IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Davison, 2006 NSPC 73

Date: 20061206
Docket: 1672523
Registry: Kentville

Between:

Her Majesty the Queen

v.

Andrew John Davison

Judge:	The Honourable Judge Alan T. Tufts
Heard:	December 6, 2006, in Kentville, Nova Scotia
Written decision:	June 13, 2007
Charge:	255(2) C.C.
Counsel:	Lloyd Lombard, for the Crown Chris Manning, for the defence

By the Court (orally):

[1] This is the sentencing matter of R. v. Andrew John Davison. Mr. Davison has plead guilty to an offence under s. 255 of the **Criminal Code** - impaired driving causing bodily harm.

[2] The offender was driving his motor vehicle on the 101 Highway, a controlled access highway through the Annapolis Valley, at approximately 3 a.m. on the 17th of March, 2006. It is clear that he was driving with his headlights off. I accept that his headlights went off unexpectedly after he got on the highway but that he was travelling on that highway for some period of time under that condition.

[3] At one point he crossed the centre line of the highway and was on the left side of the two lane highway, or the “wrong side”, if you will, when he collided head on with another vehicle. The offender's blood alcohol level was 152 mg. % when it was analysed after the accident at approximately 4:24 a.m.

[4] The female driver of the other vehicle suffered bodily harm. Her injuries are described in the Crown's brief. She suffered a crushed pelvis, a dislocated toe, and

she will require a hip replacement within the next two to fifteen years. She filed a Victim Impact Statement indicating that she continues to suffer daily from the injuries she sustained from the accident. The offender was also injured.

[5] The offender is twenty-one years of age and has no criminal record. He has been the subject of a Pre-sentence Report. He is now employed as a carpenter and been enrolled in an apprentice program up until the time of the collision. The offender is single and recently broke up with his girlfriend, a circumstance which, it is suggested, was the cause of his drinking on this occasion. His girlfriend suggested in the Pre-sentence Report that the drinking on this occasion was out of character for him. The report does not otherwise suggest that he has any ongoing issues with alcohol and the SAQ testing suggests that he does not pose a risk or a significant risk in any of the areas identified. Further it appears as he has taken responsibility for his action, showed remorse for the harm he caused to the victim and sent a letter of apology to the victim of this offence.

[6] I also received a letter from the offender's father who has described his own struggle with alcoholism and suggested his son may be susceptible to the same

disease. He has indicated that his son has a clear insight into the seriousness of his criminal conduct and the risk that alcohol presents to him because of his family history.

[7] I have received and reviewed a Victim Impact Statement filed by the victim and driver of the vehicle which the offender hit and she is present in court today. She described in detail the injuries she suffered and the impact that the car crash had on her life and the lives of her family. Needless to say the impact was considerable on this victim and her family.

[8] The Crown is suggesting a period of five years in a federal institution as an appropriate sentence together with a seven year driving prohibition. The defence argues for a conditional sentence.

[9] Before outlining the appropriate principles of sentencing I want to comment briefly on the Crown's recommendation and the role of the sentencing judge. The Crown has correctly pointed out that impaired driving and impaired driving causing bodily harm are serious criminal offences. Parliament has indicated that. Our Court of Appeal as well as other appeal courts across the country have made

the same observation. The harm that impaired driving causes on our highways of our province is oftentimes truly tragic. Indeed in our Court of Appeal in **R. v. Cromwell**, *infra*, Justice Bateman makes this point repeatedly at paragraphs 27, 28 & 29:

> [27] Drunk driving is a crime of distressing proportions. The Courts have consistently recognized that the carnage wrought by drunk drivers is unabating and causes significant social loss. ®. v. Biancofiore (1997), 119 C.C.C. (3d) 344 (Ont. C.A.), per Rosenberg, J.A. at para. 22).
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> [28] Drunk driving is an offence demanding strong sanctions. In R. v. MacLeod (2004). 222 N.S.R. (2d) 56; N.S.J. No. 58 (Q.L.)(C.A.), the Crown appealed an 18 month conditional sentence for impaired driving causing bodily harm and leaving the scene of an accident. Cromwell, J.A., writing for the Court, in allowing the appeal and substituting a sentence of 18 months imprisonment for the driving offence and six months consecutive for leaving the scene, said:
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> > [22] This and other courts have repeatedly said that denunciation and general deterrence are extremely weighty considerations in sentencing drunk driving and related offences: see for example, R. v. MacEachern, 96 N.S.R. (2d) 68; 253 A.P.R. 68 (C.A.); R. v. Buffett, (1989), 93 N.S.R. (2d) 324; 242 A.P.R. 324 (C.A.); R. v. Biancofiore (N.F.)(1997), 103 O.A.C. 292; 29 M.V.R. (3d) 90;119 C.C.C. (3d) 344; 10 C.R. (5th) 200 (C.A.); R. v. Dharamdeo ®.) (2000), 139 O.A.C. 137; 149 C.C.C. (3d) 489 (C.A.); R. v. Proulx (J.K.D.), 1 S.C.R. 61; 249 N.R. 201; 142 Man. R. (2d) 161; 212 W.A.C. 161, at para. 129. I accept the point that generally incarceration should be used with restraint where the justification is general deterrence. However, I also accept the view of the Ontario Court of Appeal in Biancofiore, shared by the Supreme Court of Canada in Proulx, that offences such as this are more likely to be influenced by a general deterrent effect. As was said in

