IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Hamilton, 2008 NSSC 217

Date: 2008/06/19
Docket: C.R. No. SY 288150
Registry: Yarmouth

Between:

Her Majesty the Queen

v.

Steven Richard Hamilton

DECISION

Judge:	The Honourable Justice A. David MacAdam
Oral Decision:	June 19, 2008
Written Decision:	July 7, 2008
Counsel:	Michelle Christenson, for the Crown Phillip Star, for the Defendant

By the Court:

[1] This is the matter of sentencing in Her Majesty the Queen and Steven Richard Hamilton. Mr. Hamilton pled guilty to operating a motor vehicle and causing bodily harm while his ability to drive was impaired by alcohol, contrary to Section 255(2) of the **Criminal Code.**

[2] On November 8, 2006, in the early evening, Mr. Hamilton was driving his truck on Vancouver Street in the Town of Yarmouth, County of Yarmouth, when it crossed over the centre line and struck three vehicles travelling in the opposite direction. The passenger in the third vehicle struck by Mr. Hamilton's vehicle was then seven months pregnant, expecting twins. After being transported to the Yarmouth Regional Hospital for treatment, she was subsequently airlifted by helicopter to the IWK Hospital in Halifax for further medical treatment and to stop her premature labour. Eventually, the children were born. The victim indicated to the Court after reading her Victim Impact Statement, that the two young children are fine.

[3] The occupants of the vehicles struck by Mr. Hamilton testified to smelling alcohol on him. The breath sample taken, followed by the second breath sample, showed readings of .200 mgs of alcohol in 100 mls of blood. Since the readings were taken approximately two hours after the time of the accidents, it was estimated that at the time of the accidents, his readings would have been in the range of .221 - .242 mgs.

[4] Mr. Hamilton, by his counsel, acknowledged the Statement of Facts outlined in crown counsel's written submission on the sentencing, which included the evidence of damage to the vehicles as well as the treatment required to the pregnant passenger in the third vehicle that was struck.

[5] In assessing the appropriate sentence, and notwithstanding the submissions by counsel as to the appropriate sentence included a joint recommendation, I have considered the purposes and objectives of sentencing as codified in Sections 718, 718.1, and 718.2 of the **Criminal Code**. The **Code** sections describe a number of sentencing objectives, namely, denunciation, deterrence (both specific and general), separation of offenders from society where necessary, rehabilitation,

reparation to victims in the community, and the promotion of a sense of responsibility in offenders.

[6] The disturbing prevalence of offences involving motor vehicles driven by persons impaired by alcohol has prompted the Courts in Nova Scotia, as well as elsewhere, to emphasize the general deterrence objective and to reflect it in sentencing for such offences. In *R. v. Buffett*, [1989] N.S.J. No. 324 (C.A.); 93 N.S.R. (2d) 324, Justice Matthews, on behalf of the Court, referenced the observation of Chief Justice MacKinnon in *R. v. McVeigh* (1985), 22 C.C.C. (3d) (145) (Ont. C. A.) at p. 150:

> Members of the public when they exercise their lawful right to use the highways of this province should not live in the fear that they may meet with a driver whose faculties are impaired by alcohol. It is true that many of those convicted of these crimes have never been convicted of other crimes and have good work and family records. It can be said on behalf of all such people that a light sentence would be in their best interests and be the most effective form of rehabilitation. However, it is obvious that such an approach has not gone any length towards solving the problem. In my opinion, these are the very ones who could be deterred by the prospect of a substantial sentence for drinking and driving if caught. General deterrence in these cases should be the predominant concern, and such deterrence is not realized by overemphasizing that individual deterrence is seldom needed once tragedy has resulted from driving.

[7] After noting the accused had, “made the judgment call” to operate his motor vehicle after consuming alcohol, Justice Matthews then continued:

> With this type of case the primary factor in sentencing must be general deterrence. Drinking and driving is a serious problem. Such conduct all too often results in disaster. It is essential that the sentencing process play its role in protecting the public from conduct such as the respondent has here displayed.

