The family changed homes, cities and provinces frequently. They lived for a period of time in Germany, where Mr. Parker, Sr. served as a member of the Canadian Armed Forces. While living in Germany Mrs. Parker, during a domestic dispute, fell through a plate glass door, sustaining an injury which ultimately caused the loss of her leg. During treatment of the injury, Mrs. Parker became addicted to prescription drugs.

For substantial periods of time after Mr. Parker's discharge from the Armed Forces, the family subsisted on welfare. The parents separated often. The family lived with the paternal grandfather while Mrs. Parker was recuperating from surgery on her leg. The children were then placed in a foster home, where Ralph Parker was sexually abused. Eventually the family reunited but the financial problems continued. At one point they moved to British Columbia. During this period, Ralph Parker's older brother, Brian, who was then 14 years old, was rendered a quadriplegic in a diving accident. Although the younger of the two brothers, Ralph Parker blamed himself for Brian's injury. Upon their return from British Columbia the family lived for several months in a single motel room. The turmoil continued throughout Ralph Parker's high school years.

Ralph Parker unsuccessfully attempted to maintain his own apartment through welfare assistance. Ultimately, he was left to live on the streets until taken in by family friends. He returned to school, completing grade 11.

Several years after the diving accident, Brian Parker received an insurance award in relation thereto. He was then cared for in a separate apartment. The caretakers, however, were stealing from Brian. Ralph Parker fired them and quit school

to care for his brother full time. When the insurance settlement was lost in a failed business venture, Brian moved to live with his mother, now in Antigonish.

At the time of the offence he was again living with and primary caretaker for his older brother, Brian. He had held a driver's license for about four months.

At the time of sentencing Mr. Parker was the father of an 11-month old son although no longer romantically linked with the child's mother. He was in a relationship with another partner, with whom he had a child, born September 9, 1996. He was employed at a laundry.

The probation officer who completed the presentence report opined that Mr. Parker accepted full responsibility for the offences. In summarizing she said:

> In all interviews, Mr. Parker presented himself in a pleasant, cooperative and non-defensive manner. While his chronological age is 21, in many ways his life experiences have given him a perspective on life which exceeds the level of maturity indicated by his chronological age. Throughout the interviews, he exhibited characteristics consistent with a warm, caring, compassionate individual who is enduring a level of stress not experienced by many young people of his age. It is the opinion of this writer that it is a testament to his strength of character that he has made a conscious choice to face the consequences of his behaviour in a mature and responsible manner. His responses to this interviewer were considered to be truthful, sincere and lacking in any attempt to project blame on anyone other than himself. While he recognizes nothing he can do will ever restore the lives of the victims or the victims' families, he is open to compensating them and the community in any manner which might repair the damage to any degree.

She found him to be a suitable candidate for a community disposition, should the court so order, and a person who needed ongoing counselling in order to deal with the consequences of his criminal conduct and to enable him to become a productive citizen.

The presentence report was accompanied by a psychological report from the doctor treating Mr. Parker. That report confirmed the opinion of the probation officer that

Mr. Parker was remorseful and assumed full responsibility for his actions. The psychologist diagnosed clinical depression along with emotional symptoms arising from his dysfunctional family background, requiring ongoing treatment. He stated that Mr. Parker "has an acute sense of being hated and defiled by the public".

Issues on Appeal:

The Crown states the following grounds of appeal:

1. The sentence ordered inadequately reflects the objectives of denunciation and deterrence.
2. The sentence ordered is inadequate having regard to the nature of the offences committed and the circumstances of the offences and the offender.
3. The sentencing judge erred in the application and interpretation of s. 742.1 of the **Criminal Code**.

In effect, the sole issue on this appeal is whether the sentencing judge erred in imposing a conditional sentence, taking into account the circumstances of this offender and these offences. In particular, the Crown submits that a fit sentence, in this case, must include a period of incarceration in a penal institution.

