PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Hamm*, 2019 NSPC 23

Date: 20190813
Docket: 8164250, 8164251
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Jesse Leo Hamm

Judge:	The Honourable Judge Paul Scovil, JPC
Heard:	October 1, 2018, in Bridgewater, Nova Scotia
Sentence Date:	August 13, 2019
Charge:	Section 249(3) and Section 249(3) of **The Criminal Code of Canada**
Counsel:	Sharon Goodwin, Crown Attorney Robert Chipman, Defence Attorney

By the Court:

[1] Jesse Hamm was the driver of a red sedan on the evening of September 29, 2017. He had been drinking with friends and was later tested for a blood alcohol content which showed 80 milligrams of alcohol in 100 milliliters of blood on the first test and 70 milligrams of alcohol in 100 milliliters of blood on the second test. He provided a statement to the police after a motor vehicle accident where he indicated, that in addition to drinking, he had consumed some cannabis.

[2] While on Central Street in Chester Nova Scotia he, "peeled his wheels" and a friend asked him to give the car a "chirp," resulting in him applying acceleration to the vehicle causing him to lose control of the vehicle. The Hamm vehicle collided with a second vehicle before coming to a stop. Accident reconstruction indicates that Mr. Hamm was travelling at 111 kilometers per hour prior to the accident. Mr. Hamm indicates he is unsure of how fast he was going but thought that it would be under 100 kilometers per hour. The speed limit in the area was 50 kilometers per hour. Of his two friends in the vehicle one dislocated his shoulder while the other suffered significant brain injury. That individual had to undergo inpatient rehabilitation which included speech therapy and physiotherapy. He continues to suffer lingering effects from the injury including issues with short-term memory.

[3] As a result of the above facts, the accused was charged with two counts of operating a motor vehicle in a manner that was dangerous to the public thereby causing bodily harm. This is his sentencing.

[4] Mr. Hamm pled guilty to the two offences on October 1, 2018. At that time a pre-sentence report was ordered. An opportunity was provided for both Crown and Defence to brief the matters before the court. On November 27, 2018, the accused applied for, and was granted, the opportunity for a restorative justice process on a postconviction basis. That application and resulted in a report from the South Shore Community Justice Society, dated May 15, 2019.

Pre-Sentence Report:

[5] The pre-sentence report shows a young individual with a date of birth, March 26, 1999 and is currently 20 years of age. He has no prior record. The accused reported a rather unremarkable upbringing. His parents had separated, and he lived, for most of his life, with his mother. It is clear from all those who were spoken to by the writer of the pre-sentence report that the accused has expressed a great deal of remorse regarding the offenses before the court.

[6] The accused has a grade 10 level of education. He has been employed continually in the fisheries sector as a worker with Deep Cove Aquatic Farms Limited.

This employment is mainly in the lobster industry. When not employed he receives payments from employment insurance. When asked by the writer of the pre-sentence report he admitted to the consumption of alcohol prior to the incident before the court. He denied an addiction to substances. He did advise that he had not consumed alcohol since being charged with the offences. He has not used any other drugs since that time. As indicated earlier, he expressed remorse to the writer of the pre-sentence report. He has enrolled in a defensive driving course and has indicated that he is prepared to comply with any sentences imposed by the courts.

[7] The writer of the pre-sentence report indicated the accused expressed concern about pending sentencing and noted that he had learned a lesson from the matter regarding issues such choices especially with respect to driving. The writer also indicated that the accused appeared to be a suitable candidate for community supervision.

Restorative Justice Report:

[8] On May 2, 2019, the South Shore Community Justice Society and Community Corrections, held a restorative justice session at the Chester RCMP detachment relating to these matters. The community justice society staff met with the accused at least three times leading up to the restorative justice session to discuss the incident and

its impact. The accused was eager to participate in the restorative justice process and was forthcoming and open throughout. He accepted responsibility for his actions and was prepared to meet and hear from those impacted by his actions.

[9] The report outlines that the sessions explored the harms and impacts that occur to those involved, including the accused, the victims and the community. The accused described the severe anxiety he has dealt with since this happened.

