PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. MacDonald*, 2015 NSPC 56

Date: 2015-08-20
Docket: 2685337, 2685338, 2817347
Registry: Pictou

Between:

Her Majesty the Queen

v.

Allister Curtis MacDonald

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	20 August 2015 in Pictou, Nova Scotia
Charge:	Para. 253(1)(b, sub-s. 259(4) and sub-s. 254(5) of the Criminal Code of Canada
Counsel:	William Gorman for the Nova Scotia Public Prosecution Service Hector MacIsaac for Allister Curtis MacDonald

By the Court:

The charges

[1] Allister Curtis MacDonald is to be sentenced today for three indictable offences under the *Criminal Code of Canada*:

- Case number 2685337, operating a motor vehicle with a blood-alcohol concentration greater than 80 milligrams of alcohol in 100 millilitres of blood which occurred on 12 December 2013, contrary to para. 253(1)(b) of the *Code*;
- Case number 2685337, operating a motor vehicle while prohibited which occurred on the same date, contrary to sub-s. 259(4) of the *Code*; and
- Case number 2817347, refusal of a roadside-screening demand which occurred on 14 December 2014, contrary to sub-s. 254(5) of the *Code*.

The facts

[2] The facts which were put before the court by the prosecutor in accordance with ss. 723 and 724 of the *Code* were that on 12 December 2013, police received

a report of an impaired driver who had just departed from a service station in Westville, Nova Scotia. The driver was described by witnesses as "smelling like a brewery" and being very unsteady on his feet. Police attempted to locate a 4x4 truck which had been described in the report, and found it off the road a short time later; an officer found an opened bottle of vodka in the cab of the truck. The driver was nowhere to be found. Police determined quickly that Mr. MacDonald was the one who had been at the wheel; they tracked him down promptly at a private residence where they arrested him for impaired driving. Mr. MacDonald eventually provided samples of his breath suitable for chemical analysis. As the first sample had been collected at a time greater than two hours after the last time of driving, police sought a retrograde extrapolation from a qualified toxicologist. The extrapolation determined that Mr. MacDonald's blood alcohol concentration at the last time of driving had been between 248 and 286 milligrams of alcohol in one hundred millilitres of blood. Counsel have agreed that the court should accept Mr. MacDonald's BAC as having been 248 mgETOH/100mlBAC at the last time of driving.

[3] Just a bit over a year later, Mr. MacDonald rolled up to a police checkpoint driving an uninsured truck with an expired plate. He smelled of liquor, and told the officer who was in charge of the checkpoint that he had drunk a lot the night

before and had had nothing to eat since. The officer made a roadside-screening demand, and Mr. MacDonald refused to provide a sample of his breath.

Forensic chronology

[4] The prosecution elected to proceed indictably on all charges. Mr. MacDonald was arraigned on the first two on 3 February 2013; he eventually elected trial in this court. Mr. MacDonald pleaded not guilty to those charges initially, but later changed his pleas to guilty. The court embarked on a sentencing hearing on 8 December 2014. After receiving some evidence in support of an application by Mr. MacDonald for a curative discharge under the provisions of s. 255(4) of the *Code* in relation to the para. 253(1)(b) count, I adjourned the sentencing hearing of my own motion to give defence counsel an opportunity to marshal additional evidence in support of the application. Unfortunately, six days later, Mr. MacDonald got picked up on the sub-s. 254(5) charge; he elected trial in this court and pleaded guilty. After a number of other adjournments, the sentencing hearing for all of the charges proceeded on 4 June 2015, and I adjourned my sentencing decision until today.

Sentencing evidence

[5] Defence counsel tendered five exhibits at the sentencing hearing:

- No. 1: a copy of a letter from the Opioid Treatment Program dated 5 December 2014 confirming that Mr. MacDonald was on the program's wait list;

- No. 2: a copy of a letter from Ade Ogunsuna, M.D., a psychiatrist who appears to have treated Mr. MacDonald from December 2013 until August 2014;

- No. 3: copies of financial records from Mr. MacDonald's forestry business showing it to be a going concern;

- No. 4: a copy of an appointment card with the Pictou West Health Clinic; a copy of a letter from the Opioid Treatment Program dated 20 April 2015 confirming Mr. MacDonald's wait-list status; a copy of a letter from Addiction Services dated 5 March 2015 stating that Mr. MacDonald would require ongoing counselling and treatment, and another one from 13 April 2015 stating that Mr. MacDonald had completed the Services' withdrawal protocol; and

- No. 5: a copy of a letter from the Opioid Treatment Program dated 4 June 2015 confirming Mr. MacDonald's admission into that program and the terms of his participation.