Standard of Review:

In addressing the standard of review on a sentence appeal, the Supreme Court of Canada in **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193 (S.C.C.) approved the following quote from Hallett, J. A. in **R. v. Muise** (1994), 94 C.C.C. (3d) 119 (N.S.C.A.) at p.124:

> The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts. If it is a fit sentence an appeal court cannot interfere. . . . sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most

> that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range.

In that same case Iacobucci J., speaking for the court, said at page 209:

> . . . An appellate court should not be given free reign 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**.

In **R. v. C.A.M.** (1996), 105 C.C.C. (3d) 327 (S.C.C.) Lamer, C.J.C., writing for the court, further elaborated on the deference due the decisions of sentencing judges. He recognized those judges' "unique qualifications of experience and judgement from having served on the front lines of our criminal justice system". He wrote at paragraph 91:

> Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

And at paragraph 92:

> . . . I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

As stated by Matthews, J.A., of this court, in **R. v. Wheatley**, C.A. No. 133184, April 21, 1997, as yet unreported, the standard of review respecting an appeal from sentence has not been affected by the recent amendments to the **Criminal Code**, discussed below**.**

Sentencing Provisions of the Criminal Code:

On September 3, 1996, Parliament passed a package of legislation, Bill C-41, amending Part XXIII of the **Criminal Code**. This legislation included a statement of the purpose and objectives of sentencing; a codification of sentencing principles that had previously been recognized at common law and authority for the imposition of a conditional sentence of imprisonment. Two recent decisions provide a thorough history of the background to the implementation of these new sentencing provisions. (see **R. v. McDonald**, Sask. C.A., March 5, 1997, [1997] S.J. No. 117 (Quicklaw) and **R. v. Wismayer**, Ont. C.A., April 8, 1997, [1997] O.J. No.1380 (Quicklaw))

Of particular relevance to this appeal are the following:

> 718. The fundamental purpose of sentencing 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;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and the community.

> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> >
> > > (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,
> > >
> > > (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child, or
> > >
> > > (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim shall be deemed to be aggravating circumstances;
> >
> > (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
> >
> > (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
> >
> > (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
> >
> > (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.

The new section of the **Code** authorizing a conditional sentence of imprisonment provides:

> 742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

> (a) imposes a sentence of imprisonment of less than two years, and
>
> (b) is satisfied that serving the sentence in the community would not endanger the safety of the community,
>
> the court may, for the purposes of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

Further sections mandate certain statutory conditions where a conditional sentence is ordered and provide the court with authority to impose additional conditions:

> 742.3(1) The court shall prescribe, as conditions of a conditional sentence order, that the offender do all of the following:
>
> (a) keep the peace and be of good behaviour;
>
> (b) appear before the court when required to do so by the court;
>
> (c) report to a supervisor
>
> (i) within two working days, or such longer period as the court directs, after the making of the conditional sentence order, and
>
> (ii) thereafter, when required by the supervisor and in the manner directed by the supervisor;
>
> (d) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
>
> (e) notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.
>
> (2) The court may prescribe, as additional conditions of a conditional sentence order, that the offender do one or more of the following:
>
> (a) abstain from

> (i) the consumption of alcohol or other intoxicating substances, or
>
> (ii) the consumption of drugs except in accordance with a medical prescription;
>
> (b) abstain from owning, possessing, or carrying a weapon;
>
> (c) provide for the support of care of dependants;
>
> (d) perform up to 240 hours of community service over a period not exceeding eighteen months;
>
> (e) attend a treatment program approved by the province; and
>
> (f) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences.

Before a conditional sentence can be imposed, certain prerequisites must exist:

1. the offence is not punishable by a minimum term of imprisonment
2. the court must impose a sentence of imprisonment of less than two years; and
3. the court must be satisfied that serving the sentence in the community would not endanger the safety of the community.

I agree with the view of Rosenberg, J.A. in **Wismayer**, **supra**, that satisfaction of the above conditions does not automatically entitle an offender to a conditional sentence, nor oblige the judge to impose one. A discretion to do so remains with the sentencing judge. No category of offence is excluded from eligibility for a conditional sentence, providing that the preconditions are met.