> Biancofiore, "... [T]he sentence for these crimes must bring home to other like-minded persons that drinking and driving offences will not be tolerated." (at para. 24) I would add that this is all the more important where, as here, the respondent's drunk driving caused serious physical injury to an innocent citizen and where, by fleeing the scene of the "accident", the offender has shown disregard for the victim's condition and disrespect for the law.

> [29] The sentence must provide a clear message to the public that drinking and driving is a crime, not simply an error in judgment. Those who would maim or kill by driving their vehicles while impaired are as harmful to public safety as are other violent offenders. The proliferation of this crime and the risk that it will be seen by society as less socially abhorrent than other crimes heightens the need for a sentence in which both general deterrence and denunciation are prominent features...

[10] The Crown has made this point quite effectively in its submissions. However the sentencing submission that the Crown has made in this case, in my opinion, is outside the recognized range authorized by the authorities as a fit and proper sentence.

[11] The Crown in its written submission says that “the defendant's behaviour is so aggravating that nothing less than a penitentiary term of five years in custody is appropriate”. This suggests that anything below five years would not be appropriate or a fit sentence.

[12] I agree with the defence that this is not the law and that the sentence proposed is outside the appropriate range. I am also going to say that the characterization of the offender's conduct which I will speak about shortly and which is extremely aggravating should not be described with adjectives such as “evil”. I do not want, however, to leave the impression that because I cannot accept the Crown's recommendation that I do not share the view generally expressed by the Crown about the seriousness of the offence or the culpable conduct of the offender. This is not the case. Clearly I am bound by the comments of our Appeal Court which I referred to earlier and with which, of course, I agree.

[13] The role of the sentencing judge is to impose a sentence that is in accordance with the law. A fit and proper sentence. A sentence which accords with the principles and purposes of sentencing set out by Parliament. I will shortly describe those principles. A sentencing judge simply cannot pick a sentence arbitrarily which is not in accordance with the principles I just alluded to in reaction to specific, tragic circumstances. To do so would be contrary to the rule of law which is the basis of our criminal justice system.

[14] The difficulty I have with the Crown's submission, with respect, is that it leaves the wrong impression that anything short of a five year sentence in prison is not appropriate and hence not in accordance with the objectives and purposes of sentencing. This is simply not the case.

[15] I will now briefly refer to the purposes, the principles of sentencing and then apply those to the case at bar. The **Criminal Code** has codified the fundamental purpose of sentencing, the objectives and principles of sentencing in s. 718, 718.1 and 718.2 of the **Criminal Code**. The fundamental purpose of sentencing in this context is simply to contribute to the maintenance of a just and peaceful and safe society; in short, to protect the public. As I mentioned above the primary objective in imposing sentences in cases such as this is general deterrence and denunciation. Denunciation is simply a means of communicating the seriousness of the conduct under review and deterrence of course is simply to craft a sentence that deters other like-minded individuals.

[16] The other legislative objectives, while still important, require less emphasis. The principles which the Court is required to employ to impose a sentence is proportionality, parity and restraint. Section 718 sets out the fundamental principle of sentencing called proportionality. Section 718.1 reads as follows:

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

[17] It is with these principles and purposes in mind the Court must craft a sentence which will meet the objectives Parliament has mandated. An assessment of the gravity of the offence requires an understanding of, first of all, the character of the offender's conduct or actions and, the consequences of those actions, see **R. v. Morrissey**, [2000] 2 S.C.R. 90.