[6] The prosecution tendered one exhibit, No. 6, a bail report generated 20 April 2015 setting out Mr. MacDonald's criminal record.

[7] The court received a presentence report dated 2 December 2014, and a supplement dated 6 January 2015.

Applicable provisions of the Code

[8] Section 255 of the *Criminal Code* states:

> 255. (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,
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> (a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,
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> (i) for a first offence, to a fine of not less than $1,000,
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> (ii) for a second offence, to imprisonment for not less than 30 days, and
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> (iii) for each subsequent offence, to imprisonment for not less than 120 days;
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> (b) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years; and
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> (c) if the offence is punishable on summary conviction, to imprisonment for a term of not more than 18 months.

[9] Sub-s. 255(4) defines what constitutes a prior offence for the purposes of reckoning whether an offender is liable to an increased penalty:

> (4) A person who is convicted of an offence committed under section 253 or subsection 254(5) is, for the purposes of this Act, deemed to be convicted for a

> second or subsequent offence, as the case may be, if they have previously been convicted of
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> (a) an offence committed under either of those provisions;
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> (b) an offence under subsection (2) or (3); or
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> (c) an offence under section 250, 251, 252, 253, 259 or 260 or subsection 258(4) of this Act as this Act read immediately before the coming into force of this subsection.

[10] Para. 255(4)(c) is sometimes the source of confusion, as it refers to s. 259 as a predicate offence in determining the applicability of mandatory increased penalties. This is misinterpreted occasionally as meaning s. 259 of the current, as-amended version of the *Code*, which would be the offence of driving while prohibited. However, one must read the entire statute to determine its meaning, particularly the clause "as this Act read immediately before the coming into force of this subsection." Accordingly, reference to s. 259 in para. 255(4)(c) means s. 259 in R.S.C. 1985, c. C-46 prior to the enactment of S.C. 1985, c. 19, which was the offence of refusal arising from operation of a water-going vessel. Regrettably, it crops up every now and again that submissions on sentence in drunk-driving cases will concede the application of the subsequent-offence minimum term of imprisonment in para. 255(1)(a)(iii) based on the erroneous belief that a sub-s. 259(4) refusal is a predicate offence. Ideally, a statute should be able to be interpreted without reference to extrinsic aids—including legislative history and section numbering in earlier versions of statutes—although that stance has been

relaxed with time.[1] It would seem that much potentially damaging confusion might be eliminated by rewording sub-s. 255(4) to use, yes, words to describe predicate offences, rather than section numbers of old versions of the *Code*. Right now, sub-s. 255(4) is a mess which could be tidied up quite easily.

Prior record

[11] Mr. MacDonald's record discloses a history of twenty-four findings of guilt under various federal statutes. A number of them would be caught by sub-s. 255(4) as prior offences giving rise to increased penalties. The two most recent are:

- Case number 1547542, a conviction for refusing to provide a breath sample contrary to sub-s. 254(5) of the *Code*, recorded 22 February 2006;
- Case number 1348742, a conviction for operating a motor vehicle with a blood-alcohol concentration greater than 80 milligrams of alcohol in 100 millilitres of blood contrary to what was then para. 253(b) of the *Code*, recorded on 31 August 2003.

[1] *See* Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis Canada Inc., 2014) at 657.

[12] These earlier findings of guilt would render the para. 253(1)(b) and sub-s. 254(5) offences which are before the court today as "subsequent offences", subjecting Mr. MacDonald to minimum terms of imprisonment for 120 days for each. This is because the prosecution served Mr. MacDonald with notices of greater penalty pursuant to s. 727 of the *Code* in relation to each of those charges; proper service was admitted by defence counsel.