The thrust of this legislative initiative is, clearly, to encourage courts to reduce the reliance upon incarceration of offenders, where appropriate. In introducing the bill in the House of Commons on September 20, 1994, Justice Minister Allan Rock said, in part:

The bill provides courts with clear policy direction from Parliament. The elements of punishment are addressed. Denunciation is there, as are deterrents [sic] and separation from society. The bill is a comprehensive and detailed one. I would like in the moments during which I will speak to the House today to highlight a number of issues that I feel are particularly important.

. . .

In the last few years, we have learned a great deal about the administration of justice, about how to protect the public better. Incarceration must remain an option for offenders who need this form of punishment and must be separated from society to ensure the safety of the population. It is worthwhile to remind the House that **Canada's incarceration rate is extremely high compared with other industrialized countries**.

Furthermore, studies show that for minor and first-time offenders, incarceration is not very useful or effective and may even be harmful if the goal is to turn the person into a law-abiding citizen.

. . .

A general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. **Alternatives should be put in place for those who commit offences but who do not need or merit incarceration**.

Where a court imposes a sentence of imprisonment of less than two years and where the court is satisfied that serving the sentence in the community would not endanger the safety of society as a whole, the court may order that the offender serve the sentence in the community rather than in an institution.

Offenders who do not comply with such conditions as may be imposed at that time can be summoned back to court to explain their behaviour, to demonstrate why they should not be incarcerated. If the court is not satisfied with that explanation, it can order the offender to serve the balance of the sentence in custody. This sanction is obviously aimed at offenders who would otherwise be in jail but who could be in the community under tight controls.

... It seems to me that such an approach [conditional sentencing] would promote the protection of the public by seeking to separate the most serious offenders from the community while providing that less serious offenders can remain among other members of society with effective community based alternatives while still adhering to appropriate conditions. **It also means that scarce funds can**

> **be used for incarcerating and treating the more serious offenders.**
>
> . . .
>
> Jails and prisons will be there for those who need them, for those who should be punished in that way or separated from society. But we must remember as well that only 10 per cent of all crime is violent and that over 53 per cent of any crime involves property, not people. Therefore, **this bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done.**
>
> **It is not simply by being more harsh that we will achieve more effective criminal justice.** We must use our scarce resources wisely. It seems to me that Bill C-41 strikes that balance and I commend it to this Chamber for its consideration.
>
> (emphasis added)

These remarks reflect the direction in s. 718.2(d) and (e) that the court consider, in passing sentence:

> (d) [that] an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (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.

The conditional sentencing provision has understandably stirred some judicial debate. One area of focus has been the requirement that the judge be satisfied that "serving the sentence in the community would not endanger the community". The issue is whether this precondition to imposing a conditional sentence should be interpreted so as to include considerations of general deterrence and denunciation, or restricted to factors specific to the offender. As Finlayson, J.A. wrote in **R. v. Pierce**, [1997] O.J. No. 715 at para 32:

> Another significant difference of opinion is with respect to what Parliament meant by the phrase "endanger the safety

> of the community". Counsel for the appellant interprets this as meaning that if the particular accused does not pose a threat to the safety of the community in the sense of re-offending, the accused's serving of the sentence in the community would not "endanger the safety of the community". All previous concerns about the fundamental purpose of sentencing codified in s. 718 would be of diminished importance. In contrast, the Crown submits that "safety of the community" means more than the risk posed by the individual accused re-offending but encompasses the need for general deterrence.

I agree with the conclusion of Rosenberg, J.A. in **Wismayer, supra**, that "endanger the community" is to be restricted to factors particular to the offender and does not include matters of general deterrence and denunciation.