[18] Here the offender was clearly impaired to such a degree that he ended up driving his vehicle on the wrong side of the road. His blood alcohol level was over 150 mg. % alcohol. He was driving without his lights on. He voluntarily consumed alcohol and became impaired to an obviously considerable extent, which is

evidenced by the remarkably dangerous driving. This was not, as Justice Bateman said in the **Cromwell,** *infra***,** simply an “error in judgment”. “This was not an accident”, if you will, as she explained, “His actions were serious.”

[19] The moral blameworthiness of his conduct is accordingly significant. The consequences of the offender's actions are clear. He caused serious bodily injury to the occupant of the vehicle he hit. This sentence must reflect both the consequences of his actions and the character of his conduct or moral blameworthiness of his actions.

[20] Crown counsel has cited cases in its brief which include those cases dealing with impaired driving causing death, criminal negligence causing death. The maximum penalty for impaired driving causing bodily harm, the offence in question here, is ten years. The maximum penalty for impaired driving causing death is life imprisonment and for criminal negligence causing death is also life imprisonment. It is not appropriate in my opinion to compare this offence with those of the offences of impaired driving causing death, criminal negligence causing death or indeed dangerous driving causing death which carried a maximum

of fourteen years. As I explained earlier the consequences of the conduct is part of the determination of the gravity of the offence so it would not be appropriate to compare those offences with the one before us today.

[21] I want to specifically address the appropriate range of sentencing, having said earlier that the Crown's submission is outside that range. To do so I will refer to other cases in Nova Scotia and across Canada. As I indicated earlier the Crown has referred to some cases including impaired driving causing death or criminal negligence causing death with some of the comments about the perils of drinking and driving contained in those cases. They are certainly valuable comments; the sentencing ranges however do not apply. I am referring specifically to the **R. v. MacEachern,** [1990] N.S.J. No. 82 and **R. v. Nickerson,** [1991] N.S.J. No. 48 cases.

[22] The cases to which I refer cover a wide range of sentencing. I will refer to them very briefly to indicate for these purposes what I consider to be the

appropriate range of sentencing in order that I can address the, in particular, the defence submission in this case.

[23] I refer to the **R. v. Jesso [2006] N.S.J. No. 267**, which Mr. Manning in his submissions referred to and I will not detail that again - it was a decision of the Nova Scotia Provincial Court in 2006. I refer to a case of **R. v. Harvey**, 61 W.C.B. (2d) 292—which is a case of impaired driving causing bodily harm—this is from the Newfoundland Court of Appeal. In that case two passengers were injured as a result of the offender's action. A period of six months in custody was imposed.

[24] **R. v. MacDonald**, 139 C.C.C. (3d) 524, which is a decision of the Manitoba Court of Appeal, emphasized that impaired driving causing death and impaired driving causing bodily harm are not the same offence. In that case bodily harm was occasioned and a fifteen month conditional sentence was imposed.

[25] In **R. v. Dharamdeo** 149 C.C.C. (3d) 489, Ontario Court of Appeal, involved two separate incidences of high breathalyzer readings, one of the incidents, being an impaired driving causing bodily harm, a six month jail term

was imposed. In **R. v. Hayre**, [2001] O.J. No. 844 (Ont. C.A.) the offender was on bail for two other charges when he committed the offence of impaired driving causing bodily harm and a five month jail term was imposed. In **R. v. Levesque**, [2001] O.J. No. 210, a term of nine months in custody was imposed. There was a prior impaired driving offence with respect to this offender and his alcohol level was three times the legal limit. **R. v. Chapman**, 2000 BCCA 152, involved dangerous driving causing bodily harm. The passenger in the vehicle was injured and a two year less one day conditional sentence imposed. In **R. v. Gomes** 2003 ABCA 149 which was referred to in the **Cromwell** case, there was a Conditional Sentence upheld for the same offence, notwithstanding that the offender had a record for alcohol-related offence.

[26] **R. v. Brady** 78 C.C.C. (3d) 134, which is an older case, 3 month custody was imposed. **R. v. Horon** 58 C.C.C. (3d) 418, (Alb. C.A.), the sentence was 2 months in custody imposed on appeal. This was a head-on collision and there was a record for alcohol-related offences, again an older case—1990. **R. v. McLaren** [1999] O.J. No. 2566, which is an impaired driving causing bodily harm and leaving the scene of an accident, a period of 8 months in custody for the impaired driving causing bodily harm was imposed. This gentleman hit two cyclists and

seriously injured them. In **R. v. Martin** [1996] N.S.J. No. 389 which counsel referred to earlier which I will not describe again, three years probation was imposed. **R. v. Buffett**, which is an older case in the Nova Scotia Court of Appeal - 6 months jail - this is prior to the Conditional Sentence regime. Again, a head-on collision. In **R. v. Whalen**, 56 C.C.C. (3d) 470 (B.C.C.A.) - 45 days in jail was imposed. The offender was an eighteen-year-old and fell asleep creating a head-on collision. **R. v. Cartier** 57 C.C.C. (3d) 569, again this is a 1990 decision of the Quebec Court of Appeal, a 90 day intermittent sentence was imposed.

