NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Desmond*, 2020 NSCA 1

Date: 20200110
Docket: CAC 484580
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Gerald Desmond

Respondent

Judge: The Honourable Justice J. E. (Ted) Scanlan

Appeal Heard: November 26, 2019 in Halifax, Nova Scotia

Subject: **Sentencing: Ancillary Orders (DNA and Forfeiture), additional reasons issued by sentencing judge.**

Summary: The sentencing judge refused to make ancillary orders requiring the respondent, after conviction for the offence of criminal negligence causing bodily harm, to provide a DNA sample and directing forfeiture of a motor vehicle involved in the incident.

A preliminary issue related to the fact the sentencing judge prepared a written decision after the appellant had filed a notice of appeal. This court had to consider whether the written decision went beyond what the sentencing judge was entitled to do. The written decision made substantive changes to the original oral reasons in that it contained analysis that did not exist in the oral decision. The appeal proceeded based on the oral reasons only.

Issue: Did the sentencing judge conduct an analysis as required by the applicable provisions of the *Code* when considering the

Crown request for ancillary orders.

Result: Appeal allowed.

The oral decision of the sentencing judge did not suggest that she did the required analysis to decide whether the ancillary orders should be granted. This court conducted the analysis as per the *Code* provisions and granted an ancillary DNA order (s. 487.051) and a forfeiture order for "offence-related property".

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Desmond*, 2020 NSCA 1

Date: 20200110
Docket: CAC 484580
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Gerald Desmond

Respondent

Judges:	Beaton, Saunders and Scanlan, JJ.A.
Appeal Heard:	November 26, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Scanlan, J.A.; Saunders and Beaton, J.J.A. concurring. DNA samples ordered and forfeiture of automobile ordered.
Counsel:	James A. Gumpert, Q.C., for the appellant Laura McCarthy, for the respondent

Reasons for judgment:

Introduction

[1] On May 25, 2017, Gerald Desmond's criminally negligent operation of a motor vehicle forever altered the life of Terrie-Lynn Atwood. He pled guilty to a single offence, criminal negligence causing bodily harm, under s. 221 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. On December 19, 2018, the respondent was sentenced to a period of incarceration of 28 months which, considering his remand credit, was time served. The court also imposed a four-year driving prohibition.

[2] The court refused the Crown's request to impose a DNA order under s. 487.051(3)(b) of the *Criminal Code* and also refused the Crown's request for a vehicle forfeiture order under s. 490.1 of the *Criminal Code*. It is the sentencing judge's refusal to impose those orders that is under appeal.

[3] This appeal also involves consideration of the issue of when, and to what extent, a judge may provide written reasons after delivering an oral decision on the record.

Background

[4] Justice Brothers, the sentencing judge, set out in her oral decision what she described as the agreed and uncontested facts:

> … I'll go over what I have characterized as the agreed and uncontested facts. The following facts are agreed to by the parties.
>
> On the evening of May 24th, 2017 and into the early morning of May 25th, 2017, Mr. Desmond and Ms. Atwood consumed some alcohol and cocaine. Mr. Desmond consumed crack cocaine specifically. The two were at Mr. Desmond's home at the time, 2-89 Pinecrest Drive in Dartmouth.
>
> Mr. Desmond stopped drinking at 1 a.m. and stopped consuming crack cocaine at 5 a.m. At 6 a.m. on May 25th, 2017, Mr. Desmond and Ms. Atwood left his residence in his vehicle. Mr. Desmond intended to drive Ms. Atwood home.
>
> Mr. Desmond was driving and Ms. Atwood was in the front side passenger seat. While driving, Mr. Desmond noticed his wallet was missing and began reaching across the seat to retrieve it from Ms. Atwood. After a scuffle between

the two, Mr. Desmond stopped his vehicle. He stopped on the right-side lane of travel on Farrell Street, and Ms. Atwood exited the vehicle.

Mr. Desmond drove a short distance and stopped his vehicle perpendicular across the ongoing lane of traffic on Farrell Street with the front of his vehicle facing the curb of the opposite lane of travel. Up until this point, Ms. Atwood indicated Mr. Desmond's driving had been fine.

Mr. Desmond was attempting a three-point turn in the roadway which was free from traffic at the time when Ms. Atwood approached from behind and kicked the vehicle. The two became involved in an altercation outside of the vehicle. The altercation lasted a few minutes and started with Ms. Atwood kicking the rear of Mr. Desmond's car. The altercation resulted in both being on the ground. Mr. Desmond got to his feet and was over top of Ms. Atwood for a few moments.

After the altercation, Mr. Desmond got back into his vehicle. Ms. Atwood also stood up and walked behind the vehicle. While she was approaching the vehicle, Mr. Desmond reversed his car. Mr. Desmond reversed the car so as to complete the three-way turn to return to his home.

