PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. T.M.*, 2020 NSPC 57

Date: 2020-12-14
Docket: 8347717
Registry: Halifax, NS

Between:

Her Majesty the Queen

v.

T.M.

DECISION ON SENTENCING

Editorial Note

Restriction on publication: The published version of this decision has been edited to remove information that would have the effect of identifying a child, parent or relative of a child who is the subject of a proceeding pursuant to s. 94(1) of the *Children and Family Services Act*

Judge: The Honourable Judge Perry F. Borden

HEARD: December 14, 2020

Decision: December 14, 2020

Charge: Section 320.14(2) *Criminal Code of Canada*

Counsel: Cory Roberts, for the Crown
Jeremiah Raining Bird, for the Defence

By the Court:

Background

[1] On July 20, 2020, Mr. M. (T.M.) attended this court with his counsel, Mr. Raining Bird, and entered a guilty plea to count 3 of the Information dated May 29, 2019. Sentencing was adjourned to October 23, 2020 for the preparation of a Pre-Sentence Report and an update to the Impact of Race and Cultural Assessment.

[2] Count 3 of the May 29, 2019 Information provides as follows.

> On or about May 15, 2019, at or near Halifax, Nova Scotia, did commit an offence under Sec 320.14(1) of the *Criminal Code*, and while operating the conveyance, caused bodily harm to A.H., contrary to Sec. 320.14(2) of the *Criminal Code*.

[3] On October 19, 2020 I wrote to counsel advising Mr. M. was known to me through my pre-law school employment and, more recently, through community volunteer work.

[4] I advised counsel I did not believe I had a conflict presiding over Mr. M.'s sentencing, as in my view our relationship was akin to a judge presiding in a smaller jurisdiction where an accused person is remotely known to the judge. However, I

was willing recuse myself if the parties deemed it appropriate. The Crown and defence did not raise an objection. On October 23, 2020 I raised this very issue with Mr. M., and he did not express any concern with me continuing to preside.

[5] Upon hearing the submissions of counsel and Mr. M.'s s. 726 *Criminal Code* address, I imposed a two-year driving prohibition order and due to scheduling, my sentencing decision was adjourned to December 14, 2020.

Circumstances of the Offence

[6] On May 15, 2019 Halifax Regional Police were dispatched to the MacDonald Bridge in relation to a three-vehicle collision. As their investigation unfolded, it was learned Mr. M's vehicle crossed the center lane and collided head on into the vehicle of A. H., who was travelling in the opposite direction. As a result of the collision, Mr. H. sustained a broken sternum. Mr. M., who was exhibiting indicia of impairment, complied with a breath demand, and provided two samples of 150 mg of alcohol in 100 ml of blood.

Position of the Parties

[7] Mr. Roberts on behalf of the Crown provided a very helpful brief on the law of impaired driving causing bodily harm. In addition to his brief, Mr. Roberts

provided 13 cases summarizing the facts and sentencing dispositions in each individual case.

[8] Mr. Roberts argues the facts associated with this offence and this offender warrants a five-month custodial sentence, a two-year Probation Order and a two-year driving prohibition order.

[9] Mr. Raining Bird on behalf of Mr. M. filed a brief advancing a completely different disposition. He asserts the facts of this offence as they relate to Mr. M. establishes that a proportionate sentence in these circumstances does not necessitate a custodial sentence. He argues the need for deterrence and denunciation have already been implemented through the extra-judicial sanctions of the shame of the indexed offence coupled with the loss of Mr. M.'s employment and income.

[10] He asserts if further denunciatory considerations exist they can be rectified through a well-drafted probation order with copious denunciation and punitive conditions. He proposes the following: a $1,500 fine, a probationary period of two years, 100 hours of community service, and a two-year driving prohibition. Alternatively, if the Court determines that a period of incarceration is required, then Mr. Raining Bird submits that any such period of incarceration ought not to exceed 90 days, and that Mr. M. should be permitted to serve the sentence intermittently.