[8] Justice Bateman, in *R. v. Cromwell*, [2005] N.S.J. No. 428 (C.A.) at paras. 27, 28, and 29, observed:

> [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. (R). 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; [2004] 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 (R). (2000), 139 O.A.C. 138; 149 C.C.C. (3d) 489 (C.A.); R. v. Proulx (J.K.D.), [2000] 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 Biancfiore, 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.
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> [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 ...

[9] Clearly offences involving the operation of a motor vehicle, where a driver's ability is impaired by alcohol, necessitates the need for sentences to give recognition to both general deterrence and denunciation. In her submission crown counsel noted a number of aggravating and mitigating factors, to which counsel for Mr. Hamilton indicated his concurrence. Crown noted as aggravating factors:

1. The motor vehicle accident resulted in damage to three separate motor vehicles and injuries to individuals other than (the pregnant victim in the third vehicle struck by Mr. Hamilton).

2. The blood alcohol level of the accused at the time of the accident was more than double the legal limit.

3. The type of offence committed in (sic. is) one wherein general deterrence is the paramount factor.

Noted as mitigating factors:

1. That he was cooperative with the police and lodged without incident.

2. That he had no Criminal Record.

3. That he entered a guilty plea without the necessity of a trial saving the victim the necessity of having to testify.

[10] The Pre-sentence Report was characterized by Mr. Hamilton's counsel as, "glowing" and indeed it was positive, noting the offence was, "out of character" for the offender. Mr. Hamilton was described as being 31 years of age with no prior involvement with the criminal justice system. The Report indicates his parents are supportive, with his mother saying that not only was this out of character for her son, but she was also of the opinion it would never happen again. He is soon to be married and his fiancee also described this offence as being out of character, expressing her opinion he would not re-offend.

[11] The Report indicates he has been employed for five years in the lobster fishing industry and was described by his employer as, "very dependable and a hard worker." The Report adds that he completed a D.W.I. Education Program in

2007 and has visited with a clinical therapist at Addiction Services on three occasions. The clinical therapist confirmed the meetings and said he was assessed as being at, “a low risk to re-offend” and, therefore, he was discharged in May 2007.

[12] He was described as polite, cooperative and able to answer all questions in a forthright manner when interviewed by the probation officer. He was reported as accepting responsibility for his actions, stating, “he felt embarrassed and terrible about the whole thing.” The Report concludes:

> The Court may wish to consider, should there be some form of community based supervision, the following conditions: abstain from the consumption of alcohol and non-medically prescribed drugs, and assessment and counselling for substance abuse.

[13] The pregnant passenger in the third vehicle filed a Victim Impact Statement. She read it to the Court, following which she acknowledged that the two young boys appear to be fine, notwithstanding her ordeal, which commenced with the accident and continuing with her transport to the Yarmouth Regional Hospital and then the airlifting to the IWK Hospital in Halifax and the eventual birth of the twins.

[14] Crown and defence have jointly recommended, as an appropriate sentence in the circumstances, a six month custodial sentence to be served in the community, under house arrest, with a number of the usual exceptions, together with a one year period of probation and a two year driving prohibition.

[15] Following submissions, the Court noted the requirement for a Victim Fine Surcharge and raised the issue of community service as part of the sentence to be imposed. Counsel agreed to adjust the joint recommendation to include a requirement for 25 hours of community service, to be completed within 11 months from the commencement of the period of probation. The crown also sought restitution for expenses incurred by the victim and her family, primarily to travel to Halifax. Defence counsel initially questioned whether these expenses would be, to some extent, covered by insurance but subsequently agreed there would be restitution, reserving the right, on behalf of Mr. Hamilton, to determine whether some of these expenses could be reimbursed from any insurance. It was agreed that the restitution would be made within three months from the date of sentencing.