Ms. Atwood was by the rear passenger side of Mr. Desmond's vehicle opening the rear door when the vehicle struck her. Mr. Desmond reversed the vehicle striking Ms. Atwood, causing her to fall to the ground. She was dragged under his vehicle. He continued to reverse back to the correct lane of travel on Farrell Street striking a vehicle which had approached in the correct lane of travel. Mr. Desmond continued to reverse the vehicle back over the sidewalk, curb, and onto the lawn, and down a small embankment.

Mr. Desmond remained on the scene and acknowledged immediately that he was responsible to two officers who attended the scene. As Mr. Desmond was speaking with Constable Brewer at the scene, it was noted that he had slow, slurred speech, bloodshot, glossy eyes, and was described as unsteady on his feet. One civilian witness described Mr. Desmond as out of it as if he had been up for days, and another indicated that he had bags under his eyes.

Mr. Desmond was arrested for impaired operation of a motor vehicle and attempted murder and read his rights and cautioned. It was determined that Mr. Desmond had low blood sugar and had to be assessed by medical professionals at the Dartmouth General Hospital, making his transport to a police station to provide samples of his breath unattainable. I'll note that Mr. Desmond was hyperglycemic causing many of the physical symptoms similar to impairment that required medical attention after being arrested.

As a result, Mr. Desmond was read a blood demand and a sample of his blood was obtained at 9:26 a.m., approximately three hours after the incident. At the time of the offence, Mr. Desmond had 19.2 grams of crack cocaine in his possession.

> The sample of Mr. Desmond's blood was sent for analysis where it was determined that there was no alcohol present in his blood at the time the blood sample was obtained. Other drugs were contained within Mr. Desmond's blood including cocaine. And I will not be able to ... I know Mr. Degen yesterday tried to pronounce these names. But there's four other chemicals that are listed in the toxicology report. They are also listed at paragraph 9 of the Crown's brief.
>
> The report of the toxicologist, Christopher Keddy, indicates that cocaine is a potent central-nervous system stimulant.
>
> Coca ethylene is a metabolite of cocaine that only forms when cocaine and alcohol are present in the blood together. There was also a chemical which is a cocaine breakdown product that is formed when cocaine is heated to a high temperature - that is, smoked. And another two chemicals that are cocaine metabolites and breakdown products. The report indicates, and the Defence agreed to the admission of this report, that the stimulant effects of cocaine may last 15 to 45 minutes depending on the amount and type of use. Where cocaine is used in a binge fashion, a post-use depression or crash may take place where the user experiences reduced control of body movement, fatigue, and a strong desire to sleep. The facts before me is that the amount of cocaine in Mr. Desmond's body was too low to be quantitatively determined at the time of testing of the blood.
>
> After this incident, Ms. Atwood was taken to hospital with life-threatening injuries. She suffered fractures to her cervical spine resulting in paralysis from her neck down. In addition, Ms. Atwood suffered a fractured breastbone, seven broken ribs, a broken femur, and bruising. She is mobile through the use of a specialized wheelchair which she controls through utilizing a device manipulated by her mouth. She spent several months recovering in hospital and attempting rehab. She was in hospital until January of 2018.

Issues

[5] While the Notice of Appeal sets out two specific grounds of appeal concerning ancillary orders, there is another issue that looms large in this appeal:

> To what extent may a judge alter her decision after it is rendered orally in court?

Analysis

Changes to the Oral Reasons

[6] The context of this appeal requires that I first determine which decisions are properly before the Court because that forms the basis for an assessment by this

Court as to whether the judge correctly applied the law in relation to the issues raised in the Notice of Appeal.

[7] The sentencing judge rendered three decisions in this case. The first was the oral decision at the time of sentencing on December 19, 2018. It was transcribed and forms part of the record. The second was the transcript of the oral decision as edited and signed by the sentencing judge (It appears at Tab C of the appellant's factum). It was forwarded to the parties under cover of letter dated June 11, 2019. The third is a written decision, dated March 12, 2019 (reported as 2018 NSSC 338), signed by the judge. That decision was provided to the parties after the Notice of Appeal was filed with this Court, on January 25, 2019. That decision included substantive additions to the oral decision. Those additions spoke directly to issues raised in the Notice of Appeal.

[8] I consider here the March 12, 2019 decision. A trial judge has limited authority to modify or change a transcript of oral reasons rendered in court. Judges often reserve to themselves the right to edit the transcripts of oral decisions for syntax or spelling or to rectify any errors in transcription that may have been made by a court reporter. The right to edit decisions is not without limit.