[10] The two victims continue to be supportive in relation to the accused. All participants in the community restorative justice process indicates that the accused has indeed learned a valuable lesson from what took place. At page 5 of that report it indicated that the accused continues to maintain employment at Deep Cove Aqua Farms Limited, completed a defensive driving course, attends his doctor regularly regarding mental health and received ongoing treatment. As well, he plans to connect with the mental health authorities for further support and he also has apologized to those impacted for his actions.

Crown Position:

[11] The Crown indicated that the accused was within a month of the dangerous driving offense charged with and later pled guilty to an offense of speeding under

section 106A(b) of the **Motor Vehicle Act** for exceeding the posted speed limit between 15 and 30 kilometers per hour.

[12] The Crown also stressed the seriousness of the offense and the emphasis of general deterrence. As a sentence range, the Crown put forward that an appropriate sentence would be a period of incarceration between six and eight months. Following the custodial period, the Crown urged a two-year probationary order together with a five-year driving prohibition pursuant to s. 259 of the **Criminal Code**. The Crown is seeking a DNA order as it is a secondary designated offense under the provision of the **Criminal Code**.

[13] The Defence stressed the positive aspects surrounding the accused and suggest that an appropriate penalty would be a 60 to 90-day intermittent sentence.

Range of Sentence Available:

[14] Section 249(3) of the **Criminal Code** is an indictable offence for which the maximum sentences 10 years. At sentencing also available for this matter is a discharge under s.730 of the **Criminal Code**, a suspended sentence under s.731 of the **Criminal Code**, a fine, or custody. The custodial periods could be served on an intermittent basis if 90 days or under. A conditional sentence is not available in this matter.

Statutory Considerations:

[15] In sentencing the accused the Court must be mindful of the purpose and principles of sentencing is set out in s.718 of the **Criminal Code**. Section 718 states as follows:

> 718 The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
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> (a) to denounce unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
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> (e) to provide reparations for harm done to victims or to the community; and
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> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[16] Section 718.1 goes on to state:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[17] Other sentencing principles are set out in s. 718.2. Section 718.2 recognizes that a court when imposing sentences shall take into consideration the following principles:

> (a) A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing.
>
> …

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation.

…

[18] Section 718.2 (d) of the **Criminal Code** provides, as well, that a sentence should be similar to sentences imposed on similar offenders for similar offenses committed in similar circumstances;

…

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[19] In its brief the Crown relied on the following cases:

R v. Rawn, 2012 ONCA 487, there Ms. Rawn was involved in a serious motor vehicle collision that injured seven people. She was originally sentenced to a two-year probationary order, two-year driving prohibition and a one-year license suspension, which was mandatory. The Crown appealed the decision and on appeal she was sentenced to a nine-month custodial sentence. Ms. Rawn had been drinking alcohol on the night of the offense. She was on a residential street with a speed limit of 50 km per hour. She was racing with another car that reached a speed of 137 km per hour.

R v Polley, 2014 NSCA 71, in Polley the accused was highly intoxicated and exhibited a lengthy period of extremely reckless driving on a very busy provincial Highway before losing control and leaving the road. Both he and his passenger were injured. The facts in Polley are quite different from the one before the court. The accused had a prior record involving a number of impaired driving offenses. In Polley the court sentenced the accused to a five-year period of imprisonment.

R v Sullivan, 2015 NSPC 40, the accused was found to have been travelling 107 km/hour in a 60 kilometers per hour zone when a motor vehicle accident occurred. Three people suffered serious injuries as well as the accused. The accused had a positive PSR with a great deal remorse. There Judge Derrick, as she then was, reviewed a number of prior cases of dangerous driving causing bodily harm. Judge Derrick also distinguished the case before her from those cases that involve drivers engaged in thrilled seeking activities. The accused was sentenced to a 90-day intermittent sentence together with two years probation and a five-year driving prohibition.

R. v Mahmud Osman Ali, 2015 MBCA 64, the accused was involved in an accident while talking on his cell phone. He entered a very busy intersection in downtown Winnipeg going through a red light. Two pedestrians receive significant injuries after the accused's vehicle was struck by an oncoming vehicle. The accused had no previous criminal record a large family and many other compelling personal antecedents. He appealed his nine-month period of imprisonment. The Court of Appeal found that the nine-month prison sentence was towards a high end of the range but accepted that it was in fact part of the range and upheld the same in their decision.

