NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Naugle, 2011 NSCA 33

Date: 20110401
Docket: CAC 325168
Registry: Halifax

Between:

Terrance Naugle

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Oland, Beveridge and Bryson, JJ.A.
Appeal Heard:	January 26, 2011, in Halifax, Nova Scotia
Held:	Leave to appeal granted and the appeal is dismissed, per reasons for judgment of Beveridge, J.A., Oland and Bryson, JJ.A. concurring.
Counsel:	Luke A. Craggs, for the appellant Mark Scott, for the respondent

Reasons for judgment:

INTRODUCTION

[1] The appellant is Terrance Lee Naugle. He is 53 years old. Over the past 36 years he has accumulated an appalling record of 22 drinking and driving convictions, 14 driving while prohibited, one dangerous driving and a slew of other *Criminal Code* convictions.

[2] Twenty-seven days after being released from a lengthy period of federal incarceration for related offences, he drove a car into a parked occupied motor vehicle and then fled. He was later apprehended and charged with impaired driving, refusing a breathalyzer, driving while prohibited and leaving the scene of an accident with intent to escape civil or criminal liability. The Crown proceeded by indictment. The maximum for each offence was five years imprisonment. The appellant never sought bail, but instead consented to remand throughout the proceedings.

[3] Mr. Naugle pled not guilty. On the day of his trial, he pled guilty to the charges of impaired driving, driving while prohibited, and leaving the scene of an accident. The sentence hearing was adjourned to permit the appellant to complete inquiries with a view to calling evidence. Eventually the hearing proceeded on January 27, 2010 without evidence being called. Victim impact statements were filed. Additional details about the facts will be set out later.

[4] The trial judge was the Honourable Frank P. Hoskins. He reserved his decision and later released written reasons, now reported as 2010 NSPC 11. After referring to and discussing the relevant principles of sentence, he imposed the maximum sentence of five years for the driving while impaired, three years consecutive for driving while prohibited and a further consecutive sentence of six months for leaving the scene of an accident with intent to escape civil or criminal liability for a total sentence of 8 ½ years. This was reduced by the trial judge giving credit to the appellant of 21 months for time spent on remand, for a net sentence of six years and nine months. Ancillary orders were also made for restitution, DNA, a lifetime driving prohibition and forfeiture of the motor vehicle driven by the appellant.

[5] The appellant advances two complaints. He says the trial judge erred in principle by imposing consecutive sentences that exceeded the maximum for the most serious offence; and the sentence of 8 ½ years is outside the acceptable range of sentence and hence manifestly excessive. For the reasons that follow, I would grant leave, but dismiss the appeal.

[6] There are two broad considerations that drive a proper determination of a fit and appropriate sentence: the circumstances of the offence and the circumstances of the offender. These broad categories will inform the Court on how to best achieve the purpose and objectives of sentence and which principles must be considered or emphasized in doing so. Further details of the facts are therefore called for.

FACTS

[7] On March 28, 2009, David McMillan, his wife Julia, and their daughter Jill were returning home to Tatamagouche via Highway 102. They had been shopping in Halifax for the day. At approximately 8:30 p.m. their vehicle ran out of gas just prior to the Enfield exit. Mr. McMillan coasted their vehicle, a Honda Pilot, onto the exit ramp, pulled over and engaged his four-way flashers. He walked to the nearby Irving Big Stop to get gas. His family stayed in the vehicle.

[8] On Mr. McMillan's return trip to his vehicle, he was just forty feet shy of the front of his vehicle when he saw a vehicle sideswipe it. The appellant was the driver. On regaining control, the appellant immediately left the scene with a blown tire and drove to a darkened area of the Irving parking lot. McMillan ensured his family was not injured. He put gas in his vehicle, drove to the Irving and approached the appellant, who was staggering and had difficulty speaking. When asked why he had left the scene of the accident, the appellant responded it was because he had to go the washroom. At that point, the appellant entered the Big Stop and started toward the restroom. McMillan followed him. The appellant changed his mind and left.

[9] Mr. McMillan requested help from a group inside the Big Stop. In the meantime, Mrs. McMillan alerted members of the RCMP who were in the dining area of the Big Stop. They left in pursuit of the appellant. They could see him go over the overpass. Cst. Benoit found the appellant banging on the door of a

residence. He was arrested and searched. In his pocket he had the newspaper clipping from the *Chronicle Herald* detailing his sentence on March 1, 2006 for four impaired driving and three driving while disqualified offences, for which he had received a federal sentence of incarceration of 3 ½ years.