Victim Impact Statement

[11] The victim in this matter did not exercise his s. 722 prerogative and file a Victim Impact Statement. However, Mr. Roberts did apprise the court with an update concerning Mr. H. The Court heard there was a period of hospitalization and the injuries caused Mr. H. considerable pain and discomfort. Further, as a result of the collision he suffers from Post Traumatic Stress Disorder but has returned to work in October 2020.

Circumstances of the Offender

[12] A Pre-Sentence Report authored by Oliver Black and an updated Impact of Race and Cultural Assessment co-authored by Lana MacLean and Sonya Paris were provided to the Court. I have had an opportunity to review and consider the content and recommendations provided therein.

[13] The Pre-Sentence Report and the Impact of Race and Cultural Assessment illustrate the abuse, neglect and trauma Mr. M. was exposed to within and beyond his biological household. Mr. M. told the assessment authors he was conceived as a result of a violent rape. At age nine, he and his siblings were apprehended by the Department of Community Services. Thereafter, he was separated from his siblings and placed initially in foster homes and then in the Nova Scotia Home for Colored

Children. In each placement, the abuse and trauma endured. Moreover, he continues to experience trauma in his daily routine. During the preparation of the Pre-Sentence Report, Mr. M. had to travel to Ontario to attend the burial of his older sister who was a victim of a violent murder.

[14] Mr. M. was raised primarily in the housing projects of Uniacke Square and describes the area as a "war zone". Within that housing complex, he witnessed "drive-by shootings, physical violence, drug deals and prostitution". The reports explicitly demonstrate Mr. M. as an individual who was exposed to a horrific upbringing, and against the real life odds of getting immersed in the criminal subculture and going to prison, he spent his adolescence and early adult life avoiding criminal activity.

[15] Despite his traumatic upbringing, Mr. M. completed grade 12 and in 2004, he graduated from Saint Mary's University with a degree in English and Sociology. He described his entire education experience as a "Eurocentric fiasco" as he was never educated by anyone who looked like or talked like him. It appears that his university experience was fraught with the turmoil of trying to assimilate or fit in with his academic peers who had remarkably different backgrounds.

[16] At all times material, Mr. M. was a productive and contributing member of his community. Until the charges before this court he was employed as a continuing care assistant for six years. Prior to that position, he was employed by the Department of Community Services as a case aide and before that position, he was a community outreach worker with Family SOS. As a result of this conviction, coupled with the Department of Motor Vehicle's five-year driving prohibition order, Mr. M.'s employment was terminated.

[17] Mr. M. has two children. He is a single parent to his eldest daughter and has shared custody of his youngest daughter. Through his lived experience he appreciates the significance and necessity of being a parent and provider for his children. Arguably he is the glue that keeps his extended family together and he often suffers from being the family role model. When he requires support or empathy from his extended family their support is not reciprocated.

[18] The reports advise a large part of Mr. M.'s persona is his willingness to give back to his north end Halifax community. His collateral supporters advised the report authors that Mr. M. volunteers a lot of his time to at risk or disadvantaged African Nova Scotian youth. He is a member of 902ManUp, and the organization's

chairman and his local MLA have provided the Court with glowing character accolades.

[19] Collateral: L. M. was interviewed for the assessment. She described an event where she took a 14-year-old T.M. to the movie, "Hurricane" (Rubin Carter). At the end of the movie he isolated himself from the group and when she checked on him, he advised, "I do not want to end up like that. I do not want to go to prison. My father is there, my oldest brother is there, my sister is there, and I am now the oldest." Another collateral in the Cultural Assessment asserts, "Because [T.M.] has done so well, we missed his need for ongoing support and assistance."

[20] I note from Mr. M.'s JEIN report, which was attached to the Pre-Sentence Report, he has five somewhat dated C*riminal Code* convictions. His last conviction was a s. 334(b) *Criminal Code* offence in November of 2011. In that case, he received a 12-month period of probation and a restitution order in the amount of $770.00.