[16] Crown, noting Section 255(2) provides for a maximum of ten years imprisonment, continued by observing:

> It would appear, based upon a review of the case law that absent exceptional circumstances, even first time offenders, convicted of this offence can expect a jail sentence. The length of that sentence is often dictated by the extend (sic. extent) of injury and damage caused as a result of the impaired driver. Based upon a review of the Pre-Sentence Report, the facts involved in the case at bar, a review of various cases decided within Nova Scotia Crown and Defence have reached a joint recommendation for Your Lordship's consideration.

[17] Both crown and defence counsel provided the Court with a number of cases involving similar offences in which periods of custodial sentence have been ordered to be served in the community under what are often called, "house arrest." Both counsel referred to the decision of Judge Alan T. Tufts in *R. v. Davison*, [2006] N.S.J. No. 569 where the accused had driven at night without lights, crossed the centre line of the highway and collided head on with oncoming traffic. The circumstances, to some extent, mirror the present. The accused was 21 years of age, with no prior criminal record and the offence was also described as, "out of character" for the accused. He showed remorse and apologized to his victim and as of the time of sentencing the Victim's Impact Statement indicated she continued to suffer from the injuries caused by the accident. The Court imposed an 18 month

conditional sentence, with 12 months being served, “under house arrest condition.” The Court also imposed a five year driving prohibition.

[18] In *R. v. Cromwell, supra*, the sentencing judge rejected the joint submission for a conditional sentence as not representing adequate deterrence, denunciation, and protection of the public. The sentence was upheld by the Court of Appeal. The crown, however, acknowledged that the factors which contributed towards the Court rejecting the conditional sentence order in *R. v. Cromwell, supra*, did not exist in the present circumstance.

[19] The crown referenced *R. v. Jesso*, [2006] N.S.J. No. 267 where an accused pled guilty to having care and control of a motor vehicle and causing bodily harm while he was impaired. A female companion suffered injury when, following an argument, he accelerated to leave the scene but forgot his vehicle was in reverse and ran over her. He then put his vehicle in forward and ran over her again. She suffered injuries, and underwent a number of orthopaedic surgeries as a consequence. The accused was 26 years of age with no criminal record. The Court imposed a sentence of 20 months conditional sentence, followed by a two year driving prohibition.

[20] Defence counsel referred to *R. v. Martin,* [1996] N.S.J. No. 389 where the Nova Scotia Court of Appeal dismissed the crown appeal from a suspended sentence of three years, with a number of conditions, when the accused went on a drunken spree with three of his friends. He drove a truck while unlicenced and hit a power pole seriously injuring passengers in his vehicle. The accused pled guilty to two counts of impaired driving causing bodily harm. The Court noted the aggravating factors included the excessive consumption of alcohol and the driving without a licence. There were, as acknowledged by the Court, several mitigating factors, such as the guilty plea, genuine remorse, a dramatic change in lifestyle, voluntary detoxification, and a genuine motivation to stop consuming alcohol. The Court apparently found the sentencing Judge had been genuinely satisfied that the accused could be rehabilitated and dismissed the crown's appeal.

[21] In *R. v. Buffett, supra,* where the accused had been involved in a head-on collision in which the other driver received extensive injuries, and suffered permanent nerve damage to part of her face, the sentencing judge had imposed a sentence of two years probation, three hundred hours of community service and a fine of $1,500.00 on a conviction for impaired driving contrary to Section 255(2)

of the **Criminal Code**. The accused was also prohibited from owning and operating a motor vehicle for three years. The crown argued that the sentence failed to adequately reflect the elements of deterrence in view of the nature of the offence and the circumstances. The appeal was allowed and the sentencing increased to six months in jail, the fine returned and the probation revoked. The Court found the sentence was clearly and manifestly inadequate.