[10] Observation of the appellant provided ample grounds for a breathalyzer demand and supported the ultimate plea of guilt to the charge of impaired driving. Quite apart from violently driving into a parked vehicle with its warning lights engaged and his glib reason for leaving the scene of an accident, Mr. Naugle was staggering, had bloodshot eyes and slurred speech. The appellant refused the breathalyzer demand. When being transported to booking in Halifax, he demanded to be taken to Central Nova Correctional Facility. Unhappy with the police refusal, he tried to kick out the side window of the police car. Restraints had to be applied. The appellant cursed and insulted the officers and told them all RCMP officers deserved to die.

[11] There was not a great deal of positive information put forward with respect to Mr. Naugle's circumstances. At the time of sentence, he was 53 years old and was said to have the support of his wife and other family members. He started drinking at age 11, and had become a chronic alcoholic. He had a very difficult and challenging childhood, spending time in the Shelburne youth facility. No information was put forward about his past employment or future prospects. The defence submitted that Mr. Naugle admits his difficulties with alcohol, and is interested and motivated in seeking assistance.

[12] However, he had undergone an assessment for substance abuse treatment in February 2006, leading up to his last sentence for drinking and driving. The assessor was of the view then that Mr. Naugle was in the preparation stage of his substance dependence. That is, he was said to be planning to quit drinking. Mr. Naugle was subsequently sentenced on March 1, 2006 to 3 ½ years incarceration on three charges of having the care or control of motor vehicle while his blood alcohol level exceeded 80 mg per 100 ml of blood, one count of refusal of a breathalyzer demand and three counts of driving while prohibited. While incarcerated he undertook a seven week addictions program. No information was provided on how he had fared in that or any other programme.

[13] Mr. Naugle was finally released from serving that sentence on February 27, 2010. Just 27 days later he was found committing the present offences. Of Mr. Naugle's 68 prior convictions, 22 were for alcohol-related driving offences. That is impaired, over 80 mg., or refusals of breathalyzer demands. In addition, he had amassed 14 driving while disqualified offences under s. 259 of the *Criminal Code*. The rest of his offences ranged from arson to assaults, break and enters, theft, possession of stolen property, and failure to comply with court orders.

ISSUES

1. Did the sentencing judge commit any error in principle that would entitle this Court to intervene?

2. Was the sentence manifestly excessive as being one outside the acceptable range of sentence?

[14] The appellant and respondent do not have any real dispute over the standard of review that this Court must apply in exercising its statutory power to consider the "fitness of the sentence" imposed at trial. The appropriate standard of review was re-stated in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 where Lamer C.J., for the full Court succinctly wrote:

> 90 Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

[15] An appellate court is required to show great deference to the decisions of sentencing judges and is not at liberty to substitute its view as to the appropriate sentence absent legal error (see *R. v. L.M.*, [2008] 2 S.C.R. 163 at para. 14).

Legal Error

[16] The error in principle put forth by the appellant is that a sentencing judge is legally constrained from imposing a consecutive sentence that exceeds the maximum sometimes available for the most serious offence involved. To do otherwise would offend the principle of totality. In other words, the total cumulative sentence that could be imposed on the appellant for the events of

March 28, 2010 was five years – the maximum provided for by the *Criminal Code* for the offence of impaired driving.

[17] The appellant made essentially the same argument to the sentencing judge who did not agree. I find no error in principle by the sentencing judge in the approach he took in arriving at the sentence he imposed. I will explain.

[18] The sentencing judge carefully considered the purposes of sentencing, and the objectives and principles that should be considered as mandated by the *Criminal Code* and relevant case law. Amongst other things, he referred to and discussed the principles of proportionality, selection of concurrent or consecutive sentences, restraint, the presence of aggravating and mitigating factors, and totality.

[19] The appellant concedes that the imposition of the maximum sentence of five years for the offence of impaired driving is unassailable. That sentence was arrived at without error in principle and is not demonstrably unfit. In other words, it is within the acceptable range of sentence, given the circumstances of the offence and those of the appellant. It is the imposition of any sentence in excess that attracts his criticism. It is therefore important to focus on what caused any additional incarceration.