[27] The most instructive case in my opinion is the **R. v. Cromwell** [2005] N.S.J. No. 428 which has been referred to by counsel and I will come back to this case later. In that case Justice Bateman chronicles a number of cases that were submitted on behalf of the defence which supported a conditional sentence and those cases were distinguished. In **Cromwell,** Mr. Manning has gone through the factual circumstances and I will not repeat that, but very briefly the offender lost control of her motor vehicle travelling on the 103 Highway, a controlled access highway here in the province. She fled the scene. There was significant injury and a Conditional Sentence was considered and rejected by the trial judge that was part of a joint recommendation. As indicated she pled guilty at the last minute after

nearly four years before the matter came on for trial. In that case the Court of Appeal upheld a period of four months in custody. She received another month with respect to another offence.

[28] The range of sentencing in my opinion, based on the authorities I just reviewed, does not exceed two years. It is not in my opinion a period of time in a federal institution. I would just refer briefly to the **R. v. MacLeod,** [2004] N.S.J. No. 58, which did impose a period of two years in custody in a federal institution, however that offender had a previous impaired driving causing death, had spent time in jail and had another offence, alcohol-related driving offence. That case really cannot be compared with the circumstances of this matter.

[29] In my opinion this offence does not warrant a penitentiary term. At the same time a period of probation would not be appropriate either. The sentencing range is such that the Court is required to consider a Conditional Sentence Order. Our Appeal Court decision in **Cromwell,** *supra***,** and the Supreme Court of Canada in **R. v. Proulx,** [2000] 1 S.C.R. 61**,** are the most instructive. In **Cromwell,** *supra***,** at

para. 63 Justice Bateman says as follows, after reviewing the various cases that were submitted to her she says:

> The common thread amongst these cases is that the conditional sentence can be a fit disposition for offenders with exemplary background where the offence is uncharacteristic and where there is virtually no continuing risk that the offender will re-offend.

She goes on and says that she was not persuaded by this in that particular case. She says later in the same paragraph,

> It was open to the counsel to craft a set of conditions with substantively more punitive, rehabilitative and restrictive.

[30] In order to properly consider a conditional sentence certain prerequisites must be met, namely that no minimum sentence applies; a penitentiary term is not required and the offender is not a risk to the safety of the community. In my opinion these prerequisites are met. I am satisfied given this young man's background, his family support, the remorse that he has demonstrated and the

insight I believe that he has into his conduct that there is little, if any, risk that he would repeat this type of conduct.

[31] The issue is simply whether a conditional sentence meets the principles and purposes of sentences which is the prime criteria. Is it capable of conveying the required denunciation and effecting sufficient specific and general deterrence? Chief Justice Lamer, in **Proulx**, *supra*, in the Supreme Court of Canada, has said that conditional sentences can provide significant denunciation and deterrence albeit not to the same extent that a jail sentence would.

[32] I return to Justice Bateman's comments in **Cromwell**., *supra*. There she said that a conditional sentence can be a fit sentence if the offender has an exemplary background, that the conduct is uncharacteristic and that there are no risks to re-offend, provided the conditional sentence is sufficiently punitive. Here the offender has no criminal record. He has supportive parents. He graduated from high school and had good marks, was active in sports in elementary school and was not a disciplinary problem at school. He was enrolled in an apprentice program up until the time of the car crash. He is now gainfully employed. In my opinion he does not

have to be enrolled in a professional school, or be “the all-Canadian boy” to be considered to have an exemplary background. In my opinion he qualifies, if you will, for that description in the context here and as referenced by Justice Bateman. The offence appears to be uncharacteristic for him based on the comments of his girlfriend and his otherwise position in the community and as I stated earlier there is virtually no risk given the factors that I considered earlier, that he would re-offend.