[9] The limited right to edit was noted in *R. v. Wang*, 2010 ONCA 435:

> [9] …This would normally be limited to matters such as punctuation, grammatical errors and the like. It is not an opportunity to revise, correct or reconsider the words actually spoken **and no changes of substance are to be made**. …
>
> [Emphasis mine]

[10] In some cases a judge may find it necessary to indicate they are providing a brief explanation or even just a bottom line in terms of a decision. When that is done the judge should make it clear that more detailed reasons are to follow. This often occurs in the context of a trial, especially if there is a jury. When a ruling is made in the context of a jury trial, reasons will likely never be put before the jury. Reasons may be delivered at a later date for the benefit of the parties, for appeal, or for precedential value. The delayed rendering of reasons facilitates continuation of the trial.

[11] It would be impossible here to list all situations that would justify a delay in delivering reasons for a decision.

[12] In the case on appeal the first oral decision was not required to keep a trial moving. The sentencing judge expressed some urgency in giving a decision. That urgency was likely related to the custodial sentence imposed. The sentence amounted to time served. Any delay would have meant the offender would be held in custody longer than what the sentencing judge determined to be an appropriate period of incarceration.

[13] The respondent entered a guilty plea on November 29, 2018. Sentencing was adjourned to December 18th and the decision was delivered orally on December 19th, 2018. The sentencing judge did say at the beginning:

> I thought it crucial to provide a decision in relation to this matter as soon as the Court could. I will not be as eloquent as I may have been if I had more time. If I'm asked to commit this to writing, I reserve the right to make any grammatical or organizational changes, adding case law, but not so as to change the content of my decision. …

[14] On January 25, 2019 the Crown filed a Notice of Appeal. At that time the oral decision from December 19, 2018 was the only one in existence. In the course of preparing the Appeal Book the appellant asked the judge to review the transcript and make any corrections to her decision. That oral decision was edited for errors, signed by the judge, and provided to the Crown under cover of letter dated June 11, 2019. I accept that the trial judge was entitled to make the editorial corrections she made in the decision sent to the Crown on June 11. That signed decision did not make any substantive changes to the oral transcript. It made a few spelling and grammar changes.

The March 12, 2019 decision is the one the appellant argues is not properly before this Court:

[15] The March 12, 2019 written decision contained much more than minor corrections. It contained a number of additions to the original decision. For ease of reference, I underline below the added portions:

> [82] <u>This offence is classified as a secondary designated offence which makes such an order discretionary. The Crown argued that this order is necessary given the severity of the crime. The Crown submitted a brief in support of their position which stated only the following:</u>

> In addition, the Crown is seeking a 5-year driving prohibition under section 259 of the *Criminal Code*, a secondary DNA order under section 487.04 of the *Criminal Code*.

[83] The Defence argues this is not a primary designated offence and, given the intrusion on Mr. Desmond's personal privacy and integrity, the Court should not exercise its discretion to order a DNA sample. I agree, and I make note of the decision in *R. v. Sullivan*, 2015 NSPC 40, on this issue.

[84] The burden is clearly on the crown. As stated in *R.v. Sullivan*, supra, at para. 59:

> The Supreme Court of Canada in *R. v. R.C.*, 2005 SCC 61 (CanLII), [2005] S.C.J. No. 62 has held that "Parliament has ... drawn a sharp distinction between "primary" and "secondary" designated offences, which are defined in s. 487.04 of the *Criminal Code*. Where the offender is convicted of a secondary designated offence, the burden is on the Crown to show that an order would be in the best interests of the administration of justice." (paragraph 20)

The Crown, in oral arguments, said the objectives to order this are two-fold:

> 1.To prevent wrongful convictions; and,
>
> 2.To ensure crimes can be investigated more effectively.

[85] The Crown argues such orders were given in relation to other similar matters but did not refer the Court to any cases. I am not satisfied the Crown has discharged its burden. Mr. Desmond has a dated criminal record. The Crown has not demonstrated how it is in the best interest of the administration of justice. In these circumstances, I am not prepared to grant an order to take a sample of Mr. Desmond's bodily substances.

[…]

[88] The Crown acknowledged that the forfeiture requested is not utilized often. During the sentencing, the Court inquired as to the factors which should be considered in reaching a decision in regards to this order. The Crown argued this was a presumptive provision in the *Criminal Code*. The Crown argued the vehicle was offence related property. The Crown acknowledged that s. 490.41(3) gives the Court discretion to refuse such an order. Subsections 490.41(3) provides:

> (3) Subject to an order made under subsection 490.4(3), if a court is satisfied that the impact of an order of forfeiture made under subsection 490.1(1) or 490.2(2) would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person charged with or convicted of the offence, as the case may be, it may decide not to order the forfeiture of the property or part of the property and may revoke any restraint order made in respect of that property or part.