In **Pierce, supra**, Finlayson, J.A. said in this regard at paragraph 45:

> A resolution of this difference of opinion as to the meaning of community safety might at first blush appear to be central to the development of a methodology for imposing conditional sentences. However, **if the narrower interpretation of community safety is simply regarded as the *sine qua non* to the exercise of a discretion to permit the sentence to be served in the community, I have little difficulty with it**. In the final analysis, the discretion must be exercised in accordance with recognized sentencing principles. This takes us back to the concerns of specific and general deterrence expressed by the Crown including s. 718.2. (emphasis added)

General deterrence and denunciation, along with all other sentencing objectives, remain factors in the judge's ultimate exercise of discretion, once the offender meets the preconditions set out in s. 742.1. In exercising that discretion the judge considers again the objectives and purpose of sentencing as mandated in s. 718. In other words, those objectives guide the judge in determining, not only the length of the custodial term, but, ultimately, whether a conditional sentence is ordered.

I acknowledge that it may seem an academic exercise whether general deterrence and denunciation are considered at the precondition stage, within the definition of "endanger the community", or thereafter. In my view, however, it is logical

that they be weighed in conjunction with all of the other sentencing objectives, once the preconditions are met, so as to preclude undue emphasis on these two factors in comparison to all others.

The cases which advocate the broader interpretation of "endanger the community", with respect, in my view, arose in response to the position of some of the courts that first struggled to interpret these amendments and concluded that, once an offender met the preconditions, the court was obliged to impose a conditional sentence (see, for example in **R. v. Scidmore**, [1996] O.J. No. 4446 (Ont.C.A.)). It was, therefore, important to interpret "endanger the community" in the broadest possible fashion. If accepting, as do I, that a discretion remains in the sentencing judge whether to impose a conditional sentence, although the preconditions in s. 742.1 are satisfied, and that the exercise of discretion requires the judge to revisit the objectives and purpose of sentencing, it is unnecessary to resort to the broad definition, because general deterrence and denunciation are considered, along with all other objectives in the final exercise of discretion. To consider general deterrence and denunciation in the context of "endanger the community" and again in the final exercise of discretion would result in an overemphasis upon those two objectives, in comparison to all others.

It is important to emphasize that a conditional sentence is only considered where the judge has decided that no disposition other than incarceration is a fit sentence. Without doubt this creates a conundrum which is resolved only when one remembers that the conditional sentence is a form of incarceration, albeit served in the community.

In this regard, I find the remarks of Twaddle, J.A. in **R. v. Arsiuta**, [1997] M.J. No. 89 (Man.C.A.) germane:

> The term "conditional sentence" is a bit of a misnomer. It is not a new form of sentence, but rather a new way in which a prison sentence can be served. A judge must first impose a prison term - using all the sentencing principles to arrive at one of the right length - and then, if the sentence is for a

> term of less than two years and the judge is satisfied that the serving of the sentence in the community will not endanger the community's safety, the judge may direct that it be served there subject to strict conditions.

Once the judge has determined that a custodial sentence is warranted and the preconditions are met, the judge is then to consider whether the objectives sought through incarceration in an institution can be adequately addressed by some form of control within the community.

ANALYSIS:

The Crown does not contest the conclusion of the sentencing judge that the appropriate length of sentence, here, for the dangerous driving causing death offences is two years less a day, all sentences running concurrently. The sole issue is whether that term should be served in a penal institution.

The Crown can point to no specific error in the sentencing judgment of Justice MacDonald. The Crown submits, however, that the conditional sentence inadequately reflects the need for general deterrence and denunciation.

The Crown's position here is similar to that advanced in **R. v. Pierce, supra** at para. 36:

> The Crown submits that the concepts of general deterrence contained in the preamble to the conditional sentence provisions are an overriding consideration and it is the serving of the sentence within the community which must be considered in determining whether the sentence endangers the safety of the community, not simply the risk of the appellant re-offending. In other words, what would be the effect on the public's respect for the justice system and its perception of receiving protection from the sentencing process if a conviction, such as that of the appellant's, is punished by a non-custodial term of imprisonment? Does a sanction which fails to contribute to "respect for the law and the maintenance of a just, peaceful and safe society" (s. 718) protect and enhance the safety of the community?

