C.A.C. No. 02843

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Selig, 1994 NSCA 197

Hallett, Chipman and Roscoe, JJ.A.

BETWEEN:		
THOMAS ALVIN SELIG		Timothy A. Reid for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Robert C. Hagell for the Respondent
	Respondent	
		Appeal Heard: September 20, 1994
		Judgment Delivered: September 30, 1994

THE COURT: The appeal is dismissed and the application of the respondent for an increased sentence is likewise dismissed as per reasons for judgment of Roscoe, J.A.; Hallett and Chipman, JJ.A., concurring.

ROSCOE, J.A.:

The appellant pled guilty to criminal negligence in the operation of a motor vehicle causing the death of Karen Ruby Gordon contrary to s. 222 of the **Criminal**

Code and was sentenced to a six year term of incarceration. In addition, he was prohibited from driving a motor vehicle for a period of 20 years.

The grounds of appeal are as follows:

"1. The sentence imposed is excessively harsh, having regard to all of the facts of this case and circumstances of the Appellant.

2. The Learned Sentencing Judge erroneously applied wrong principles of sentencing in using a retributive approach and denunciative approach in response to public clamour by the surviving victims.

3. The Learned Sentencing Judge erred in finding the facts of this case disclosed a more serious case of criminal negligence than that found in **R. v. MacEachern** (1990), 96 N.S.R. (2d) (N.S.C.A.), and he erred in utilizing **MacEachern** as authority for the setting of a sentencing starting point of 5 years for such cases.

4. The Learned Sentencing Judge erred in law in failing to correctly interpret and apply the provisions of Section 735 of the Criminal Code and in exceeding his jurisdiction by allowing the victim's mother to read to the Court an Impact Statement describing the harm done to, or loss suffered by, the victim arising from the commission of the offence and thus introducing emotion into the sentencing process.

5. The Learned Sentencing Judge imposed an excessively lengthy driving prohibition, out of proportion to previous license suspensions in cases of a similar nature."

Although the Crown has not cross appealed it submits that the sentence should be increased pursuant to the Court's jurisdiction conferred by s. 673 of the **Criminal Code**.

At approximately 7:15 p.m. on May 19, 1992, Ms. Gordon was driving her motor vehicle through the intersection of Main Avenue and Dunbrack Street in the city of Halifax. She proceeded slowly through a green light heading east bound on Main Street. At the same time that Ms. Gordon was proceeding through the intersection, the appellant was driving south bound on Dunbrack Street at a speed estimated by witnesses to be fifty or sixty miles per hour and proceeded past stopped cars, through the red light and collided with the motor vehicle driven by Ms. Gordon. The impact of the appellant's motor vehicle running into Ms. Gordon's motor vehicle forced her vehicle

into a third motor vehicle which had stopped in a north bound lane on Dunbrack Street for the red light. As a result of the impact of the appellant's motor vehicle hitting Ms. Gordon's motor vehicle, she sustained injuries which caused her immediate death.

Blood samples taken from the appellant more than two hours after the accident were found to contain 130 milligrams of alcohol in 100 millilitres of blood and through his counsel, he made a formal admission of impairment at the time of the accident. In addition, the appellant was driving without a driver's license. The trial judge made the following comments:

> ". . . There is an acknowledgment that Mr. Selig's ability to drive was impaired. ... There is evidence in this matter of speed, erratic driving, acceleration, sunny and near perfect driving conditions; that a number of vehicles were stopped at the red light; that Mr. Selig either didn't notice or ignored the red light; that there was a straight stretch of highway leading up to the light and clear view. Even without the admission of impairedness at the time of the accident, I believe that all of the above are consistent with impaired driving. In addition, Mr. Selig was prohibited from driving and had been for some time. Karen Gordon did not contribute in any way to the accident that happened here, if indeed it can be styled an accident. ... I have reviewed the law in the matter and, in particular, the case of **R. v. MacEachern**, a decision of our Court of Appeal. **MacEachern** reviewed the law in Nova Scotia on criminal negligence causing death and in a thorough going review of all of the prior law, decided that the maximums were too lenient for criminal negligence causing death and, in fact, noted by the court at page 82
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>> I can, however, much more easily visualize situations where a sentence of five years and upwards would be justified for such an offence.
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> I am satisfied, under all the facts of this case, without getting into a fine analysis of the meaning of the word flagrant and blatant, that the offending driving in this matter is worse than that in **R. v. MacEachern** ... But the plain fact is that, as I have noted earlier, there are all these factors present that indicate extreme culpability in this matter. The fact of Mr. Selig's loss of an eye is a fact that I suggest acts in aggravation of the circumstances, not in mitigation. Mr. Selig knew he had one eye gone. He chose to drive regardless. He chose to drive while he was prohibited. ... your Pre-Sentence Report says that you do not feel that you ever

had a drinking problem and in addition, gave a different story of the alleged gun accident than the Adult Probation authorities had information on."