[13] There is no minimum penalty for the charge of driving while prohibited.

[14] In advancing an application for a curative discharge, defence counsel acknowledged that it is only the para. 253(1)(b) count that is eligible for it. This is because sub-s. 255(5) states:

> (5) Notwithstanding subsection 730(1), a court may, instead of convicting a person of an offence committed under section 253, after hearing medical or other evidence, if it considers that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest, by order direct that the person be discharged under section 730 on the conditions prescribed in a probation order, including a condition respecting the person's attendance for curative treatment in relation to that consumption of alcohol or drugs.

[15] Accordingly, a curative discharge cannot be granted for refusal or drive-while-prohibited offences.

Submissions of counsel on sentencing

[16] Defence counsel applied for a curative discharge in relation to the para. 253(1)(b) count, and sought short, sharp sentences in relation to the charges under sub-ss. 259(4) and 254(5).

[17] The prosecution opposed the application for a discharge, and sought a global sentence in the range of 3.5 to 5 years.

Disposition of application for curative discharge

[18] I shall deal first withe the curative-discharge application. In my view, the grounds for a discharge have not been made out.

[19] It is Mr. MacDonald's burden to show that he is need of "curative treatment" and that a discharge would not be contrary to the public interest.[2]

[20] While there is evidence before the court that Mr. MacDonald is in need of some form of treatment, Mr. MacDonald's need must not oust the court's concern for public safety, which is integral to the public interest.[3] Public interest, in my view, is linked inextricably to risk. The risk which the court apprehends most

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[2] *R. v. Aucoin*, [1987] N.S.J. No. 177 (A.D.).
[3] *See, e.g., R. v. Riley*, [1996] N.S.J. No. 80 (C.A.) at para.24, citing *R. v. Wallner*, [1988] A.J. No. 847.

readily is the risk that, if allowed to serve a community-based sentence, Mr. MacDonald might decide to drink and drive and endanger public safety in a way described appositely by the Ontario Court of Appeal in *R. v. McVeigh* when it characterized every drinking driver as a potential killer.[4] Previous sentences—which have ranged from counselling-intense suspended sentences to terms of imprisonment followed by counselling—have not put a firm and final stop to Mr. MacDonald's drinking and driving. What evidence is there before the court now that a discharge this time would make any difference?

[21] Most of the evidence presented to the court on this point was not of high quality. The report from Dr. Ogunsuna, for instance—which offers an optimistic assessment of Mr. MacDonald's compliance with treatment, his progress and prognosis—was not subject to the usual circumstantial guarantees of reliability: that is, it was not presented to the court under oath and was not subject to cross examination. Further, Dr. Ogunsuna's favourable assessment of Mr. MacDonald's prospects predated the December 2014 incident which gave rise to Mr. MacDonald being found guilty of refusal; I cannot imagine that the doctor's outlook would not have been altered by that improvident turn of events.

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[4] [1985] O.J. No. 207.

[22] The 13 April 2015 letter from Addiction Services informs me that Mr. MacDonald completed their withdrawal protocol. How do they assess what constitutes completion? How do they measure success? What is Mr. MacDonald's risk of relapse? These questions loom large when the court considers the point made by the prosecution that Mr. MacDonald has been subject to eight court orders since 2002 which have sought to treat his alcohol-use disorder, but which have failed to stop him from committing crimes with alcohol in his body.

[23] While Mr. MacDonald's enrolment in the Opiate Treatment Program is a good development, how will it address Mr. MacDonald's mental-health and alcohol use comorbidity?

[24] All that is left after that is Mr. MacDonald's self-appraisal of his needs and of his glowing outlook—not a basis upon which the court might make an informed assessment of risk.

[25] I recognize that imprisoning Mr. MacDonald might not be a fail-safe means of risk management: it will put a halt to the treatment that he has commenced in the community; and I cannot impose in a warrant of committal an order that Mr. MacDonald accept treatment while in custody. Imprisonment as a risk-management instrument sometimes merely defers risk until the offender's release

date. However, based on the evidence before me, it is this outcome--coupled with stringent terms of probation--which I believe will address the principles of sentencing in the most effective fashion.