Central to the Crown's position is the proposition that general deterrence or denunciation can only be achieved, in this case, through institutional incarceration - that a community based sanction cannot suffice for this purpose.

While any comparison between a disposition suspending the passing of sentence and the conditional sentence here is inappropriate, the imposition of a non-custodial sentence in cases of dangerous driving causing death is not a new concept arriving with the conditional sentencing provisions. There is ample authority for suspension of sentence with probation. (see, for example, **R. v. Hollinsky** (1995), 46 C.R. (4th) 95 (Ont.C.A.); **R. v. Thompson** (1983), 58 N.S.R. (2d) 51 (N.S.C.A.)). In such cases the court has been satisfied that general deterrence and denunciation can be effected short of incarceration. The sentence imposed by Justice MacDonald, however, insofar as it includes a lengthy period of house arrest, is substantially more onerous than the suspended sentences in each of the above cases. It should not be equated with a non-custodial sanction.

I agree with the comments of Donnelly, J. in **R. v. K.R.G.**, [1996] O.J. No. 3867 at paragraph 30:

> General deterrence may be achieved in a variety of ways. The stigma of trial and conviction is a major deterrent. A conditional order must be, and must be seen to be, more onerous than suspended sentence by way of probation. To achieve goals of denunciation and general deterrence, the punishment must be meaningful by being visible, sufficiently restrictive, enforceable and capable of attracting stern sanction for failure to comply with the conditions.

The challenge for the sentencing judge is, as it always has been, to balance the objectives of sentencing - this is not a new problem. It is worthy of note, however, that the judge is directed, in s. 718, to impose a just sanction that has "one or more" of the enumerated objectives. This, in my view, recognizes the irreconcilability of certain of the objectives and leaves to the court a reasonable latitude in choosing the appropriate

emphasis for this offence and this offender. Protection of the public - "the maintenance of a just, peaceful and safe society" - remains, as always, the overarching goal of sentencing. Rehabilitation of the offender, where achievable, is key to public protection.

It is worthy of note that in **MacDonald, Pierce** and **Wismayer**, **supra**, the original sentence was imposed before the amendment to the **Code**. On appeal, the court was considering a retrospective application of the conditional sentencing provisions, not having the benefit of the trial judge's views. Such is not the case here. We have a thorough and thoughtful decision from the sentencing judge. He approached the task logically and in a manner consistent with the process since approved in **Wismayer**, **Pierce** and others. He did not confine his concern for general deterrence and denunciation to the determination of the length of sentence, but revisited those issues, which were the primary focus in this case, in deciding whether a properly crafted conditional sentence would be fit.

MacDonald, J. found the aggravating factors to be the speed of the vehicle and the fact that the victims were not pedestrians or even on a sidewalk, but rather sitting on a church lawn. In mitigation the judge considered Mr. Parker's youth; that he had no related criminal record; that his home life was chaotic and filled with tragedy and poverty; that he had shown genuine remorse; and his favourable pre-sentence report. The judge could not conclude that alcohol was a factor contributing to the offences.

Justice MacDonald recognized the gravity of the offences in which regard he said in part:

> The seriousness of these offences in the case at bar is also reflected in the fact that dangerous driving causing death carries a maximum of 14 years imprisonment with 10 years for dangerous driving causing bodily harm.

He correctly noted that there is a wide range of sentences for such offences varying from suspension of sentence to a term of federal incarceration.

MacDonald, J. expressly directed himself to general deterrence and denunciation when deciding whether to impose a conditional sentence:

> **The biggest concern is whether or not a conditional sentence would serve as a sufficient deterrent for this crime and whether or not such a sentence would adequately show this court's denunciation of Mr. Parker's actions**, given the tragic circumstances of these crimes. I refer again to the **Criminal Code**, specifically s. 718 (a) and (b):
>
> > 718 The fundamental purpose of sentencing 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;
> > (b) to deter the offender and other persons from committing offences;
>
> To resolve this dilemma, I must take a close look at the principle of general deterrence in this case.
> (emphasis added)