[21] Suffice to say the charges before this Court are out of character for Mr. M.

The Law

[22] The relevant punishment provision of the *Criminal Code* provides as follows:

> **320.2 Punishment in case of bodily harm** -- Every person who commits an offence under subsection 320.13(2), 320.14(2), 320.15(2) or 320.16(2) is guilty of
>
> (a) an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of,
>
> (i) for a first offence, a fine of $1,000 …
>
> 320.19 (3) **Minimum fines for high blood alcohol concentrations --** Despite subparagraphs (1)(a)(i) and (b)(i), every person who commits an offence under paragraph 320.14(1)(b) is liable, for a first offence, to
>
> (a) a fine of not less than $1,500, if the person's blood alcohol concentration is equal to or exceeds 120 mg of alcohol in 100 mL of blood but is less than 160 mg of alcohol in 100 mL of blood;
>
> …

[23] As this case involves a case of bodily harm and was prosecuted by indictment, a conditional sentence is an illegal sentence by operation of s. 742.1(e)(i) of the *Criminal Code*. Accordingly, the available sentences and sanctions available to Mr. M. are as follows:

- A fine of at least $1500 as per s. 320.19(3)(a)
- A fine and probation as per s. 731(1)(b)
- A term of imprisonment of up to 14 years per s. 320(2)(b)
- A term of imprisonment of up to 14 years and a fine per s. 734
- An intermittent term of imprisonment of up to 90 days with a term of probation per s. 732.
- A Driving Prohibition Order per s. 320.24(5)(b)

- A DNA Order per s. 487.04 of the *Criminal Code*. However, the Crown has not proffered an argument pertaining to obtaining a sample of Mr. M.'s DNA.

Sentencing Principles

[24] In all sentencing decisions, determining a just and appropriate sentence is highly contextual and is an individualized process which depends on the circumstances of the offence and the particular circumstances of the offender.

[25] *R. v. Lacasse***,** 2015 SCC 64, was an included case within the Crown book of authorities. The Crown asserts that paragraphs 5 and 6 are of particular significance in relation to impaired causing bodily harm cases as the Supreme Court has implemented a clear directive for trial courts. Those paragraphs provide as follows:

> [5] In the context of offences such as the ones in the case at bar, namely impaired driving causing either bodily harm or death, courts from various parts of the country have held the objectives of deterrence and denunciation must be emphasized in order to convey society's condemnation: *Citations omitted*
>
> [6] While it is normal for trial judges to consider sentences other than imprisonment in appropriate cases, in the instant case, as in all cases in which general or specific deterrence and denunciation must be emphasized, the courts have very few options other than imprisonment for meeting these objectives, which are essential to the maintenance of a just, peaceful and law-abiding society.

[26] While I appreciate the Crown's argument, I am also mindful of direction the Supreme Court of Canada gave in *R. v. M.(C.A.)*, 1996 CanLII 230 (SCC), at

paragraph 91-92, where the Court held that the determination of a just and appropriate sentence required the trial judge to carefully balance societal goals of sentencing against the moral blameworthiness of the offender. Further, the gravity of the offence must be considered and reflected when determining the perspective of a victim and the needs of, as well as the current conditions of, the community. In addition:

> … It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. See *Mellstrom, Morrissette* and *Baldhead.* Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. …

[27] Furthermore, and with the utmost respect, I disagree with the Crown's interpretation of the *Lacasse* principles. As acknowledged further along in that decision, Justice Wagner recognises there will be instances where a custodial disposition is not the only option available for impaired offences resulting in bodily harm or death. This proposition was concisely articulated at paragraph 58 where Wagner, J. stated:

> [58] There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable

> objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. …

[28] Further, in the dissenting decision at paragraph 132, Gascon, J., addressed paragraph 6 as follows:

> [132] I would also qualify my colleague's statement that the courts have "very few options other than imprisonment" (para. 6) for meeting the objectives of general or specific deterrence and denunciation in cases in which they must be emphasized. In my view, the courts should not automatically assume that imprisonment is always the preferred sanction for the purpose of meeting these objectives. To do so would be contrary to other sentencing principles. Rather, a court must consider "all available sanctions, other than imprisonment," that are reasonable in the circumstances: s. 718.2(*e*) *Cr. C.*; *Gladue*, at para. 36.