> [89] It is clear the vehicle, a 2005 Chevy Aveo, was used in the offence. It was therefore offence-related property. However, I am not convinced this is an appropriate case to make such an order.
>
> [90] Because the vehicle is offence-related property the onus shifts to the offender to establish the impact of the forfeiture is disproportionate.
>
> [91] Mr. Desmond lost his work and his apartment along with his possessions when he was incarcerated on May 25, 2017. When leaving custody, he will be re-entering society with little more than his vehicle. I accept the representations of Defence counsel that forfeiting the vehicle would be a substantial consequence whereas Mr. Desmond has limited initial means and resources to re-establish himself.
>
> [92] Given the sentence of imprisonment and the significant driving prohibition and, given the dated criminal record and the little means the offender has to start to rehabilitate himself, it would be disproportionate in this case to order forfeiture of his only asset, given the importance of his rehabilitation and transition into society.
>
> [93] I was provided with no authority from the Crown to assist me in reaching a decision on this matter. Pursuant to s. 490.41(3), a court may decline to order vehicle forfeiture if the order would be disproportionate. Given the nature of the offence, the circumstances of the offender (including that he is African Nova Scotian) the mitigating and aggravating factors, and given, as his counsel stated, that the vehicle is the only asset he has and could be sold to help him get on his feet, it would be disproportionate to order forfeiture.
>
> [Underlining indicates sections added]

[16] The additions included an analysis of the cases, a review of the law, and consideration of circumstances of the case not present in the original decision. To a certain extent it even contradicted the oral decision. In this regard, I reference, for example, the oral decision on the forfeiture. It suggested the decision was discretionary and the judge simply refused to exercise that discretion. The March decision contained much more and referenced the circumstances, suggesting that some weighing was required.

[17] A judge has the right to make limited editorial corrections. This is not a second chance to fill in any obligatory blanks that were missed the first time around. The changes in the March 12, 2019 version were changes of substance, filling in the analytical parts that were absent from the oral decision.

[18] Parties to criminal proceedings are entitled to finality in decisions. Those decisions are the ones on which they base future strategy, including whether to

advance an appeal. It would undermine the administration of justice if decisions could be altered in substance, especially after a Notice of Appeal has been filed. This is to be distinguished from the situation where a court may indicate the result 'with reasons to follow'. In such cases a court is entitled to deliver the reasons as promised but it cannot alter the outcome as initially indicated.

[19] The limits of a judge's authority to edit decisions, and how it should be done, was discussed in *Wang*, *supra*:

> [9] … editing the transcript for readability and to assist in catching errors by the transcriber - not the judge - is appropriate. This would normally be limited to matters such as punctuation, grammatical errors and the like. It is not an opportunity to revise, correct or reconsider the words actually spoken and no changes of substance are to be made. …
>
> [10] The integrity of the trial record and of in court proceedings is fundamental to the judicial system and to the transparency of those proceedings. Counsel who are present when oral reasons are delivered in court should have confidence that the decisions they make with their client based on these oral reasons will not be undermined by alterations that represent something substantially different from what in fact occurred in the courtroom. …
>
> [11] As stated by Dickson J. in *Baxter Travenol Laboratories v. Cutter (Canada)*, [1983] 2 S.C.R. 388 at 398: "Reasons for judgment are not meant to be tentative." When parties to a proceeding receive reasons that on their face are final, they ought to be entitled to rely on this apparent finality. The Supreme Court of Canada in *R. v. Teskey*, [2007] 2 S.C. R. 267 recognized, however that in some circumstances there may be good reason for announcing a decision prior to delivering full reasons that led to it. There may be urgency in the outcome being known or, as frequently occurs in the case of rulings in the course of a trial, the judge does not want to delay the progress of the trial so will indicate the result arrived at with or without brief oral reasons. Similarly, a summary conviction appeal judge might choose to announce the decision and outline the reasons for the decision in the presence of the parties. In such cases the judge should give a clear indication that the transcription of the decision (and any brief oral reasons that may have been given) will be supplemented by more comprehensive reasons, written or oral, to follow.

[20] In this case, the *Code* sets out the analytical requirements. The oral decision does not reflect the judge did the necessary analysis. For her to fill in the necessary blanks after a Notice of Appeal was filed, no matter how well intentioned, places courts in a difficult position in terms of the administration of justice. The participants and observers may well question the fairness of the process if they

perceived, rightly or not, that the written reasons might be an attempt to patch a previous error.

[21] While in the end it is always the judge's responsibility to properly articulate and apply the law, it is unfortunate in this case trial counsel were not much help to the judge in identifying the legal principles or leading authorities with respect to both DNA and forfeiture orders. Understandably, counsels' attention was primarily focused on the length of sentence which might be imposed. It would certainly appear from a review of counsels' sentencing briefs and oral argument that little time was taken up with the substantive merits of the ancillary orders sought by the Crown; yet both are central to this appeal.