Dominik Tempelton Machek v R., 1994 Carswell NS 18 (N.S.C.A.) the accused had driven down a street in Halifax at a high rate of speed with no headlights on. The vehicle went through two stop signs without stopping before hitting a vehicle. The accused had not consumed alcohol or drugs. The occupants of the vehicle that was struck suffered serious injuries. The Court imposed a sentence of nine months imprisonment followed by two years of probation. The accused was a 19-year-old with a grade 12 education. He had had 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. He had a criminal record as well for possession of narcotics, and a theft under. The accused was seeing a psychologist to provide a report. That report indicated that he was an overactive person, was prone to emotional liability, impulsivity and counterproductive activity with a low frustration tolerance. It is interesting to note that in this case the Crown had requested a period of incarceration but had no objection to a sentence in the intermittent range. Counsel for the appellant concurred in this position. The trial judge significantly increased that recommendation. One should note that this case was done without the advantage of the Supreme Court of Canada's comments on how trial judges are to react to joint recommendations. If that case had been decided today, I have no doubt that the joint recommendation would have been followed.

R. v Hunter Currie, 2018 ONCA 218, the accused had pled guilty to two counts of dangerous driving causing bodily harm. He was sentenced to concurrent sentences of 18 months imprisonment plus 2-years' probation. The appellant fell asleep at the wheel of his car around 4 o'clock in the afternoon on November 22, 2014, on a busy highway in the Sudbury area. He was travelling 80 kilometers per hour in a 60-kilometer zone. He crossed the centre line and ran into the victims' car. The victims, a mother and a daughter, suffered grievous injuries. Additionally, the accused attempted to dispose of the bag of marijuana after the accident and had drug paraphernalia in his vehicle. Evidence from toxicologist showed that he had between 40 and 90 milligrams of alcohol in 100 milliliters of blood. Urine testing revealed the presence of marijuana, cocaine and fentanyl in his system.

R. v Zeiko Irons, 2016 ONSC 1490, the accused was convicted by a jury of two counts of dangerous driving causing bodily harm together with two counts of failure to remain at the scene of an accident. The accused rear ended a motorcycle being driven by one of the victims with the other victim being his passenger. The accused admitted that time the accident he was travelling at a maximum of 110 km/hour. The overwhelming evidence as witnesses described as "extreme lane changes" being made by the accused at high speeds before the collision occurred. The accused was found guilty after a jury trial. He had a criminal record for a sexual assault and sexual interference and received a sentence of 17 months in jail and two years' probation. The accused was convicted of dangerous driving causing bodily harm; and sentenced to 12 months incarceration on each conviction concurrent to each other. In relation to the two convictions of failure to remain at the scene, the accused was sentenced to six months incarceration on each conviction, concurrent to each other but consecutive to the sentence on the other counts. His total sentence was 18 months custodial.

R v. Startup, 2011 ABPC 389, the accused was convicted after trial of dangerous driving causing bodily harm and impaired driving causing bodily harm. On the date in question, the accused was involved in a single vehicle accident after leaving a neighbourhood Pub. A couple blocks away from his residence, his pick-up truck veered out of control, crossed the opposite lane of travel, and smashed head-long into a cement block retaining wall. The passenger in his vehicle was seriously injured when his head penetrated the windshield

The accused had no prior record however, he did have a driving record. He was a youthful first offender of otherwise good character. He is in his last year of the Refrigeration and Air Conditioning Mechanic course. He received a one-year period of incarceration and two years of probation. The Defence sought a custodial period

between nine and 12 months while the Crown was suggesting a period that would be over the 12-month period.

R v Bennett, 2007 CarswellNFLD 129, the accused pled guilty to dangerous driving causing bodily harm to another person and possession of marijuana. He was driving an uninsured and an unregistered vehicle at the time of the offense. The mechanical condition of the vehicle was in poor condition.