[29] The primary purposes and principles of sentencing are set out in s. 718-718.2 of the *Criminal Code*. This includes the fundamental principle that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." The gravity of an offence lies in the nature and comparative seriousness of the offence, in the circumstances of its commission, and the harm caused.

[30] The purpose of sentencing is achieved by blending the various objectives identified in s. 718(a)-(f). The fusing of those objectives is contingent upon the

nature of the offence and the circumstances of the offender. Judges are often tasked with the difficult challenge of determining which objective or combined objectives justifies precedence. Moreover, s. 718.1 directs that the sentence imposed must fit the offence and the offender.

[31] In *R. v. Bratzer***,** 2001 CarswellNS 406, at paragraph 11, Justice Bateman addressed this phenomenon wherein she stated:

> [11] While it is said that the law on sentence appeals is not complex (*R. v. Muise (No. 4)* (1994), 94 C.C.C. (3d) 119, [1994] N.S.J. No. 487(N.S. C.A.)), the statutory factors which the sentencing judge must entertain in crafting a sentence are varied and often conflicting. The formulation of a fit sentence is not a simple task. …

[32] While addressing the spirit of denunciation and general deterrence Bateman, J. provided the following guidance at paragraph 47 in *Bratzer*:

> [47] As noted above, with the implementation of the revisions to Part XXIII of the **Criminal Code**, all reasonable, available sanctions are to be considered as an alternative to imprisonment and an offender is only to be deprived of liberty if less restrictive measures are not appropriate (**Criminal Code**, s.718.2(d) and (e)). Institutional imprisonment is no longer considered the only means of expressing denunciation and effecting general deterrence. In **R. v. Wismayer** (1997), 1997 CanLII 3294 (ON CA), 115 C.C.C. (3d) 18; O.J. No.1380 (Q.L.)(C.A.), Rosenberg, J.A., writing for a unanimous court, referred to the negative impact of imprisonment, particularly upon youthful or first time offenders (at p. 25). He cited a number of studies, as summarized in the *Report of the Canadian Sentencing Commission, 1987* (The Archambault Report) which concluded that instead of deterring criminals, institutional incarceration often has the effect of reinforcing criminal inclinations. Reasonable alternatives to incarceration must be considered when the sole purpose of imprisonment would be

> general deterrence. This was, in large part, the reason for the development of the conditional sentence.

[33] Justice Rosenberg expanded upon the philosophy of general deterrence in *R. v. W.(J.)*, 1997 CarswellOnt 969, at paragraph 49, where he articulated.

> This is not to doubt the theory of general deterrence, or its application to the manner of service of the sentence of imprisonment. Requiring some offenders to serve the sentence in a correctional facility as opposed to the community can reasonably be expected to deter some persons from offending: see *R. v. Shropshire, supra*, at p. 202. However, these conclusions suggest that general deterrence is not a sufficient justification for refusing to impose a conditional sentence. In view of its extremely negative collateral effects, incarceration should be used with great restraint where the justification is general deterrence. These effects have been repeatedly noted with depressing regularity. Some of the comments have been collected by the Sentencing Commission at pp. 42-44 and bear repeating:
>
> 1969: Ouimet Committee, Report of the Canadian Committee on Corrections, p. 314:
>
> One of the serious anomalies in the use of traditional prisons to re-educate people to live in the normal community arises from the development and nature of the prison inmate subculture. This grouping of inmates around their own system of loyalties and values places them in direct conflict with the loyalties and values of the outside community. *As a result, instead of reformed citizens society has been receiving from its prisons the human product of a form of anti-social organization which supports criminal behaviour* (p.314). [Emphasis added.]
>
> …
>
> 1977: Solicitor General of Canada. A Summary and Analysis of Some Major Inquiries on Corrections -- 1938 to 1977, p. iv:
>
> Growing evidence exists that, as educational centres, our prisons have been most effective in educating less experienced, less hardened offenders to be more difficult and professional criminals.