[22] In *R. v. Hannemann*, [2001] O.J. No. 839 (S. Ct. J.), the court discussed reasons as to why there is a limited right to edit decisions, once delivered:

> [159] A number of interests are served by an approach of restraint in judicial editing after oral delivery of reasons or a charge to a jury in a criminal case. Firstly, there must be finality and certainty … [L] itigants must have closure and be in a position of certainty to receive legal advice respecting the exercise of appellate rights and compliance with any ruling of judgment, Secondly, **and in particular where an appeal has been filed**, the appearance of justice may be unfairly compromised where the court engages in substantive revisions of earlier statements: *Regina v. Hawke* (1975), 22 C.C.C. (2d) 19 (Ont. C.A.) at 53-54 per Dubin J.A. (as he then was); *The Queen v. E.(A.A.), supra* at 474 per Lamer C.J.C., at 488 per Cory J.
>
> [Emphasis added]

[23] In *R. v. Geesic*, 2010 ONCA 365 the court was dealing with changes to an oral decision after a Notice of Appeal had been filed:

> [2] Turning to the errors, the trial judge impermissibly altered the substance of the reasons she delivered orally in court as transcribed by the court reporter. This was especially troublesome here as the editing occurred after the Crown had filed its Notice of Appeal. For obvious reasons, this is unacceptable and should not occur.

[24] The written decision here was not simple editing of the original transcript. It did more than add references to case law or expand on reasons apparent in the original decision. The written decision provided an analysis that did not exist in the first decision. The sentencing judge was precluded from doing an analysis that was

not done in the first instance. The March 12, 2019 decision will not be considered for purposes of this appeal.

[25] The decision delivered under cover of letter dated June 11, 2019 made grammatical corrections only. It will be considered in this appeal.

[26] I now turn to the remaining issues on appeal.

Standard of Review

[27] The remaining issues involve questions of law as it relates to considerations required to decide whether to grant a DNA order or a forfeiture order as requested by the Crown.

[28] The standard of review for an appellate court reviewing a lower court decision respecting a DNA order is laid out in *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont. C.A.) and was followed by this Court in *R. v. Clancey*, 2003 NSCA 62 at para. 6:

> 6 The standard of review in this case is as outlined by the Ontario Court of Appeal in *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont. C.A.) at ¶ 8 as follows:
>
> > The options available and the factors that the trial judge must weigh in determining whether to make a DNA order are more limited than in making a sentencing decision. However, as Weiler J.A. said in *Briggs*, the standard of review of orders under s. 487.051(1)(b) and s. 487.052 should be the standard applied to the review of such discretionary orders. Accordingly, 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 decision to either make or refuse to make a DNA data bank order if the decision was clearly unreasonable.

[29] Thus, the standard of review for DNA orders is the same as is applied to other discretionary orders. This appeal turns on the judge's failure to consider relevant factors.

[30] The standard of review with respect to forfeiture orders was laid out in *R. v. Siek*, 2007 NSCA 23 at para. 18: "the standard of review for forfeiture orders is the same as that applicable to review of sentences generally. *R. v. Yates* (2002), 169 C.C.C. (3d) 506 (B.C.C.A.); *R. v. Harb* (1994), 88 C.C.C. (3d) 204 (N.S.C.A.)." Thus, the appeal court assesses whether there has been an error in principle, or a

failure to consider a relevant factor, or an overemphasis of appropriate factors, or that the sentence is 'demonstrably unfit', or clearly unreasonable.

Issue #1 Did the sentencing judge err in law in refusing to make an order under s. 487.051(3) of the *Criminal Code* in the absence of any evidence of the impact such an order would have on the Respondent's privacy and security of the person, and by failing to give reasons for refusing to make the order.

[31] The Crown asked the sentencing judge to make a DNA order under s. 487.051(3) of the *Criminal Code.* That section provides as follows:

> **Order — persons found not criminally responsible and secondary designated offences**
>
> 487.051(3) The court may, on application by the prosecutor and if it is satisfied that it is in the best interests of the administration of justice to do so, make such an order in Form 5.04 in relation to
>
> […]
>
> (b) a person who is convicted, discharged under section 730 or found guilty under the *Youth Criminal Justice Act* or the *Young Offenders Act*, of an offence committed at any time, including before June 30, 2000, if that offence is a secondary designated offence when the person is sentenced or discharged.

[32] That section requires a court to be satisfied it is in the best interests of the administration of justice to make a DNA order. In making that decision, the sentencing judge shall consider factors as set out in s.487.051 (3) including:

- the person's criminal record
- the nature of the offence;
- the circumstances surrounding the commission of the offence; and
- the impact an order would have on the person's privacy and security of the person

It also requires that a sentencing judge give reasons for her decision.