An appropriate term of imprisonment

[26] In seeking a global term of imprisonment of 3.5 to 5 years, the prosecution did not present to the court any authorities which might support such a range, either from reviewing courts of this province which would offer binding guidance to me, or from other courts which have dealt with similar offenders in similar circumstances, in support of judicial parity. With respect to defence submissions that the court impose short, sharp sentences, the court is bound by mandatory minimums with respect to the refusal and drive-over-80 charges, which would not appear to admit of short, sharp outcomes.

[27] Most helpful--and authoritative--is the opinion of Saunders J.A. in *R. v. Bernard*, 2011 NSCA 53; leave refused, [2011] S.C.C.A. No. 381.

[28] *Bernard* sets out very comprehensively the need to consider the gap and jump principles in taking care not to impose a sentence that is unduly long or harsh.

[29] The gap principle recognizes the appropriateness of giving credit to an offender who has made an effort to stay out of trouble.[5] It is particularly applicable here, as Mr. MacDonald remained offence free from 20 February 2007 (when he was sentenced to a six-month conditional-sentence term for a refusal charge) until 12 December 2013.

[30] I also take into account the jump principle, which holds that sentences should increase gradually from prior sentences, even when the court is dealing with an offender with a significant criminal history. This is especially important in dealing with sentences imposed under s. 255 of the *Code*: this is because there is already a great, big jump hardwired into the statute, as the minimum sentence for a subsequent offence is four times the minimum sentence for a second offence.

[31] I must also take into account the principle of totality as required by para. 718.2(c) of the Code, so that the combined sentence imposed upon Mr. MacDonald today not be unduly long or harsh.

[32] *Bernard* is also a good guide for determining a proper range of sentence for Mr. MacDonald. The sentence imposed in the Court of Appeal upon Mr. Bernard was 5-months' imprisonment for an initial court of over .08, 7 months to be served

[5] See Clayton C. Ruby, Gerald J. Chan & Nader R. Hasan, *Sentencing*, 8th ed. (Markham: LexisNexis Canada Inc., 2012) at 402.

consecutively for a second count of over .08, 9 months to be served consecutively for a count of refusal, 1 month to be served consecutively for a breach of recognizance, and 2 months to be served consecutively for a later breach.

[33] While it is true that, unlike Mr. MacDonald, Mr. Bernard had never before served a sentence of imprisonment, it is also the case that Mr. Bernard's offences carried a far, far greater risk of lethality, given the egregious nature of Mr. Bernard's driving while he was impaired. Further, Mr. Bernard was sentenced for three separate and distinct instances of alcohol-involved driving as well as well as two bail breaches. In this case, Mr. MacDonald's three offences were committed on two different dates only, and do not demonstrate as high a degree of blameworthiness or lack of respect for the law. However, I must consider that Mr. MacDonald's extrapolated BAC for the first offence--248 mg%--was well above the 160 mg% threshold prescribed in s. 255.1 of the *Code* as making a drinking-and-driving offence more serious.

[34] Although I have considered the entirety of Mr. MacDonald's record, I believe that the earliest among his convictions (a para. 237(b) offence under S.C. 1985, c. 19, s. 36, which would be today a 253(1)(b) over-.08 offence; a sub-s. 242(4) offence, which would be today a sub-s. 254(5) refusal; and a sub-s. 233(1)

offence, which would be today a s. 249 dangerous-driving count) are so remote in time as to be of negligible weight.

[35] In taking into account the principle of totality, it is important that I not work backward from a preconceived global sentence; rather, I should determine what would be an appropriate sentence for each charge, had it stood alone. This is a notional value only, and is not to be endorsed on the information or included in the warrant of committal. I should then state the final sentence of the court, after determining appropriate reductions to each count to ensure that the total sentence of the court not be unduly long or harsh.

[36] Had each charge proceeded separately, I would have imposed a sentence of 150 days for the para. 253(1)(b) offence, 90 days for the sub-s. 259(4) offence, and 210 days for the 254(5) offence.