Parity in Sentencing

[34] In all sentencing precedents, it has been emphasized repeatedly through jurisprudence and the codification of s. 718.2(b) of the *Criminal Code* that a sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. However, finding a case that is precisely comparable for a particular offender often becomes an exercise in futility. It is difficult, if not impossible, to find a precedent that is in tandem with any other case; thus, the genesis of sentencing objectives being described as more of an art rather than a science. The constant reality remains that the facts and circumstances of every offence and every offender are always distinguishable.

[35] As previously stated, in this instance the Crown argues for a custodial sentence of five months, a two-year probationary period, and a two-year driving prohibition order. He asserts the 2018 amendments to s. 320.14(2) of the *Code*, demonstrates Parliament's intention to impose harsher sentences than have previously been imposed. He relies on *R. v. Friesen*, 2020 SCC, at paragraph 99 as authority for this proposition.

[36] Upon review of the legal authority he provided it becomes apparent that the disposition he is requesting is certainly within the range of sentences that have been imposed for this type of an offence. The cases of *R. v. George*, 2016 NSCA 88, *R.*

v. Beals, 2019 NSPC 68, and *R. v. Boudreau,* 2019 NSPC 69, were of tremendous assistance in terms of establishing a guideline as there are many similarities consistent with Mr. M.'s matter.

[37] In *George,* the accused pled guilty to impaired causing bodily harm. His blood alcohol concentration was almost twice the legal limit; his passenger girlfriend suffered a dislocated hip and required seven sutures to remedy a facial wound. Our Court of Appeal overturned the impermissible suspended sentence and imposed a four-month custodial sentence and 12 months of probation in part because of the accused's brazenness in misleading the trial judge about his addiction recovery and rehabilitation.

[38] In *Beals*, the offender whose blood alcohol concentration was 220 mg and 210 mg of alcohol in 100 ml of blood pled guilty to impaired causing bodily harm. The victim suffered a concussion and required 20 sutures to repair the damage to her tongue. Her two infant children were uninjured. The Impact of Race and Cultural Assessment revealed the offender had suffered significant untreated trauma prior to the offence. He received a 90-day intermittent sentence, 18 months of probation and a two-year driving prohibition order.

[39] In *Boudreau*, the offender's extrapolated blood alcohol concentration was between 200 mg percent and 223 mg percent at the time of the offence. He pled guilty to impaired causing bodily harm and his passenger suffered significant injuries and required hospitalization. The Court imposed a $2,000 fine and a two-year driving prohibition order.

[40] In addition to the authority provided by the Crown, I have reviewed the very recent case of *R. v. Burns***,** 2020 NSPC 48. In that case the offender, whose blood alcohol concentration was 100 mg of alcohol in 100 ml of blood, pled guilty to impaired causing bodily harm. Her vehicle collided with an oncoming vehicle occupied by two people. One of the occupants suffered soft tissue damage while the other suffered a fractured sternum, resulting in hospitalization for more than a month, temporary hearing loss, and enduring psychological, emotional, and financial impacts. The offender received a 12-month conditional sentence order, followed by 12 months of probation and a two-year driving prohibition order.

