C.A.C. No. 110557

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Machek, 1994 NSCA 253

Clarke, C.J.N.S.; Hallett and Chipman, JJ.A.

BETWEEN:	)	
	)	Mark T. Knox
DOMINIK TEMPELTON MACHEK	)	for the Appellant
	)	
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	William D. Delaney
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	November 22, 1994
	)	
	)	
	)	Judgment Delivered:
	)	November 25, 1994

THE COURT: The appeal is dismissed as per reasons for judgment of Chipman, J.A.; Clarke, C.J.N.S. and Hallett, J.A., concurring.

CHIPMAN, J.A.:

The appellant pled guilty in Provincial Court to three charges of dangerous driving causing bodily harm. He sought leave to appeal and appeals from his sentence of nine months incarceration plus two years probation on each charge, to be served concurrently.

On June 9, 1994 at about 10:00 p.m., the appellant had an argument with his girlfriend at her home on Connolly Street in Halifax. He left the home in an agitated state, got into his vehicle and drove northerly on Connolly Street at a high rate of speed, with his headlights off. He drove through, without stopping, at stop signs at the intersections of Roslyn Street and Edgewood Road. At the Edgewood Road intersection, he collided with a westbound Mazda pickup truck driven by Dennis LeRue and occupied by Ronald and Adam LeRue. These three people suffered serious injuries. Dennis LeRue suffered a broken arm and an undisplaced pelvic fracture and fractured ribs and Ronald LeRue and Adam LeRue suffered undisplaced fractures of the cervical spine.

At the time of the accident, the appellant had not consumed alcohol or drugs. He was a duly licensed driver.

The appellant is 19 years of age and has a grade 12 education. He has five previous motor vehicle accidents and convictions under the **Motor Vehicle Act** for failure to obey traffic signs, speeding and failure to display a license on demand. His criminal record consists of a conviction in November of 1992 for possession of a narcotic, a conviction in 1993 for two counts of theft under $1,000 and a conviction in August of 1994 for theft under $1,000 in respect of which he was sentenced to 45 days incarceration, to be served intermittently to be followed by six months probation.

Following the motor vehicle collision on June 7, 1994 the appellant was charged on an information alleging three counts of criminal negligence causing bodily harm contrary to s. 221 of the **Criminal Code**. On July 25, 1994 he pleaded guilty in Provincial Court to three counts of the included offence of dangerous driving causing bodily harm contrary to s. 249(3) of the **Code**. At the same time, he consented to a driving prohibition for a period of three years being imposed upon him pursuant to s. 259(2) of the **Code**.

The appellant was sentenced on October 31, 1994 in Provincial Court. The Provincial Court judge had before him a pre-sentence report dated September 28, 1994, a

report of Dr. John S. Bishop, a psychologist, dated October 25, 1994 and a report of Charles Casselman, a counsellor at Veith House, dated October 29, 1994. Dr. Bishop referred to the appellant as an overactive person who is prone to emotional lability, impulsivity and counterproductive activity with a low frustration tolerance. He recommended continued counselling for his anger management. Mr. Casselman's report recited that the appellant had 11 therapy sessions designed to assist his impulse control and inappropriate anger.

At the sentencing, counsel for the Crown asked for a period of incarceration, but indicated that the Crown had no objection to sentence "in the intermittent range". Counsel for the appellant concurred in this position.

In imposing sentence, the court referred to the general principles governing sentencing and the importance of general deterrence in sending a message to the community that dangerous driving must not be tolerated. The court referred to the appellant's driving record and the serious injuries sustained by three people as a result of the appellant's inability to control his anger. The court was unable to accept the view of counsel as to the range of sentencing and imposed the sentence of nine months incarceration, concurrent on each count, together with two years probation with conditions of reporting and attending anger assessment counselling and treatment as directed by the probation service.

The appellant applied for release pending his appeal to this court which was granted on November 3, 1994 by virtue of s. 679(1)(b) of the **Code**. The appellant's application for leave to appeal his sentence has thus been granted.

On this appeal, the appellant raises three issues:

(1) Whether the trial judge erred in failing to give effect to the submission of Crown counsel that an intermittent sentence was appropriate.

(2) Whether the trial judge erred in failing to recognize in his reasons the mitigating factors in the appellant's favour.

(3) Whether the sentence was manifestly excessive.

FIRST ISSUE:

While the recommendations of Crown counsel, concurred in by the defence, are entitled to considerable weight, the trial judge is not bound by them. See **R. v. Lai** (1988), 69 Nfld. & P.E.I. R. 297 (Nfld. C.A.); **R. v. Rubenstein** (1987), 41 C.C.C. (3d) 91 (Ont. C.A.); and **R. v. Blumer** (1993), 18 W.C.B. (2d) 557 (Que. C.A.). The power of a trial judge to impose sentence cannot be limited by the submission of Crown counsel or a joint submission resulting from a plea bargain. If the trial judge has not otherwise erred in applying the principles of sentencing, this court should not disturb the disposition imposed merely because it does not accord with such submissions made to the judge.

ISSUE TWO:

A number of factors were urged before the trial judge in mitigation. They were not mentioned by him in the brief reasons for sentence given orally at the conclusion of the argument. Such omission in and of itself does not constitute an error of law. See **MacDonald v. The Queen** (1976), 29 C.C.C. (2d) 257 (S.C.C.). It is apparent from the trial judge's brief reasons that the aspects of the matter unfavourable to the appellant were those which concerned him the most.

THIRD ISSUE:

The principles governing the imposition of sentence and appeals therefrom have been stated by this court on many occasions and need not be restated. See **R. v. Grady** (1971), 5 N.S.R. (2d) 264 and **R. v. Cormier** (1975), 9 N.S.R. (2d) 687. A review of the nature

of the offence committed by the appellant indicates aggravating circumstances in the commission of a serious offence which carries a maximum penalty under the **Criminal Code** of ten years incarceration. The appellant showed recklessness and a disregard for the safety of others to a very high degree. The only mitigating circumstance is the absence of the involvement of alcohol or drugs. Even so, the appellant's conduct bordering almost on the deliberate warrants the emphasis placed by the trial judge on general deterrence.

While the circumstances in **R. v. MacEachern** (1990), 96 N.S.R. (2d) 68, differ from those in this case by reason of the involvement of alcohol and the fact that death resulted, that case, as many others cited to us in argument, is pertinent. The concern of the courts for highway safety must be reflected by emphasis on general deterrence where motorists display such a complete disregard for the lives and safety of others as did the appellant. His driving at high speed, without lights in a dense residential area, coupled with his disregard of two stop signs, imposed a risk to other motorists just as substantial as if he had been intoxicated.

We have reviewed all of the authorities referred to by counsel and few reveal misconduct in the operation of a motor vehicle as egregious as that displayed by the appellant. Indeed, had death occurred as it so easily could have, a sentence at the higher end of the range such as was imposed in **MacEachern, supra**, would not be inappropriate.

Turning to the offender, while it is true that he is young and has expressed remorse and commenced positive steps towards managing the dangerous personality traits which led to this mishap, he has a past record which is not unsubstantial for a person of his age. Five motor vehicle accidents and three infractions involving the use of a motor vehicle are not without significance. The three **Criminal Code** convictions indicate a lack of respect for the law, which was demonstrated as well in his actions at issue here.

While this court might have imposed a different sentence, it cannot be said in the face of these circumstances the sentence imposed by the trial judge was unfit by reason of it being excessive.

The appeal is dismissed.

Chipman, J.A.

Concurred in:

Clarke, C.J.N.S.

Hallett, J.A.