[33] The decision is to be made in the context of the law as it relates to DNA orders. The considerations on a Crown DNA application are somewhat different than those that apply in other sentencing situations. The provisions of s. 487.051

are not governed by the principles of sentencing as set out in s. 718 of the *Criminal Code*. DNA orders are not punitive. This was noted in *R. v. Brigg* (2001), 157 C.C.C. (3d) 38 (ONCA), where the court said:

> [71] .... A DNA data bank order is not, however, a sentence and does not require the same safeguards to be in place. A DNA order is not a punishment and should not be treated as one: see *R. v. McIntyre*, [2000] O.J. No. 3939 (C.J.). Consequently, an authorizing judge may take into consideration the entire criminal record of the offender, including whether the offender has been convicted of further offences committed after the date of the offence on which the application is based and the nature of those offences.

[34] *Briggs* was followed in *R. v. Murrins*, 2002 NSCA 12 where Bateman, J.A., for the Court, stated:

> [96] It is my opinion that the ordering of a bodily sample for DNA testing is not "punishment" for the offence.

[35] She said:

> [107] I am not persuaded that the ordering of a DNA sample is "punishment" within the meaning of s. 11(i) of the *Charter*. Its impact on the offender is not comparable to the control central to imprisonment, house arrest or even reporting. It does not constitute a deprivation or hardship such as that which accompanies a restitution order, a fine or even a firearms prohibition. In no direct way does the order put limits upon the future behaviour of the offender. I do not agree that it constitutes "severe handling" or "harsh treatment". Nor is it a direct consequence of the conviction. The court cannot order a DNA sample on its own motion - there must be an application by the Crown. It is not within the range of tools from which the judge may craft the sentence.

(See also, *R. v. Cross*, 2006 NSCA 30, ¶48; and *R. v. Lawson*, 2019 BCCA 290, ¶37).

[36] It was noted by the Supreme Court in *R. v. Rodgers*, 2006 SCC 15 at ¶32:

> [32] […]
>
> In this case, the state's interest is not simply one of law enforcement *vis-à-vis* an individual - it has a much broader purpose. The DNA data bank will: (1) deter potential repeat offenders; (2) promote the safety of the community; (3) detect when a serial offender is at work; (4) assist in solving cold crimes; (5) streamline investigations; and most importantly,

> (6) assist the innocent by early exclusion from investigative suspicion (or in exonerating those who have been wrongfully convicted).

[37] Here, the sentencing judge gave very short reasons in dismissing the DNA order application. I refer to the transcribed reasons of December 19, 2018:

> There are ancillary orders that the Crown wishes me to consider. The first is the DNA order. The Crown seeks a DNA order pursuant to s.487.05(1). This offence with which you pled guilty is classified as a secondary offence under that section, and it makes this order discretionary. In these circumstances, I am not prepared to grant an order to take a sample of Mr. Desmond's bodily substances. The Defence argues that it is not a primary designated offence. And given the intrusion on your personal privacy and integrity, the Court should not exercise its discretion to order a DNA sample be provided. I agree. I make note of the decision in **R. v. Sullivan** 2015 NSPC 40 on that issue.

[38] The sentencing judge noted that this was a secondary offence, and as the passage quoted above illustrates, she referred only to 'the intrusion on personal privacy and integrity'. There is nothing in the decision to indicate she conducted the assessment considering the offender's record, the nature of the offence and the circumstances surrounding the offence. Although she did reference *R. v. Sullivan*, 2015 NSPC 40 and the reference therein to the intrusion on the offender's privacy and integrity, the oral decision does not suggest that was weighed as against the other factors she was required to consider. If an offender's privacy and personal integrity were the only factors considered in these applications, I see no path to there ever being justification for granting a DNA order. Clearly that was not the intent of Parliament.

[39] The sentencing judge's reference to *Sullivan*, *supra*, could not have been meant to be a blanket consideration of the enumerated factors set out in s. 487.051(3)(b). In *Sullivan*, the sentencing judge, Derrick, P.C.J. (as she then was) said:

> [58] The Crown has requested a DNA order. Dangerous driving is a secondary designated offence under the DNA provisions of the *Criminal Code*. The making of the order is subject to judicial discretion: section 487.051(3)(b) provides that:
>
> > In deciding whether to make the order, the court shall consider the person's criminal record, whether they were previously found not criminally responsible on account of mental disorder for designated offence, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person and shall give reasons for its decision.