Aggravating and Mitigating Circumstances

[41] The optimum approach to address all sentencing criteria is always contingent and manifested on the unique circumstances of the case and the offender. The aggravating features present in this case are as follows:

- Mr. M.'s vehicle collided with Mr. H.'s vehicle on the midspan of the MacDonald Bridge, causing significant injury and trauma to Mr. H.;
- At the time of the collision, Mr. M.'s blood alcohol concentration was 150 mg;

[42] I find the mitigating circumstances are as follows:

- Mr. M. entered an early guilty plea to the charge before the Court, relieving the Crown of the burden of proving the elements of the offence and requiring the victim to testify;
- He cooperated with the police and has accepted responsibility for his criminal activity;
- Mr. M. has a dated criminal record with no related convictions and has never received a period of custody for his convictions;
- He has expressed significant genuine remorse for his conduct and his pain and shame was exhibited during his s. 726 address to the Court;
- His education, prospects of education, and employment; and
- The support of his community, community organizations, and local MLA

Analysis

[43] In *Burns*, the Crown proceeded summarily thus enabling the option for the Court to consider and ultimately impose a conditional sentence order. As previously

discussed, in this instance, the matter is prosecuted by indictment thus precluding the application of s. 742.1 of the *Criminal Code*.

[44] The facts associated with the impaired causing bodily harm in that case are quite similar to Mr. M.'s fact scenario. However, the case is also distinguishable by virtue of a first-time offender with low readings versus an individual with a dated and unrelated record and statutorily aggravating readings. Furthermore, the lived experiences of the two offenders is quite telling. On the one hand there is a young Caucasian female with a traditional intact family unit versus a 38-year-old African Nova Scotian male with a fractured family structure marred by child apprehension, abuse, and lingering untreated trauma.

[45] *Beals* is also aligned with some of the variables confronting Mr. M. Most notably is their community involvement, the garnered support from their respective communities and their cultural assessments which exhibited significant trauma during their upbringing. However, the circumstances are also distinguishable as in Mr. Beals' case there were greater aggravating features such as speeding in rush-hour traffic, alcohol concentration of two and one half times the legal limit, and a far more significant unrelated criminal record.

[46] *George* and *Boudreau* are both factually similar. However, they too are readily distinguishable. Nonetheless, they are intended to serve as sentencing guides for potential sentences available in this proceeding. They nor any of the cases provided by counsel are intended to serve as a straitjacket in the exercising of my discretion (see *R. v. Keepness*, 2010 SKCA 69, 359 Sask. R. 34 (Sask. C.A.), at para. 24).

[47] I have carefully considered the Crown's position in detail. Far too often the carnage unleashed by impaired drivers is exposed in courts throughout this country. Despite the social stigma, explicit drunk driving television commercials, campaigns and Parliament elevating mandatory minimum penalties, the fact of the matter is impaired driving offences continue to plague our community and courthouses, thus explaining why general deterrence in the form of custodial sentences frequently takes center stage in these dispositions.

[48] In this instance, the question remains: Can the purposes and principles of sentencing as enunciated in s. 718-718.2 of the *Code* be achieved through the implementation of a carefully crafted, noncustodial disposition?

[49] In *Boudreau*, 2019 NSPC 69, at paragraph 36, Atwood, J. provided authority from across the country where noncustodial sentences were imposed for impaired causing bodily harm. See:

> • *R v Roasting*, 1999 ABCA 52—suspended sentence affirmed for young First-Nation female with no record, but who was on judicial interim release at the time of the offence; presumptive BAC was 200 mg EtOH/100 ml bld;
>
> • *R v Riddell*, 2011 SKQB 378—$2500 fine, 3-year term of probation, 3-year prohibition imposed on young male with chronic physical- and mental-health conditions; significant victim impact; presumptive BAC of 190 mgsEtOH/100ml bld;
>
> • *R v Harris*, [2002] QJ No 8684 (CQ)—29-year-old drove while impaired at excessive speeds, resulting in a head-on collision; significant injuries suffered by innocent motorist; full cooperation with police; presumptive BAC of 200 mgsEtOH/100 ml bld; sentenced to $2000 fine, 14-months' probation, 180 hours of community service, one-year prohibition;
>
> • *R v Rowan*, [2003] OJ No 5922 (OCJ)—fine of $1200, 2-year term of probation and 3-year prohibition imposed on 53-year-old remorseful male who drove with a presumptive BAC of 210 mgEtOH/100ml bld; no record; defence appeal from driving-prohibition term dismissed, [2004] OJ No 3719 (CA);
>
> • *R v Weisgerber*, 2009 SKPC 107—curative discharge not granted, $2000 fine and 3-year terms of probation and prohibition imposed on 67-year-old First-Nation male with impaired and refusal priors;
>
> • *R v Audy*, 2010 MBPC 55—fine of $1000, 18-months' probation and 2-year driving prohibition imposed on 29-year-old First-Nation female with no record; extreme social-support insecurity and classified as a high risk to reoffend; presumptive reading of 140 mgEtOH/100ml bld;
>
> …