The task of this Court on an appeal from sentence is as stated in **R. v. Cormier** (1974), 9 N.S.R. (2d) 687 where Macdonald, J.A. stated at pages 694-695:

"Thus it will be seen that this Court is required to consider the " fitness" of the sentence imposed, but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles a sentence should be varied only if the Court is satisfied that it is clearly excessive or inadequate in relation to the offence proven or to the record of the accused. "

In **R. v. MacEachern** (1990), 96 N.S.R. (2d) 68 this Court considered the principles of sentencing specifically in relation to drinking and driving offences and after an extensive review of cases from this and other jurisdictions Macdonald, J.A. concluded: (at p.82)

" The present case is a blatant example of criminal negligence, involving as it does excessive speed, erratic driving of a mechanically defective vehicle, alcoholic impairment and tragic loss of life. The respondent has a prior criminal record including a conviction for impaired driving. He obviously has an alcohol problem. Giving full weight to the principle of deterrence, both specific and general, and to the need to repudiate and denounce in the most emphatic terms the conduct of the respondent and taking into consideration what mitigating circumstances exist, I would vary the sentence imposed by Judge MacDonnell to five years' imprisonment. In addition, I would increase the period of prohibition from driving a motor vehicle from five to ten years.

I would allow the appeal, and vary the sentence imposed by Judge MacDonnell from two and one-half years' imprisonment to five years' imprisonment and would also vary the prohibition order made under s. 259(2)(a) of the **Code** from five to ten years.

I would again emphasize that the sentence imposed by Judge MacDonnell was well within the range heretofore deemed acceptable for this particular offence. He is not to be faulted in any way. I have recommended a substantial increase in the sentence because I am now convinced that

> the sentences for drinking and driving offences, particularly those resulting in loss of life, must, as a matter of policy, be substantially increased for the greater protection of the public through the element of general deterrence."

The appellant is 34 years old and although he denied it, obviously has a major problem with alcohol which is evident from his driving record and criminal record which has been set out in the respondent's factum as follows:

Motor Vehicle Driving Record

July 25, 1980	Speeding 96(1) MVA
Oct. 27, 1980	Red light violation 87(2) MVA
Nov. 6, 1980	Drive left single line 105(2) MVA
Nov. 6, 1980	Insufficient equipment 234(2) MVA
Dec. 5, 1980	Speeding 96(2) MVA
Nov. 29, 1982	Driving while license susp. 258(2) MVA
June 20, 1983	Driving while license susp. 258(2) MVA
Feb. 5, 1990	Speeding 94(1)
March 14, 1990	Careless and imprudent driving 90(2)
Jan. 22, 1991	Fail to comply with red light 93(2)

Criminal Code Record

May 11, 1976	Poss of Narcotic 3(1) NCA	$300
March 28, 1978	BE & Theft 306(1)(b)	15 days, prob 1 yr
Aug. 9, 1978	Mischief 387(4)	3 mos prob, 100 hrs CSW, restitution
March 21, 1979	Mischief 387(3)	$300
April 18, 1979	Breach Probation 666(1)	$100
July, 1980	Resist Arrest 118	$50
Nov. 5, 1980	Cause disturbance 171(1)(c)	$50
Nov. 25, 1980	Refusal 235(2)	$
May 25, 1981	Refusal 235(2)	
July 2, 1981	Poss Narcotic 3(2)(a) NCA	$100
Oct 21, 1981	Poss Narcotic 3(1) NCA	$500
Jan. 19, 1982	Trafficking Restricted Drug 42(1) FDA	2 mos
Feb. 4, 1982	Poss for Purpose 4(2) NCA	4 mos consec
June 3, 1983	Refusal 235(2)	$500
Oct. 6, 1986	Breathalyzer over 80 (Nfld) 236(1)	
Jan. 3, 1991	Breathalyzer over 80 253(b)	$750
May 21, 1991	Poss for Purpose NCA 4(2)	12 mos
April 7, 1992	Driving while prohibited	1 mo
Aug. 31, 1992	Assault with weapon x2 267(1)(c)	9 mos consec

At the sentencing hearing Ms. Gordon's mother read a victim impact

statement in which she described her daughter's life and the tragic loss suffered by her surviving family members as a result of her untimely death. The appellant argues that it was an error for the trial judge to allow the statement to be read into the record, rather than simply having it filed. Section 735 of the **Criminal Code** provides in part:

> "(1.1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 736 in respect of any offence, the court may consider a statement, prepared in accordance with subsection (1.2), of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.
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> (1.2) A statement referred to in subsection (1.1) shall be
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> (a) prepared in writing in the form and in accordance with the procedures established by a program designated for the purpose by the Lieutenant Governor in Council of the province in which the court is exercising its jurisdiction; and
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> (b) filed with the court.
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> (1.3) A statement of a victim of an offence prepared and filed in accordance with subsection (1.2) does not prevent the court from considering any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged pursuant to section 736."