[20] Obviously, the sentence beyond five years was the result of selection by the sentencing judge of consecutive sentences for the offences of driving while disqualified (by virtue of the previous orders of prohibition) and leaving the scene of the accident. The sentencing judge referred to the principle of totality but nonetheless declined to make any of the sentences concurrent or otherwise reduce the overall sentence.

[21] There are no specific provisions in the *Criminal Code* to guide a sentencing judge on when to select a consecutive as opposed to a concurrent sentence. The *Code* does direct that a Court that imposes a sentence shall take into consideration a number of principles, one of which is that of totality. Section 718.2 provides:

> *(c)* where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

[22] The discretion to order consecutive or a concurrent sentence is also afforded deference. Sopinka J., for the majority in *R. v. McDonnell*, [1997] 1 S.C.R. 948 wrote:

> 46 In my opinion, the decision to order concurrent or consecutive sentences should be treated with the same deference owed by appellate courts to sentencing judges concerning the length of sentences ordered. The rationale for deference with respect to the length of sentence, clearly stated in both *Shropshire* and *M. (C.A.)*, applies equally to the decision to order concurrent or consecutive sentences. In both setting duration and the type of sentence, the sentencing judge exercises his or her discretion based on his or her first-hand knowledge of the case; it is not for an appellate court to intervene absent an error in principle, unless the sentencing judge ignored factors or imposed a sentence which, considered in its entirety, is demonstrably unfit. The Court of Appeal in the present case failed to raise a legitimate reason to alter the order of concurrent sentences made by the sentencing judge; the court simply disagreed with the result of the sentencing judge's exercise of discretion, which is insufficient to interfere.

[23] In *R. v. Adams*, 2010 NSCA 42 this Court reiterated the appropriate relationship between the selection of concurrent or consecutive sentences and the principle of totality. Bateman J.A., in her unanimous reasons for judgment, explained:

> [23] In sentencing multiple offences, this Court has, almost without exception, endorsed an approach to the totality principle consistent with the methodology set out in *C.A.M., supra*. (see for example *R. v. G.O.H.* (1996), 148 N.S.R. (2d) 341 (C.A.); *R. v. Dujmovic*, [1990] N.S.J. No. 144 (Q.L.) (C.A.); *R. v. Arc Amusements Ltd.* (1989), 93 N.S.R. (2d) 86 (S.C.A.D.) and *R. v. Best*, 2006 NSCA 116 but contrast *R. v. Hatch* (1979), 31 N.S.R. (2d) 110 (C.A.)). The judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, concurrent. The judge then takes a final look at the aggregate sentence. Only if concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced. (See for example, *R. v. G.O.H.*, supra at para. 4 and *R. v. Best, supra*, at paras. 37 and 38)

[24] I think it is fair to say that where multiple offences arise out of the same transaction, the Court must ensure that the selection of consecutive, as opposed to concurrent sentences, does not give rise to a sentence out of proportion to the overall gravity of the conduct, or otherwise create a sentence that is unduly long or harsh.

[25] In *R. v. M. (C.A.)*, *supra*, the Supreme Court addressed the interplay between consecutive sentences and the general principle of totality, in the context of multiple offences committed at different times. Lamer C.J. wrote, for the Court:

> 42 In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:
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> > The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".
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> Clayton Ruby articulates the principle in the following terms in his treatise, *Sentencing*, *supra*, at pp. 44-45:
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> > The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence ***may*** offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects. [emphasis added]

[26] With respect, I find nothing in the above statement of principle that equates to anything more than requiring a sentencing judge, or a reviewing court, to address whether the offences being considered should properly be ordered to be served consecutively and, having done so, to ask if the sentence offends the totality principle.

[27] The appellant lays considerable reliance on the decision of the Saskatchewan Court of Appeal in *R. v. Bear*, 2007 SKCA 127. Mr. Bear was a 51 year old aboriginal offender. He pled guilty to a charge of having the care or control of a

motor vehicle in excess of the permitted concentration of alcohol in his blood (s. 253(b)) and driving while prohibited (s. 259(4)). The offences were committed while on early release from a sentence of two years less a day for impaired driving. His previous record was similar to, but not as extensive as Mr. Naugle's. That is not to say it was not horrific. It was. Mr. Bear had 20 prior convictions for driving while disqualified and 15 prior impaired driving related offences. The Crown sought a total sentence in the four to five year range. The trial judge considered that a proper sentence was four years incarceration for each offence consecutive to each other, but after considering the principle of totality, and time spent on remand, reduced it to three years for each offence, consecutive.