[50] Moreover, there is ample jurisprudence acknowledging properly crafted probationary conditions can serve as a compelling deterrent (See: *R. v. George* (1992), 112 N.S.R. (2d) 183 (C.A.); *R. v. Martin*, 1996 NSCA 207; *R. v.*

R.T.M. (1996), 1996 NSCA 156; *R. v. Voong*, 2015 BCCA 285; *R. v. Rushton*, 2017 NSPC 2, at paragraph 95, and *R. v. Barrons*, 2017 NSSC 216 at paragraphs 44-46.

[51] Also see *Lacasse*, at paragraph 134 where Justice Gascon amplified the general and specific deterrence reasoning and observed:

> [134] … "the objective of general and even specific deterrence does not relate exclusively to the severity of a sentence considered in the abstract. Deterrence can work through conditions tailored to fit the offender or the circumstances of the offender, as the ... Court noted in *Proulx*." …

Conclusion

[52] I would be remiss if I did not acknowledge the significant abuse, neglect and unaddressed trauma that continues to torment Mr. M. It is not surprising that he presents with a guarded exterior and has difficulty trusting others given his experiences within his biological household and the residential facilities where he resided for parts of his upbringing. The authors of the Impact of Race and Cultural Assessment describe the residential group home experience as "a pipeline to prison".

[53] Despite that assertion, and coupled with his upbringing and the criminal subcultural within his community, he persevered in his pursuit of attaining an education and gainful employment. Arguably, one could say he spent his entire life

avoiding a lifestyle that would lead to incarceration and yet he finds himself knocking on the doorsteps of a prison for a custodial sentence.

[54] I have considered carefully the Crown's sentencing recommendation and their supporting authority. Quite clearly, the requested disposition recognizes the inherent dangers associated with impaired driving related offences. The facts before me coupled with the inflicted injuries are extremely serious. In this instance, there was a very real risk of lethality. Mr. M. and nobody else is responsible for the events and aftermath that occurred on May 15, 2019.

[55] Circumstances such as these require deterrence to rebuke and demonstrate condemnation for these offences. However, as previously referenced, I am obligated to blend the various sentencing considerations in conjunction with the circumstances of the offence and how they relate to this offender.

[56] I am of the opinion that the likelihood of Mr. M. reoffending in an impaired related offence is quite low. There is no indication within the reports before me to suggest that he has any substance related issues. Furthermore, I am informed that the Department of Motor Vehicles have revoked Mr. M.'s driving privilege for the next five years. There are no pressing safety issues for the community in terms of

his risk of recidivism for the index offence. Simply put, he is precluded from driving for the next five years, thus reducing any unforeseeable risk to the community.

[57] With respect to the issue of general deterrence, when I weigh the aggravating and mitigating circumstances, I am of the opinion that a five-month custodial sentence would be excessive for this offender. Correspondingly, I have come to the same conclusion with respect to imposing an intermittent sentence. Notwithstanding the unavailability of a conditional sentence order, if the same were statutorily permissible, I am of the opinion that in this instance it is not necessary to deter and denounce the unlawful conduct.