> [59] The Supreme Court of Canada in *R. v. R.C.*, [2005] S.C.J. No. 62 has held that "Parliament has...drawn a sharp distinction between "primary" and "secondary" designated offences, which are defined in s. 487.04 of the *Criminal Code*. Where the offender is convicted of a secondary designated offence, the burden is on the Crown to show that an order would be in the best interests of the administration of justice." (paragraph 20)
>
> [60] As I noted earlier, Mr. Sullivan has no criminal record. He is a person of good character who has been regularly employed and complied with his release conditions. There has been no suggestion that Mr. Sullivan is likely to have further conflict with the law. Indeed, the Crown expressly stated that specific deterrence was not a consideration in this case. As I stated in *R. v. Shields*, [2014] N.S.J. No. 473:
>
> > [22] The objectives of the DNA provisions - the identification of persons alleged to have committed designated offences, deterring potential repeat offenders, detecting serial offenders, streamlining investigations, solving "cold cases", and protecting the innocent by eliminating suspects and exonerating the wrongly convicted - could be used to ground the argument that every offender's DNA should be collected. Parliament has expressly allowed for judicial discretion and crafted very specific criteria in the case of secondary designated offences. There is nothing in the legislation stipulating that only exceptional cases of secondary designated offences should be exempt from DNA sampling...
>
> [61] The Crown has not shown me how it is in the best interests of the administration of justice to collect Mr. Sullivan's DNA and intrude upon his constitutionally protected privacy and security rights. As noted by the Supreme Court of Canada in *R.C.*, a DNA order is.:
>
> > ...undoubtedly a serious consequence of conviction. This is evident from the comprehensive procedural protections that are woven into the scheme of the DNA databank. The taking and retention of a DNA sample is not a trivial matter and, absent a compelling public interest, would inherently constitute a grave intrusion on the subject's right to personal and informational privacy. (*paragraph 39*)

[40] That assessment, as done by Judge Derrick, is a more complete review of the circumstances that arose in that case. The facts in *Sullivan* were very distinct from this case. The sentencing judge in this case did not reference the distinctions nor do any analysis taking into account the facts of Mr. Desmond's case.

[41] In *Sullivan* the offender was convicted of two counts of dangerous driving after he sped up and lost control of his vehicle causing a collision with a number of other cars. There were a number of persons injured but none of the injuries could

be compared to the catastrophic injuries sustained by the victim in this case. Mr. Sullivan was found to be a person of good character. He had prior convictions under the *Motor Vehicle Act* and one conviction related to liquor possession.

[42] Mr. Desmond had prior, but dated, convictions for possession and trafficking of narcotics as well as driving-related convictions. I agree with the Crown's submission in the original sentencing brief: Mr. Desmond bore a high degree of moral culpability. He was grossly negligent in reversing at a high rate of speed knowing the victim was in close proximity to his car. He did not stop when he struck her; he did not stop when he struck another car; and after that he sped over the curb onto an adjacent lawn as he reversed the car.

[43] The altercation prior to the incident spoke of rage, not a momentary loss of control. Mr. Desmond's consumption of cocaine prior to the incident as well as his possession of that same drug when arrested should also have been considered.

[44] All of these factors distinguish this case from *Sullivan.* I am satisfied the reference by the sentencing judge could not have meant that the facts were the same; instead, she was only referencing the impact of DNA samples on the privacy and personal integrity of the offender.

[45] To properly consider the Crown's application she had to consider the factors referred to above. I am satisfied she did not do so.

[46] The judge erred in law by failing to consider relevant factors as required by the provisions of s. 487.05(3) of the *Criminal Code*.

[47] Section 487.054 permits the appeal of the decision related to the DNA order. On appeal, this Court has the power to make the order that the trial court should have made (*R. v. Hendry, supra* and *R. v R.(B.)*, 2011 NLCA 23). The record is sufficient to allow this Court to consider all relevant factors in conducting a proper assessment as to whether a DNA sample should be ordered.

[48] Being satisfied the sentencing judge did not undertake the required analysis, I will do so. The victim in this case will never be able to provide for her own basic personal care and needs. She is dependant upon others for all her personal care, every day. The victim was 25 years old at the time of the offence. She has been paralyzed from her neck down and relies upon a wheelchair. She is unable to do many of the things that most people take for granted. In addition, she has

considerable scarring on her face as a result of having been dragged under the car; over the pavement, ground, and curb.

[49] Mr. Desmond's decision to consume drugs prior to the operation of the motor vehicle is a valid consideration. The record suggests he ceased drinking alcohol at approximately 1 a.m. but had consumed cocaine within approximately 90 minutes of the incident. According to the victim, Mr. Desmond consumed a lot of crack throughout the evening of May 24, 2017, and into the morning of May 25, 2017. The toxicology reports on file indicate a level of cocaine by-products in the respondent's blood which "suggests a high level or binge use of cocaine".

[50] Mr. Desmond has prior convictions under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 and driving-related convictions including speeding, driving without insurance, driving without a license, and failing to stop at a red light.