[28] Jackson J.A., in an oral decision, said:

> **2** We are all of the view that consecutive sentences of three years significantly exceed the sentences imposed by this Court on similar offenders in similar circumstances. These consecutive sentences also exceed the maximum provided by Parliament for each of the individual offences for which Mr. Bear pled guilty. These sentences must be set aside.
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> **3** Notwithstanding our decision to set aside the sentences that were imposed, we recognize that Mr. Bear's record, coupled with the circumstances of the offences, merits a greater penalty than we have previously imposed for a drinking and driving offence. To that end, the sentence for having care or control contrary to s. 253(b) and s. 255(1) shall be fixed at four years, and the sentence for operating a motor vehicle while disqualified contrary to s. 259(4) shall be fixed at two years concurrent. The three year driving prohibition in relation to each offence shall remain in place.

[29] No further explanation was given by the court for interfering with the trial judge's determination that a consecutive sentence for the driving while disqualified was appropriate, nor why it was that exceeding the maximum penalty for either of the specified offences in and of itself constituted error.

[30] I accept that it would be an error in principle to utilize the commission of the elements of other offences arising out of the same incident to justify the imposition of a maximum sentence for the core or underlying offence, and then impose consecutive incarceration for those other offences. I will elaborate.

[31] Proportionality is recognized as an overarching principle of sentence (See *R. v. M. (C.A.), supra* at para. 40 and *R. v. Wozny*, 2010 MBCA 115 at para. 38). LeBel J. in *R. v. Nasogaluak*, 2010 SCC 6, writing for the full Court, in a thorough, albeit *dicta* discussion of the principles of sentence in Canada, wrote about what proportionality means in the context of sentencing. He said:

> [42] For one, it requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 533-34, *per* Wilson J., concurring). Understood in this latter sense, sentencing is a form of judicial and social censure (J. V. Roberts and D. P. Cole, "Introduction to Sentencing and Parole", in Roberts and Cole, eds., *Making Sense of Sentencing* (1999), 3, at p. 10). Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.

[32] To utilize the commission of the elements of other offences to justify the imposition of a maximum sentence for the core or underlying offence, and then impose consecutive incarceration for those other offences, would be to double count the moral culpability of the offender resulting in a sentence beyond one countenanced by the overarching principle of proportionality. The appellant did not suggest the trial judge did this.

[33] Here the trial judge was keenly aware that the three offences arose from the same transaction. Nonetheless, he chose to impose consecutive sentences for each. In doing so he relied on the Ontario Court of Appeal decision of *R. v. Gummer* (1983), 1 O.A.C. 141, [1983] O.J. No. 181. Concurrent sentences of six months imprisonment had been imposed on the offender for dangerous driving and leaving the scene of an accident with intent to escape civil or criminal liability. On appeal, the Court concluded the trial judge had erred in imposing concurrent sentences. Martin J.A., for the Court, wrote

> **13** The learned trial Judge considered that it was appropriate to impose concurrent sentences because so many of the ingredients of the offence of failing to remain were "caused by the earlier offence, the consumption of alcohol, the blurring of Judgment" for which the respondent had already been sentenced in respect of the offence of dangerous driving. Counsel for the respondent ably argued that the trial Judge did not err in imposing concurrent sentences and that sentences for offences arising out of the same transaction or incident are properly made concurrent. **We do not consider the rule that sentences for offences arising out of the same transaction or incident should normally be concurrent, necessarily applies where the offences constitute invasions of different legally protected interests, although the principle of totality must be kept in mind**. The offences of dangerous driving and "failing to remain" protect different social interests. The offence of dangerous driving is to protect the public from driving of the proscribed kind. The offence of failing to remain under s. 233(2) of the Code imposes a duty on the person having the care of a motor vehicle which has been involved in an accident, whether or not fault is attributable to him in respect of the accident, to remain and discharge the duties imposed upon him in such circumstances. [emphasis added]

[34] This principle was more recently applied by that Court in *R. v. Gillis*, 2009 ONCA 312. It has also been applied in drinking and driving context in *R. v. Antle* (1993), 108 Nfld. & P.E.I.R. 321 (Nfld. C.A.), [1993] N.J. No. 176, and *R. v. Bérubé* [1994] N.B.J. No. 484 (Q.L.) (Q.B.). The appellant does not suggest that the offences in issue here do not protect different societal interests and hence could not legitimately be made consecutive.