The accused had no drivers license. The accused was driving his vehicle up and down the sides of the pit and performing jumps. In the ensuing collision his passenger suffered a skull fracture and a partially paralyzed face. The accused was 25 years of age with no criminal record a period of six months custody, a period of six months incarceration, a three-year driving prohibition and a one-year period of probation is an appropriate sentence for these offences

R. v. Randi Allan Kruse, 2014 ABPC 171, the offender was operating a motor vehicle at excessive speed and struck a motorcycle. Two motorcycle passengers were seriously injured as well is the passenger in a vehicle driven by the accused. The accused had a dated criminal record. He admitted to consuming two beer before driving but had a positive pre-sentence report. The Crown was seeking a period of custody between 12 and 15 months while the Defence counsel was seeking in a period of custody of six to nine months. The Court imposed a period of nine months custody followed by 12 months probation

R v. Jagjit Singh Gill, 2010 BCCA 388, the offender was driving his truck in a residential area while attempting to light a cigarette. In doing so he crossed several lanes of traffic struck another vehicle almost head-on. The victim suffered serious bodily harm. The Court imposed one year of imprisonment for dangerous driving. As pointed out by Crown counsel in this matter that there was significant deviation in the case and that the offender had left the scene of an accident, did not return to attempt to assist the victim. He was sentenced to 18 months for leaving the scene of the accident together with the dangerous driving penalty of one year. There is a cumulative sentence of 30 months imprisonment which was upheld by the Court of Appeal.

R v Kevin Daly, 2013S KPC 40, the accused was intoxicated and struck a pedestrian with his motor vehicle. He had a blood-alcohol reading of 130 milligrams in 100 milliliters of blood. The pedestrian suffered serious bodily harm including a brain injury that impacted his ability to recall. It required, that the victim required significant care from family members with no hope of improvement of the situation.

> The accused had no criminal record, was married, had a university degree and was employed. He received a six-month period of custody.

Defence Position:

[20] Mr. Hamm requests a period of custody of less than 90-days that can be served intermittently followed by two years' probation.

[21] Defence counsel addressed the principles set out in *R v Gladue*, (1999) S.C.R. 688. He further submits that this is a case of exceptional circumstances which could reduce the importance of deterrence and denunciation.

[22] Mr. Hamm relies on two cases. The first is *R v Murray Kuhl,* YKTC 27, and *R v Savoury,* an unreported Nova Scotia Provincial Court decision from Judge Benton dated June 18, 2019.

[23] In the *Kuhl*, supra, the accused was driving a motor vehicle with a blood-alcohol content of 214 milligrams of alcohol in100 milliliters of blood. While turning into a driveway he struck a pedestrian causing severe injury to her knee. The accused was a substitute teacher with a good background and was remorseful. He took responsibility for his actions and had no prior record Mr. Kuhl took the matter to trial. At the end of the day, he was sentenced to a 90-day period of custody which could be served intermittently together with probation for 12 months.

[24] In *R. v. Dylan Savoury*, the accused had been charged with one count of impaired driving causing bodily harm. The youthful offender had collided with a tree while operating a motor vehicle. He had a blood alcohol content of 200 milligrams of alcohol in 100 milliliters of blood. The passenger in the vehicle suffered serious injuries to his vertebrae. The Crown was seeking a 12-month custodial period followed by probation while the Defence was seeking a 90-day intermittent sentence with probation. Judge Benton stressed that that this was a young person. There was a positive pre-sentence report. The pre-sentence report showed a positive background for this person. He had paid restitution for damages done in the course of the accident. He was remorseful. Judge Benton sentenced Mr. Savoury to a 90-day intermittent sentence with a driving prohibition and other ancillary orders.

Sentencing Principles:

[25] Sentencing principles in Canada have been, for the most part, codified under section 718 of the **Criminal Code**, as set out earlier.

Mitigating Circumstances:

[26] The following are clear mitigating circumstances put forward by the accused:

1. He had no prior record prior to these offenses;
2. He is gainfully employed;
3. The accused entered a guilty plea prior to a preliminary inquiry, which was scheduled;

4. There was a positive pre-sentence report;
5. He is a youthful offender at the age of 20;
6. He has a supportive family and the victims as well;
7. He exhibited through-out a great deal of remorse for what had occurred;
8. He is taking positive remedial steps to address those issues which led to the offense including a defensive driving course and continued therapy for mental health issues.