Section 735 (1.2) provides that in order for a victim impact statement to be considered, it must, as a minimum be reduced to writing and filed with the court. Nothing therein precludes the oral presentation of the statement in open court and subsection (1.3) specifically allows the consideration by the judge of other evidence in addition to the statement. Certainly it is within the discretion of the trial judge to allow the written statement to be read into the record, and there was in this case no error by the trial judge in the exercise of that discretion.

All the other grounds of appeal can be dealt with collectively as they each

concern the length of the sentence which the appellant claims is excessive and the respondent argues is too lenient under the circumstances.

Counsel for the appellant submits that **MacEachern** should be reconsidered in light of a series of recent cases from the British Columbia Court of Appeal, most notably **R. v. Woodley** (1993), 44 M.V.R. (2d) 51. The sentence in **Woodley** was reduced by the Court of Appeal to two years less a day on a charge of criminal negligence causing death where the accused was 26 years old, had no prior convictions, was at the time of the accident only slightly impaired by alcohol, was extremely remorseful and of whom the trial judge said was not likely to again commit a driving offence. After his review of that court's recent pronouncements on appropriate sentences for criminal negligence cases, Seaton, J.A. summarized the principles involved at page 57:

> "The appellant argued that only cases that include very serious moral blameworthiness warrant penitentiary sentences. I do not think the cases support that position.
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> Long penitentiary sentences are reserved for cases in which isolation is the goal. **R. v. Lunn**, **supra,** is an example of such a case.
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> Sentences of four years and more are given where there are aggravating circumstances such as prior convictions or particularly blameworthy conduct.
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> Shorter penitentiary sentences are given in cases that do not exhibit either the need for isolation or great moral blameworthiness.
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> Sentences of less than two years have been imposed on young people, in cases where the moral blameworthiness is of short duration or otherwise minimal, where there are mitigating circumstances, or where neither the offence nor the offender can be thought to warrant other than a minimal sentence.

Offences that do not cause death usually result in a shorter sentence."

In my view, the reasons in **Woodley** and the cases referred to therein do not conflict with this Court's decision in **MacEachern**.

The trial judge was correct in relying upon **MacEachern** as authority and guidance in determining the proper sentence in this case. This Court clearly articulated that previous sentences for this type of offence were often too low. Although the Court cautioned that it was not setting a benchmark, the reason given for its reluctance was that the offence is one with so many possible variations in the manner in which it can be committed and continued:

> ". . . In this regard, the offence is analogous to manslaughter which can be close to accident or close to murder, depending on the circumstances.
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> One can perhaps visualize a situation where the facts are so extraordinarily favourable to the accused that a minimum sentence in a provincial institution would be an adequate sanction for criminal negligence causing death in the operation of a motor vehicle. I can, however, much more easily visualize situations where a sentence of five years and upwards would be justified for such offence."

This is not a case where the facts are "favourable to the accused". It is one, similar to **MacEachern**, which is a blatant example of criminal negligence. The factors that contribute to this designation in this matter are that the appellant's ability to drive was impaired by alcohol, he was speeding in a busy, high density residential-commercial area, he was driving without a licence, he proceeded through a red light

which was clearly visible for some time before he came upon the intersection, he has a lengthy criminal record including five prior drinking and driving offences and a poor driving record including several other speeding and red light violations, and he suffers from alcohol abuse but persists in denying the problem. The sentencing judge correctly viewed the appellant's defective vision as an additional aggravating factor. There are no mitigating factors. It is a case where it is necessary to "repudiate and denounce in the most emphatic terms" the conduct of the appellant, to use the words of **MacEachern**. The six year sentence and the twenty year driving prohibition is required as a specific deterrent to Mr. Selig, and as a general deterrent to others. The streets and highways must be made safer and the public must be offered some protection from this type of offence. The relative leniency from which the appellant has benefited in the past has been to no avail. He has not taken steps to obtain treatment to overcome his addiction and has repeatedly put the lives of others at risk by driving while impaired.

The respondent submits that the aggravating factors in this case are such that an eight year sentence would be appropriate. While the circumstances here are worse than those in **MacEachern**, mainly as a result of the appellant's prior record, the trial judge took those circumstances into account, and consequently increased the sentence by one year. As indicated by this Court on numerous occasions, 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 that the sentence is clearly excessive or manifestly inadequate. See: **R. v. Cormier** (1974), 9 N.S.R. (2d) 687; **R. v. Wilson** (1974), 10 N.S.R. (2d) 629; **R. v. Pepin** (1990), 98 N.S.R. (2d) 238 .

The trial judge relied on the proper principles, considered the circumstances of the offence and the offender and made no reviewable errors. The sentence is neither clearly excessive nor manifestly inadequate. Accordingly, the appeal is dismissed and the application of the respondent for an increased sentence is likewise dismissed.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.