[35] The analysis carried out by the learned trial judge was as follows:

> [117] As previously mentioned, Mr. Naugle is charged with having committed three separate and distinct offences, which arose from the same transaction, but constitute invasions of three different legally protected interests.
>
> [118] Accordingly, the court must consider not only the appropriate sentence for each offence, but whether in light of the principles of totality and proportionality, the global sentence is a fit and just disposition for these offences and offender. I am mindful, that the global sentence, the combined sentence, must not be unduly long or harsh so as to impose on Mr. Naugle a crushing sentence not in keeping with his record and prospects. Although, there is little evidence of positive rehabilitative prospects for Mr. Naugle, a total sentence should not be so long as to crush optimism about eventual re-integration into society.

...

Disposition regarding the Driving while Prohibited Offence (s. 259(4))

[128] With respect to the offence of driving while disqualified, contrary to s. 259(4) of the *Criminal Code*, a just and appropriate sentence is 3 years, or 36 months, consecutive to the 5 years for the impaired driving. **This sentence is consecutive to the impaired driving, notwithstanding that it arose from the same incident, because the offence of driving while disqualified protects different societal interest than the impaired driving provisions.** Moreover, these offences have different essential elements. Mr. Naugle was prohibited from driving a motor vehicle by a court order, so he breached the trust reposed in him by the court and the public when he committed that offence. His state of sobriety at the time of driving is irrelevant, as he was simply prohibited from operating a motor vehicle under any circumstance. This offence requires an intent to disobey a court order. This is Mr. Naugle's 15th conviction for driving while prohibited or disqualified. As stated, he clearly has demonstrated that he has a total disregard for court orders, and respect for the legal process. **In reaching the conclusion that 3 years, or 36 months, was a just and appropriate sentence for this offence and offender, I have considered and applied the principles of totality and proportionality**.

Disposition regarding the Failing to Remain at the Scene Offence (s. 252(1))

[129] The offence of failing to remain at the scene of an accident is a serious offence, particularly when there are people in the hit vehicle, as was in this case. While I realize that there has been no evidence proffered in this sentencing hearing that Mr. Naugle was aware that the car he struck was occupied, it is still an aggravating factor that the accused, Mr. Naugle, did not stop to check to see whether there was anyone in the car he hit on the highway. He simply drove way without having any concern whatsoever. His attitude and demeanor following the accident is consistent with his pattern of being selfish; demonstrating a complete disregard for the well being of others.

[130] This is Mr. Nagle's first conviction for this offence, although I weighed that against the other 68 previous convictions contained in his criminal record.

[131] **Having applied the principles of proportionality and totality in determining a just and appropriate sentence for this offence and offender, I have reached the conclusion that 6 months consecutive to the other offences; namely, the ss. 253(a) and 259(4) of the Criminal Code.**

> [132] This offence is consecutive to the other two offences because it protects different societal interests. It also involves different essential elements than the other offences. The offence of failing to remain at the scene of an accident imposes a duty on the person operating a motor vehicle which has been involved in an accident, to remain and discharge the duties imposed upon him in such circumstances. This offence requires an intent to escape criminal and/or civil liability.
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> [133] **Again, consideration and application of the totality principle was underscored in reaching the sentence of 6 months, as it was in reaching the three year sentence for the driving while prohibited offence**.
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> [134] **Indeed, it should be stressed that the principles of totality and proportionality were underscored in reaching the global sentence of 8 ½ years, or 102 months**. [emphasis added]

[36] Hoskins Prov. Ct. J. was obviously very aware of the principles of proportionality and totality. Nonetheless, he concluded that a total sentence of 8½ years was a just and appropriate sentence given the circumstances of the offences and those of the appellant. He recognized that such a sentence was a significant increase over Mr. Naugle's last sentence, but justified it on the basis that reluctance to impose a substantial increase is based on the premise that rehabilitation is still a live possibility. Here the judge found it was not. The appellant does not suggest an error in the finding on this issue by the sentencing judge.