Aggravating Circumstances:

1. The excessive speed of the vehicle at the time of the collision;
2. That the accused was consuming alcohol and drugs prior to the incident;
3. That that the driving occurred in a residential area;
4. The injuries suffered by the victims;
5. That he was further convicted of speeding under 106A (b) of the **Motor Vehicle Act**.

[27] Sentencing is a highly individualized the process (*R. v Ipeelee*, [2012] S. C. J.No. 13 (SCC), *R.v. W. (L.W.)* [2000] S.C.J. No. 19 (SCC), *R. v. Shropshire*, [1995] S.C.J. No. 52 (SCC)).

[28] Supreme Court of Canada has stressed the individuality at the core of sentencing when they said in *Ipeelee*, at para. 38:

> [38] Despite the constraints imposed by the principle of proportionality, trial judges enjoy a broad discretion in the sentencing process. The determination of a fit sentence is, subject to any specific statutory rules that have survived *Charter* scrutiny, a highly individualized process. Sentencing judges must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender. Appellate courts have recognized the scope of this

> discretion and granted considerable deference to a judge's choice of sentence. As Lamer C.J. stated in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:
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> > Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code* .

[29] In cases such as this for dangerous driving causing bodily harm there must be clear emphasis on denunciation and deterrence. In *Rawn*, supra, the Ontario Court of Appeal reflected that: "Dangerous driving puts the public at great risk. The crime is all the more egregious when people, often innocent members of the public, are injured."

[30] All the cases that have been reviewed by Crown and Defence clearly express the repudiation by society of those individuals who choose to get behind the wheel of an automobile and drive it in such a manner that places the public and the accused at great risk. The cost to victims, first responders, and to the healthcare system are often very high.

[31] Courts in relation to offenses like those before me today must struggle with weighing repudiation with proportionality and parity with other cases.

[32] The Crown has stressed that the case before me is one of a matter that contains a "thrill-seeking" aspect. To some extent the case law would suggest that that type of behaviour would move sentencing in an upward fashion in severity. While this is self-

evident a court cannot lose overall perspective relating to sentencing when stressing disapproval of this type of activity.

[33] In examining the cases that have been put forward by both the Crown and the Defence one cannot help to come to conclusion that a wide range of sentencing options are available in these types of situations. Given that wide range it becomes an agonizing journey for sentencing judge balancing on the razor's edge of sentencing principles to arrive at a fit and just sentence.

[34] It is clear that to achieve the proper demonstration of societal concern over this type of driving a custodial sentence is imperative. When one looks at the low range of what is put forward by the Crown of six months and the upper range of custodial period of 90-days put forward by the accused one has to balance what an extra three months of custody in the end will do in relation to rehabilitating this offender. He is young. He has taken all the steps necessary and available to him to ensure that he leads a different lifestyle and what led to the offense before the court. Taking him completely out of society for six months would almost certainly affect his current employment as well as ongoing therapy he is involved in.

Conclusion

[35] Taking into account all of the above a 90-day intermittent sentence would not be unfit nor detract from all the principles of sentencing that I have reviewed. Consequently, I sentence him to a 90-day period of custody which can be served intermittently.

[36] It should be remembered that the sentence does not end there. In order to achieve the maximum ability for society to monitor the rehabilitative aspects of a sentence I also place the accused on a period of probation for three years. That probationary period will include the statutory terms under the **Criminal Code** together with a prohibition from consuming alcohol and cannabis products as well as non-medically prescribed drugs. He is to continue treatment and counselling as directed by his probation officer for mental health and or substance abuse issues.

[37] I further impose a five-year driving prohibition.

[38] In relation to the ancillary request for a DNA under s. 487.04(b), this matter is the designated secondary offence. I will order that the DNA as it can be useful in these types of offences to determine things such as who may have been driving where DNA evidence might be available to pinpoint who would be behind the driver's wheel.

Paul B. Scovil, JPC