The judge concluded that general deterrence should be addressed particularly to young drivers and that the message could best be disseminated by Mr. Parker speaking to young people:

> **The purpose of general deterrence is to send a message**. I must ask myself, "To whom is the message directed?" I agree that the message should go out to the motoring public generally (as Mr. Bychok has indicated), but I feel particular emphasis should be placed upon young drivers.
>
> I next ask myself the question, "Will young drivers get the message regardless of how severe it is?" A message is, after all, of no use unless it is heeded. I also ask, "What is the best way to get young people to heed this message?" **Will they change their driving habits if they realized, through the media, that Mr. Parker went to jail? I do not think so.** I do not think so because all too many young people feel that tragedies like this will just not happen to them. Therefore, the problem may not be in the severity of the message but in the transmission of the message, i.e. getting the message through.

> If, by speaking to young drivers, Mr. Parker can tell his story properly (and I will talk of that in more detail later), then some young drivers just may appreciate the tragic consequences of dangerous driving. If his story does not include a jail term, with actual incarceration, the nightmare he has nonetheless gone through and the devastation he has nonetheless created just may get through. This process, I feel, would therefore likely deter young drivers more than any message, however severe, that goes unheeded. A conditional sentence would allow Mr. Parker to immediately begin to send this message. (emphasis added)

The Crown conceded that there was little likelihood that Mr. Parker would reoffend**.**

As I have previously noted, the Crown's submission presumes that, here, general deterrence and denunciation can only be achieved through incarceration in a penal institution - that to do otherwise will not suffice in the public eye. Indeed, it may be fair to assume that given the newness of the conditional sentence provision, the public will initially view it as a lenient disposition when compared to institutional imprisonment. To that extent, it is unfortunate that the implementation of the legislation was not accompanied by a public education program. In my view, however, a conditional sentence can, in certain circumstances, effect a more restrictive and lengthier period of confinement and control than the offender would experience if institutionalized.

Without doubt the courts and the public have predominantly favoured institutional incarceration as the means of expressing denunciation and deterrence. However, prior to the implementation of the conditional sentence provision, the courts had few tools to otherwise express those objectives. Parliament has now authorized a new mechanism for controlling offenders, short of imprisonment in an institution, and has encouraged the courts to use that tool where appropriate. The extent to which the public accepts the deterrent and denunciative value of a conditional sentence will only be measured over time. Judicious use of the conditional sentence will provide the public with an

opportunity for first hand observation of its impact upon the liberty of an offender. A properly informed public, in my view, will not perceive a conditional sentence, such as that imposed here, to be a lenient disposition. The essence of institutional incarceration is a deprivation of liberty. The conditional sentence ordered here effects a substantial deprivation of liberty. Indeed, had Mr. Parker been ordered to serve two years in a federal institution, assuming that he would have been deemed a minimum risk, he would, by now, be released into the community. Instead, under the terms of the sentence imposed by Justice MacDonald he will remain under house arrest for another fourteen months, and then serve a probationary term of two years. He is nevertheless required to provide financially for himself and his family to the extent that he is able. Not to be forgotten is his obligation during this period, to speak to young persons about the devastating consequences of his actions.

By remaining in the community he can continue with the psychological counselling which will assist in his rehabilitation. Justice MacDonald found Mr. Parker to be an individual whom he could realistically hope would become a productive member of society. Notwithstanding Mr. Parker's dreadful family background, he had exhibited a measure of responsibility and maturity beyond his years, albeit marred by his tragic and criminal actions in respect of this offence. Would society be served or his rehabilitation enhanced by committing him to an institution? In **Wismayer**, Justice Rosenberg referred to the negative impact of incarceration, particularly upon youthful or first time offenders. At page 25:

> In view of its extremely negative collateral effects, incarceration should be used with great restraint where the justification is general deterrence. These effects have been repeatedly noted with depressing regularity. Some of the comments have been collected by the *Sentencing Commission* [Report of the Canadian Sentencing Commission, 1987 - The Archambault Report] at pp. 42-44 and bear repeating:

1969: Ouimet Committee, *Report of the Canadian Committee on Corrections*

> One of the serious anomalies in the use of traditional prisons to re-educate people to live in the normal community arises from the development and nature of the prison inmate subculture. This grouping of inmates around their own system of loyalties and values places them in direct conflict with the loyalties and values of the outside community. As a result, instead of reformed citizens society has been receiving from its prisons the human product of a form of anti-social organization which supports criminal behaviour (p. 314).