[58] Moreover, when I consider the aggravating and mitigating circumstance present in this case, I find that this sentencing decision should focus on promoting a sense of responsibility for Mr. M. and his rehabilitation. In these circumstances, I find that the sentencing principles enunciated s.718.2(d) and (e) of the *Criminal Code* are applicable, and the Court should also focus on the principle of restraint in determining the appropriate disposition for this offender. It should be noted that despite a dated and unrelated record, Mr. M. does not have any convictions for failing to comply with court orders. This in and of itself demonstrates an ability to comply with orders of the Court.

[59] Mr. M. is of African Nova Scotian decent. I highlight this point because I am cognizant of the over-representation of African Canadians or African Nova Scotians housed within prisons and penitentiaries throughout this province and country. I raise this not because Mr. M. is entitled to some form of sentencing discount by virtue of his ancestral heritage. However, the inequity requires addressing. If we are truly going to tackle the alarming rates of over-representation of racialized groups, it is crucial that we accept the stark reality that status quo of our sentencing system is fundamentally flawed. All justice system stakeholders can and must do better other than conducting business as usual.

[60] I have considered the primary purposes and principles of sentencing which are relevant in this case. Accordingly, I conclude that a significant fine and properly crafted period of probation is consistent with the fundamental purposes and principles of sentencing set out in s. 718 to 718.2 of the *Criminal Code.* Further, having Mr. M. serve that sentence of imprisonment in the community would not endanger the safety of that community.

[61] I recognize this disposition is different from sentencing ranges that are frequently imposed for impaired causing bodily harm offences. However, it is my belief that the fine and the probationary conditions that I intend to impose are

consistent with the fundamental principles and purposes of sentencing. Indeed, if Parliament intended to prohibit the availability of a community-based disposition for this offence, they would have precluded its availability by operation of s. 320.2(a) of the *Code*.

[62] In this instance when I reconcile the facts of the offence against the horrific background and yet remarkable accomplishments of Mr. M. The concerns identified by the Ouimet Committee Report and the 1977: Solicitor General of Canada Report are readily apparent. I have no doubt that the subculture within a prison would have a profound and negative impact on Mr. M. In essence there would be no ability for him to escape a culture that he has spent a lifetime trying to avoid.

[63] The facts before me are serious. However, equally compelling are the unique circumstances of Mr. M. The *sui generis* factors present in this instance is the very scenario Wagner, J. commented on in *Lacasse*, where he opined there will always be that unique case that calls for a sentence outside a particular range. I conclude this is that unique case, thus warranting this rare disposition.

[64] Accordingly, the sentence I intend to impose is as follows:

- $2,000 fine, payable on or before December 3, 2021;

- A 24-month driving prohibition order which commenced on October 23, 2020;
- 24-month probation order comprised of the statutory conditions in addition to the following rehabilitative conditions:
- Report to a probation officer on or before December 15 and thereafter as directed by your probation officer;
- Complete 200 hours of community service work to be completed on or before June 3, 2021. One hundred of those hours will relate to an impaired-free driving focus;
- Not to enter premises where alcohol is the primary product for sale;
- Not to consume alcohol beyond the parameters beyond your residence;
- Attend for assessment and counselling in relation to substance abuse;
- Attend for assessment and counselling in area of mental health;
- Attend for assessment and counselling as directed by probation services;
- Participate and co-operate with any assessment, counselling or program as directed by Probation Services;
- Attend for culturally competent counselling with 902ManUp, operated by the John Howard Society and the iMove/iNSpiRe program;
- Attend the DWI program at the Nova Scotia Health Authority for assessment;
- Seek a referral to the Nova Scotia Brotherhood Initiative with focus on getting a referral to Dr. Jacob Cookey and or Dr. Jason Chatman or their designate; and
- report back to this Court on December 10, 2021 for the purpose of a status update.

Judgement Accordingly.

The Honourable Judge Perry F. Borden
Judge of the Provincial Court