[51] I am not satisfied the impact of a DNA order as it relates to Mr. Desmond's privacy and security of person would outweigh the circumstances of this offence. I again refer to *Rodgers* and the benefits for the administration of justice in having this offender's DNA in a data bank. I am satisfied a DNA sample should be provided. Mr. Desmond shall be required to provide a sample of his DNA as per an order in Form 5.04.

Issue #2 Forfeiture of the accused's automobile as requested by the Crown: Did the sentencing judge err in law in refusing to make an order under s. 490.1(1)(a) of the *Criminal Code* by failing to properly consider and apply the provisions of s. 490.1 of the *Criminal Code*?

[52] The relevant sections of the *Criminal Code* on the issue of forfeiture are sections 490.1(1)(a) and 490.41(3) which state:

> **Order of forfeiture of property on conviction**
>
> 490.1 (1) Subject to sections 490.3 to 490.41, if a person is convicted, or discharged under section 730, of an indictable offence under this Act or the Corruption of Foreign Public Officials Act and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that offence-related property is related to the commission of the offence, the court **shall**

> (a) if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province;
>
> **Non-forfeiture of property**
>
> 490.41 (3) Subject to an order made under subsection 490.4(3), if a court is satisfied that the impact of an order of forfeiture made under subsection 490.1(1) or 490.2(2) would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person charged with or convicted of the offence, as the case may be, it may decide not to order the forfeiture of the property or part of the property and may revoke any restraint order made in respect of that property or part.
>
> [Emphasis added]

[53] The definition of offence-related property is set out in s. 2 of the *Code*:

> 2 In this Act,
>
> "offence-related property means any property, within or outside Canada,
>
> (a) by means or in respect of which an indictable offence under this Act or the Corruption of Foreign Public Officials Act is committed,
>
> (b) that is used in any manner in connection with the commission of such an offence, or
>
> (c) that is intended to be used for committing such an offence;

[54] Section 490.1(1)(a) requires a sentencing judge to decide on a balance of probabilities if: (a) property is "offence-related property"; and (b) the offence was committed in relation to that property. Here, the sentencing judge found the vehicle driven at the time of the incident was the respondent's vehicle and it was the vehicle that struck the victim causing her to fall to the ground. She was dragged and crushed by the vehicle causing her severe injuries. That fulfils the prerequisite requirements under s 490.1 (1)(a) of the *Code.*

[55] The oral decision does not address the presumptive nature of the forfeiture provisions nor does it explain the circumstances that would justify the forfeiture order not being granted. The trial judge said:

> The Crown seeks a vehicle forfeiture order. The Crown acknowledged that the forfeiture request is not utilized often. To be considered, I must find the property was used in this offence. This is a discretionary order under 490.1. I was provided

> with no authority to assist me in exercising my discretion. I choose not to exercise it, and I will not require the vehicle be forfeited.

[56] A sentencing judge is to conduct an analysis under the provisions of s. 490.41(3) in order to determine whether a forfeiture order should be granted. That was not done. In order to deny a forfeiture request a judge must be satisfied that the impact of an order of forfeiture would be disproportionate to: the nature and gravity of the offence; the circumstances surrounding the commission of the offence and the criminal record of the offender.

[57] The failure to consider relevant factors is an error in law.

[58] In terms of remedies available to this Court, I refer to s. 490.1(3) of the *Code*. It provides:

> A person who has been convicted of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act*, or the Attorney General, may appeal to the court of appeal from an order or a failure to make an order under subsection (1) as if the appeal were an appeal against the sentence imposed on the person in respect of the offence.

[59] In *R. v. Trac*, 2013 ONCA 246 the court consider that section and said:

> [50] The *Criminal Code* provides for appeals from the refusal to make forfeiture orders under s. 462.37 (proceeds of crime) or s. 490.1 (offence-related property). **Those appeals are treated as sentence appeals, meaning that this court can either dismiss the appeal or make the appropriate forfeiture order**. The court cannot order a new forfeiture hearing: see ss. 490.1(3), 673, and 687
>
> [Emphasis added].

[60] The factors that are to be considered in the s. 490 analysis takes into account many of the same facts that I referred to in relation to the DNA order. I will not repeat the relevant facts again.

[61] Having done the analysis required under s. 490.41(3), I am satisfied the impact on the offender is most appropriately described as an inconvenience, or a financial hardship, which pales in comparison to the catastrophic consequences for the victim. This offence occurred in circumstances where the driving exhibited an extreme disregard for this victim and others in the area. The victim, her family, and the public at large will share a lifetime of consequences as a result of what Mr. Desmond did using that vehicle.

[62] This is an appropriate case to order a forfeiture of the motor vehicle that was involved in the incident and I would so order.

[63] For the reasons set out above I would allow the appeal and grant the ancillary orders sought by the Crown.

Scanlan, J.A.

Concurred in:

Beaton, J.A.

Saunders, J.A.