[37] As this would result in a sentence of less than two years, I shall consider the applicability of conditional sentencing. Mr. MacDonald is not eligible for conditional sentences for the para. 253(1)(b) and sub-s. 254(5) offences in virtue of para. 742.1(b) of the *Code* as they attract minimum terms of imprisonment. He is eligible for a conditional sentence in relation to the sub-s. 259(4) count. However, given my public-interest analysis in considering the fitness of a curative discharge

for the para. 253(1)(b) count, I am unable to conclude that a conditional sentence for driving while prohibited would not endanger the safety of the community.

[38] Taking into account the principle of totality, the sentence of the court shall be as follows:

[39] Case number 2685337, operating a motor vehicle with a blood-alcohol concentration greater than 80 milligrams of alcohol in 100 millilitres of blood which occurred on 12 December 2013, contrary to para. 253(1)(b) of the *Code*, a sentence of 120 days;

[40] Case number 2685337, operating a motor vehicle while prohibited which occurred on the same date, contrary to sub-s. 259(4) of the *Code*, a sentence of 60 days to be served consecutively;

[41] Case number 2817347, refusal of a roadside screening demand which occurred on 14 December 2014, contrary to sub-s. 254(5) of the *Code*, a sentence of 180 days to be served consecutively.

[42] This results in a total sentence of 360 days to be served in a provincial prison, which I believe is in line with the range described in *Bernard*.

[43] There will be $200 victim surcharge amounts imposed on each count, and Mr. MacDonald will have 36 months to pay the total sum.

[44] On the para. 253(1)(b) count, there will be a driving prohibition of three years plus 360 days; on the 259(4) count, there will be a three-year prohibition to run consecutively as allowed by sub-s. 259(2.1) of the *Code*; and on the 254(5) count, there will be a four-year prohibition, to run consecutively. Mr. MacDonald shall not be eligible to apply for the provincial interlock program for a period of five years.

[45] With respect to all counts, the court imposes a period of probation of 18 months to commence upon Mr. MacDonald's release from custody. The probation order will deal contain appropriate terms of counselling and abstention, and will restrict Mr. MacDonald's ability to own and control motor vehicles.

[46] The court would have considered the imposition of forfeiture orders covering the vehicles driven by Mr. MacDonald, as comprehended in sub-ss. 490.1(1) and 490.2(2) of the *Code*, and as interpreted judicially in *R. v. Manning*, 2013 SCC 1. However, as forfeiture was not sought, I have no jurisdiction to grant it *sua sponte*.

[47] I feel compelled to observe that there is much about the current state of s. 255 of the *Criminal Code* that calls for a comprehensive review. The terminology used in sub-s. 255(5) in particular evinces an anachronic approach to alcohol-use disorder. Modern epidemiology recognizes alcohol-use disorder as an array of conditions, not the monolithic bête noire of "alcoholism".[6] It is not something necessarily amenable to a supposed "cure" achieved of necessity through professionally dispensed treatment. Highly effective outcomes as observed in the South Dakota 24/7 Sobriety Project have demonstrated that alcohol and drug users who have criminally combined their usage of substances with driving can alter their behaviour dramatically through continuous monitoring, coupled with swift, certain, but modest sanctions.[7] The bottom line is that there are many vectors to achieving pro-social outcomes which will protect the public from the grave risks inherent in substance-impaired driving; the current focus on two only—namely, mandatory-minimum sentences with steep penal gradients, and putatively "curative" treatment—might not be entirely in the public interest.

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[6] Bridget F. Grant et al., "Epidemiology of DSM-5 Alcohol Use Disorder: Results From the National Epidemiologic Survey on Alcohol and Related Conditions III" JAMA Psychiatry. 2015 Aug 1;72(8):757-66. doi: 10.1001/jamapsychiatry.2015.0584.

[7] Beau Kilmer et al., "Efficacy of Frequent Monitoring with Swift, Certain and Modest Sanctions for Violations: Insights from South Dakota's 24/7 Sobriety Project" Am J Public Health. 2013 Jan;103(1):e37-43. doi: 10.2105/AJPH.2012.300989.

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