[37] Hoskins Prov. Ct. J. indicated he took into account proportionality and totality in arriving at a total sentence of 8½ years to avoid a sentence so long as to crush the appellant's optimism about eventual reintegration into society. The total sentence imposed is a significant jump from the previous sentences imposed on Mr. Naugle. In my opinion, the sentence was justified by the need to protect society. Although the trial judge did not specifically refer to the need to segregate Mr. Naugle from society, it is plain this is what he had in mind.

[38] The judge aptly expressed his concerns as follows:

> [82] It would appear from the foregoing, that Mr. Naugle has a real and uncontrollable compulsion to drive a motor vehicle while impaired by alcohol. Furthermore, his long criminal record demonstrates a consistent and repetitive

> pattern of non-compliance of court orders; he has repeatedly violated driving prohibition orders imposed by the courts.
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> [83] Mr. Naugle's chronic pattern of driving while impaired, including the current offences, coupled with his habitual record for non-compliance of prohibition orders continues to expose members of the public to risk. For over 18 years, the accused has risked the lives and safety of members of society by driving a motor vehicle while impaired. While I understand that alcoholism is a terrible disease, which causes people to become impaired, I do not understand the compulsion to drive a motor vehicle, while impaired. I mention this because Mr. Naugle is not being sentenced for suffering from alcoholism, but rather for his criminal transgressions of driving a motor vehicle while impaired by alcohol, defying court orders which prohibited him from operating a motor vehicle, and leaving the scene of an accident with intent to escape liability. These are crimes, suffering from alcoholism is not a crime. As referenced by Huddart J.A., in delivering the judgement of the *British Columbia Court of Appeal, in R. v. Newhouse*, [2004] B.C.J. No. 2288, at para. 2. Indeed, presumably there are many people in our society who suffer from alcoholism that do not drive a motor vehicle while impaired, because they do not want to risk the consequences that invariably flows from such selfishness.
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> [84] **Notwithstanding the numerous and varied sentences he has received, nothing up to this point has deterred or discouraged him from re-offending. In fact, the only gaps in his long criminal record which show that he was not active in committing criminal offences, are when he was imprisoned, serving a jail sentence.** [emphasis added]

[39] I find no error in principle by the trial judge in imposing consecutive sentences for these offences nor in selecting the length thereof. No rationale, plausible or otherwise, was offered in the court below or here for the persistent refusal by the appellant to make sincere efforts to pursue rehabilitation to address his substance abuse, or failing that, to refrain from highly dangerous and morally reprehensible acts of driving while impaired and prohibited from doing so. Accordingly, I see no basis that would permit this Court to intervene.

Sentence is Manifestly Excessive

[40] Having found no legal error, this Court can only alter the sentence imposed if it is unreasonable because it is clearly excessive. In *R. v. Shropshire*, [1995] 4 S.C.R. 227, the Supreme Court of Canada quoted with approval the approach

articulated by the Nova Scotia Court of Appeal in *R. v. Pepin*, *infra* and *R. v. Muise*, *infra*. Iacobucci J. wrote:

> [47] I would adopt the approach taken by the Nova Scotia Court of Appeal in *R. v. Pepin* (1990), 98 N.S.R. (2d) 238 and *R. v. Muise* (1994), 94 C.C.C. (3d) 119. In *Pepin*, at p. 251, it was held that:
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> > ...in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles or [if] the sentence is clearly or manifestly excessive.
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> [48] Further, in *Muise* it was held at pp. 123-24 that:
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> > In considering the fitness of a sentence imposed by a trial judge, this court has consistently held that it will not interfere unless the sentence imposed is clearly excessive or inadequate. ...
> >
> > ...
> >
> > 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. . . . My view is premised on the reality that 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 my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive.
> >
> > ...
>
> [50] Unreasonableness in the sentencing process involves the sentencing order falling outside the "acceptable range" of orders; ...