1973: LeDain Commission, *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs.*

> Perhaps the chief objection to imprisonment is that it tends to achieve the opposite of the result which it purports to seek. Instead of curing offenders of criminal inclinations it tends to reinforce them. This results from confining offenders together in a closed society in which a criminal subculture develops (pp. 58-59).
>
> These adverse effects of imprisonment are particularly reflected in the treatment of drug offenders. Our investigations suggest that there is considerable circulation of drugs within penal institutions, that offenders are reinforced in their attachment to the drug culture, and that in many cases they are introduced to certain kinds of drug use by prison contacts. Thus imprisonment does not cut off all contact with drugs or the drug subculture, nor does it cut off contact with individual drug users. Actually, it increases exposure to the influence of chronic, harmful drug users (p. 59).

1977: Solicitor General of Canada. *A Summary and Analysis of Some Major Inquiries on Corrections* - 1938 to 1977

> Growing evidence exists that, as educational centres, our prisons have been most effective in educating less experienced, less hardened offenders to be more difficult and professional criminals, (p.iv).

[emphasis in original]

While Ralph Parker is morally culpable and criminally liable for his actions on July 20, 1995, his crime is to be distinguished from an intentional criminal undertaking such as drug trafficking or fraud (**R. v. Pierce**, **supra**).

In **R. v. Lokanc**, [1996] A.J. No. 1191, Moore, C.J.Q.B., imposed a conditional sentence, not including house arrest, in a case of dangerous driving causing death. His remarks are equally applicable here. In sentencing the offender he said:

> The objective of general deterrence can be met in this case without resorting to imprisonment. **Other members of the community will be deterred by the consequences visited on you as a result of your actions. I know the offence has had a devastating impact on you and has left you wracked with guilt, that you were prominently named in the media as the person responsible for this tragedy**, and that you have faced five months of uncertainty as to what will happen to you.
>
> This is not to say that in every case of dangerous driving causing death or serious bodily harm, that a conditional sentence will be imposed. Each case is different.
> (emphasis added)

The oft quoted remarks of former Chief Justice McKinnon in **R. v. Grady** (1971), 5 N.S.R. (2d) 264 (N.S.C.A.) remain appropriate:

> It would be a grave mistake, it appears to me, to follow rigid rules for determining the type and length of sentence in order to secure a measure of uniformity, for almost invariably different circumstances are present in the case of each offender. There is not only the offence committed but the method and manner of committing; the presence or absence of remorse, the age and circumstances of the offender, and many other related factors. For these reasons it may appear that lesser sentences are given for more serious offences and vice versa, but the court must consider each individual case on its own merits, even if the different factors involved

> are not apparent to those who know only of the offence charged and the penalty imposed.

I share Justice MacDonald's sense of helplessness at redressing, through the sentencing process, the unique, catastrophic loss to the Orichefsky family of their two daughters and the ongoing trauma and injuries suffered by Adam William Butt and Charles Dennis Donner. No sentence available in our criminal justice system could lessen nor redress the devastating impact of that loss.

Disposition:

It is unnecessary for us to consider the fresh evidence tendered by the defence to the effect that Mr. Parker has fully complied with the terms of his conditional sentence. I am satisfied that Justice MacDonald, in imposing this conditional sentence did not err.

Accordingly, the appeal is dismissed.

Bateman, J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.

C.A.C. No. 133174

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - RALPH DOUGLAS ROSS PARKER Respondent	)	REASONS FOR JUDGMENT BY: Bateman, J.A.