[33] A conditional sentence is a term of imprisonment. It is not a lenient sentence. It carries a very high stigma. In my opinion, in these circumstances it carries the required denunciation and deterrence. There is considerable amount of pejorative comments made about conditional sentences in the media and in the press. Obviously a jail sentence carries much more deterrence and denunciation than a conditional sentence but this is not to say that conditional sentences are not punitive. The Supreme Court of Canada has said that and Parliament has said that. As well, it is a term of imprisonment and to suggest that it is otherwise would be offensive, in my opinion, to the intentions of Parliament.

[34] When I saw these photographs today and read the Victim Impact Statement and listened to the account of the accident it made a very significant impression on me. It reinforced the need to impose a sentence which denounced and generally deterred this kind of conduct, so I certainly share the various pejorative comments that can be attributed to this kind of conduct —those repeated by our Appeal Court on various occasions.

[35] In my opinion considering this offender and considering these circumstances, I am satisfied that a period of conditional sentence meets the principles and purposes of sentencing; meets the objectives of deterrence and denunciation for the reasons I just stated. Accordingly I am going to impose a period of eighteen months in conditional sentence, twelve of which will be served under house arrest, followed by a period of probation of six months, which will total a two year sentence.

[36] The terms and conditions of the conditional sentence are the mandatory ones set out in the **Criminal Code** including, and together with the optional provisions of complete abstention from alcohol and drugs, weapons and the requirement to

take assessments, all of this will be in the “usual” wording, will be reduced to writing and explained to the offender. Furthermore after the house arrest there will be a curfew, which I will explain. The offender is not to be in any establishment whose purpose is the sale or distribution of alcohol and he is to perform 100 hours of Community Service at the expiration of the house arrest period. He will be confined to his residence, particulars to be supplied, and that is to be at the home of his mother, as I understand it, and his brother and he is to be available for telephone calls or personal visits by his supervisor. The usual provisions with respect to absences will apply with respect to employment or education, health related, rehabilitative assessments and medical emergencies. I am, however, providing that he be in his residence each evening at 7 p.m. I am mindful that he works with his father and simply stated I do not want him out past the stated time, notwithstanding he may have an opportunity to be employed. My purpose is to make the order as punitive as possible to reflect the need for denunciation and deterrence which I explained earlier. Furthermore he will be allowed at specific times to attend religious occasions, but only with the approval of his supervisor and that is simply to address the upcoming festive season.

[37] Finally, if he is travelling outside his home in accordance with these provisions he is to do it via the most direct route. He is not to have alcohol in his residence. This may have some effect on the other individuals in the residence but that is a burden that they are going to have to bear and again it is intended to be punitive and protective of the community. He is also restricted on the number of visitors that he can have at his home and that the availability of weapons and ammunition are also restricted from his home, and I appreciate that this may have a negative effect on the other members of the household but again that is the burden that they have to bear for housing him during this period of time.

[38] This will all be followed by a period of six months of probation and the terms and conditions will simply be to keep the peace and be of good behaviour; report and to abstain from the use of alcohol and to seek and maintain his employment.

[39] Finally I am going to provide specifically that he not drive an automobile during his period of conditional sentence, obviously he will be suspended, but to better reinforce the repercussions if he were to drive.

[40] Mr. Davison, you came very close to going to jail today, sir. I hope you appreciate that. I will tell you as well that the same case that I spoke about in the Supreme Court of Canada also says that if you breach your conditional sentence the presumption is you spend the rest of the time in jail. I am sure that you do not want to go to jail for eighteen months, and these conditions begin immediately as soon as you sign this order. I can guarantee you this is not a lenient sentence. It keeps you from going into an institution and having the indignity of being lodged in an institution, which I expect is not a very pleasant experience, but other than that it is restrictive of your liberty. You can go to jail now if you breach any conditions on the preponderance of probabilities, if you will, you do not have the same liberty as other members of the community, do you understand that? You are paying, in my opinion, a heavy price for your conduct, which quite frankly you deserve given all of what has happened. You should do this and you should do it eagerly and get this behind you. Pay your debt to society. I accept that you have shown remorse which you indicated through your counsel and hopefully this will put an end to all this after the two years of your restrictions on your liberty, sir. You stay with the Sheriff until all the paperwork is completed. You are not allowed to leave until you do that. Once you have done that you will be free to go.

[41] I have considered the driving prohibition. In my opinion a period of five years is appropriate. I do that for the following reason: your youthful age, which obviously contributed to this. It is mitigating and aggravating to some extent. Also you will be subject to a DNA order which in my opinion is appropriate in this case as well, and you will be required to supply that.

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A. Tufts, J.P.C.