[41] One of the acknowledged roles of appeal courts is to minimize the disparity of sentences imposed by sentencing judges on similar offenders for offences committed throughout Canada. In *R. v. M. (C.A.)*, *supra*, Lamer C.J., for the unanimous Court, wrote:

> [92] Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada. See, e.g., *R. v. Knife* (1982), 16 Sask.R. 40 (C.A.), at p. 43; *R. v. Wood* (1979), 21 Crim. L.Q. 423 (Ont. C.A.), at p. 424; *R. v. Mellstrom* (1975), 22 C.C.C. (2d) 472 (Alta. C.A.), at p. 485; *R. v. Morrissette* (1970), 1 C.C.C. (2d) 307 (Sask. C.A.), at pp. 311-12; *R. v. Baldhead*, [1966] 4 C.C.C. 183 (Sask. C.A.), at p. 187. But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. See *Mellstrom*, *Morrissette* and *Baldhead*. 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. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons, consistent with the general standard of review we articulated in *Shropshire*, 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.

[42] Lamer C.J., in *R. v. W. (G.)*, [1999] 3 S.C.R. 597, summarized the law as:

> [19] I emphasize also that in *R. v. Shropshire*, [1995] 4 S.C.R. 227, and *M. (C.A.)*, this Court held that a variation of sentence (after leave to appeal has been granted) should only be made by an appellate court if the sentence imposed is "clearly unreasonable" or "demonstrably unfit", these two standards in my view meaning the same thing. In *Shropshire*, the Court concluded (at para. 50) that unreasonableness in the sentencing context refers to an order falling outside the "acceptable range" of sentences under similar circumstances. ...

[43] To be excessive, the appeal court must conclude that the sentence imposed is unacceptably outside the range for similar offenders for offences committed in similar circumstances. Indeed, s. 718.2(d) directs that the court sentencing an offender shall take into consideration that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Having said that, it is not an exercise in math. In the end, the sentence imposed must be in accord with the principles and objectives of

sentencing, only one of which is regard for sentences imposed in other cases. LeBel J., in *R. v. Nasogaluak*, *supra*, commented on this as follows:

> [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[44] The appellant summarizes twelve cases that were referred to by the trial judge at para. 92 of his decision. He acknowledges that his circumstances for related offences is arguably more serious than in most, if not all, of the cases he refers to, however he argues his overall sentence is far longer.

[45] What is an acceptable sentence for any offender cannot be determined in isolation. Both the circumstances of the offence and those of the offender must be considered. As the Crown points out, the cases relied upon by the appellant are different from this case for a number of reasons. In some, the Courts noted the First Nation's background of the offenders, positive steps toward rehabilitation or the absence of a record approaching that of the appellant. Other cases are less relevant as they are from a time prior to amendments to the *Criminal Code* reflecting Parliament's intention to emphasize the seriousness of this type of conduct or indeed society's contemporary condemnation of these offences.

[46] The appellant concedes that a sentence of five years for the impaired driving offence was within the appropriate range. It is an appropriate concession. It is only due to the imposition of consecutive sentences for the offences of leaving the scene of an accident and driving while prohibited that takes the total effective sentence to one of 8 ½ years and hence said to be outside the acceptable range. As was discussed earlier, if the maximum sentence for the offence of impaired driving was reached due to the commission of the elements of the other offences, it may well be that consecutive sentences will not be appropriate. To make the sentences

consecutive would be to punish the appellant twice for the same conduct. As was also noted, the appellant does not suggest this was the case.

[47] It should be stressed that Mr. Naugle is not a typical alcohol related driving offender. All previous attempts to help rehabilitate and deter him have failed. He has persisted in highly dangerous and criminal conduct. Mr. Naugle was not sentenced more severely because he is an alcoholic, but for committing crimes that reflected a complete disregard for accepted norms of behaviour. Neither was he sentenced for his past offences. His criminal record did not operate as a direct aggravating factor dictating a more severe sentence. However, as with any accused, a previous related record may well lead to an increase in severity of sentence, by type or length. It may be, and here was, cogent evidence that previous sentences have done nothing to assist in rehabilitation or in deterring him from the commission of further offences. The sentence separates him from society to prevent him, at least while incarcerated, from recidivism. Hopefully it will deter him, and demonstrate to others, that this type of behaviour is a serious crime and will be treated as such.

[48] Having found no error by the sentencing judge in imposing consecutive sentences nor in how he considered the issue of totality, the sentences imposed here do not, in my opinion, fall outside the acceptable range of sentence for this offender in these circumstances. Accordingly, although I would grant leave to appeal, I would ultimately dismiss the appeal.

Beveridge, J.A.

Concurred in:

Oland, J.A.

Bryson, J.A.