[22] In *R. v. Davison*, *supra*, Judge Tuffs reviewed a number of Nova Scotia cases involving sentences for impaired driving causing bodily harm in which courts imposed conditional sentences of varying lengths and with various conditions attached thereto. At para. 28 he concluded:

> [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.

[23] Judge Tuffs after deciding the range of sentencing did not exceed two years and, therefore, permitted the imposition of a conditional sentence, then commented that in his opinion the offence did not warrant a penitentiary term, adding on the other hand, that probation would not be appropriate either. In view of his conclusion as to the appropriate sentencing range, he noted the Court was required to consider a conditional sentence Order. He then referenced the comments of Justice Bateman in *R. v. Cromwell, supra*, at para. 63:

> 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.

[24] Judge Tuffs observed that Justice Bateman had not been persuaded by the circumstances existing in *R. v. Cromwell, supra*. He then noted that in the same paragraph she added:

> It was open to counsel to craft a set of conditions which were substantially more punitive, rehabilitative and restrictive, thus addressing the need for deterrence, denunciation and protection of the community.

[25] Judge Tuffs, at paras. 30 - 31, continued:

> [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.
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> [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.

[26] Judge Tuffs went on to review the circumstances in determining that a conditional sentence would be appropriate in the case of Mr. Davison, the accused. Many of the circumstances which convinced Judge Tuffs that a conditional sentence was appropriate, exist in the present case of Mr. Hamilton, namely, that the offender had no criminal record, had supportive parents and fiancee, had graduated from high school and was gainfully employed. He also noted that the offence was uncharacteristic for him based on the comments of his girlfriend and there was "virtually no risk . . . that he would re-offend." He decided a conditional sentence was appropriate in that it was not a lenient sentence and bore with it a "very high stigma," as well as the required denunciation and deterrence.

[27] Similarly, for many of the same reasons outlined by Judge Tuffs, I am satisfied the joint recommendation, with the additional provision for community service, is appropriate in the present circumstances. Therefore, I impose a six months conditional sentence to be served in the community under, “house arrest” followed by a one year probation and a two year driving suspension. In addition, there will be 25 hours of community service, the nature and content of which is to be determined by his probation officer, during the first 11 months of his probation. There should be restitution, to be made within three months of the date of sentencing. There will also be a Victim Fine Surcharge, as required under the **Criminal Code**.

[28] With respect to the conditional sentence there shall be, in addition to the mandatory conditions, the following additional conditions:

> (a) Remain at his residence located at a place approved by his supervisor, at all times, and be available for personal visits and/or telephone calls from his supervisor or their delegate at a number approved by his supervisor, except that he is permitted to:
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> (I) continue attendance at his place of employment;

(II) attend at any health-related appointments as may be scheduled;

(III) attend at such rehabilitative assessment, counselling, or treatment as is ordered by the Court or approved by his supervisor;

(IV) respond to any emergency situations that require him to be absent, and thereafter, to return to his residence as soon as is practicable and notify his supervisor of his absence without delay;

(V) he is permitted to be absent one day per week for four hours as agreed upon by his supervisor to attend to personal business and obtain the necessities of life.

*Travel to and from such locations is to be via the most direct route.

** He is to permit access to his residence by his supervisor or their delegate to monitor his compliance with this conditional sentence order and to be subject to electronic supervision as directed by the probation officer.

(b) Abstain absolutely from the consumption and possession of alcohol.

(c) Abstain from the possession of all non-prescription narcotics or drugs as prohibited by the Controlled Drug and Substance Act.

(d) Attend for substance abuse assessment, counselling and treatment as directed by the probation officer.

(e) Participate in electronic supervision including voice verification if directed to do so by the supervisor/probation officer.

(f) Make restitution in the amount of $1,045.84 to be paid to the office of the Clerk of the Court. The full sum to be paid by September 18, 2008.

[29] In respect to the Probation Order, there shall be the mandatory conditions required under the **Criminal Code** as well as optional conditions (b), (c) and (d) of the conditional sentence, adjusted as may need be required.

J.