SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Morine, 2011 NSSC 46

Date: 20110125
Docket: CR No. 326294
Registry: Digby

Between:

Her Majesty the Queen

v.

Christian Ralph Morine

SENTENCING DECISION

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	January 25, 2011, in Digby, Nova Scotia
Written Decision:	February 3, 2011 [based on January 25, 2011 oral decision]
Counsel:	Lloyd Lombard for the Crown Darren MacLeod for the Defendant

By the Court:

INTRODUCTION

[1] Mr. Morine has pled guilty to four indictable *Criminal Code* offences arising out of his crashing of his motor vehicle December 7, 2008.

[2] Firstly, he pled guilty that at or near South Farmington, County of Annapolis, Province of Nova Scotia, he did (and I'm paraphrasing here), without reasonable excuse, fail to comply with a demand made to him by a peace officer to provide samples of his breath, as in the opinion of a qualified technician were necessary to enable a proper analysis to be made to determine what concentration, if any, of alcohol there was in his blood, contrary to s. 254(5) of the *Criminal Code.*

[3] This carries a maximum of five years imprisonment under s. 255(1)(b).

[4] Secondly, he pled guilty to an offence under s. 255(2) of the *Criminal Code*, which carries a maximum term of imprisonment of ten years, that being that he did on that same date and place, have care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or a drug and thereby caused [bodily] harm to Robert Wayne Milbury.

[5] Thirdly, he pled guilty to the offence under s. 255(3) of the *Criminal Code*, which has a maximum of life imprisonment and which was for the offence of having care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or a drug and thereby caused the death of Elizabeth Burden Morrisette.

[6] And lastly, at the same time and place, he did assault Constable Wetzel, a peace officer engaged in the execution of his duty contrary to s. 270(2)(a) of the *Criminal Code*, for which there is a five year maximum period of imprisonment, when proceeding by indictment.

THE SPECTRUM OF MORAL BLAMEWORTHINESS

[7] Mr. Morine is here today for his sentencing in relation to those offences. These are all serious offences, as reflected by their respective maximum possible sentences. Causing the death of another person is especially serious.

[8] In relation to an offence which has a life imprisonment maximum, one is pressed to consider - when is the maximum sentence appropriate? In **R. v. LM** 2008 SCC 31 [2008] 2 SCR 163, the Supreme Court of Canada answered this question. At para. 18, the Court stated:

> This individualized sentencing process is part of a system in which Parliament has established a very broad range of sentences that can in some cases extend from a suspended sentence to life imprisonment. The *Criminal Code* provides for a maximum sentence for each offence. However, it seems that the maximum sentence is not always imposed where it could or should be, as judges are influenced by an idea or viewpoint to the effect that maximum sentences should be reserved for the worst cases involving the worst circumstances and the worst criminals. As can be seen in the case at bar, the influence of this notion is such that it sometimes leads judges to write horror stories that are always worse than the cases before them. As a result, maximum sentences become almost theoretical: . . ..

And, at para. 22, the Court continued:

> Thus, the maximum sentence cannot be reserved for the abstract case of the worst crime committed in the worst circumstances. The trial judge's decision will continue to be dictated by the fundamental principle that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1 of the *Cr. C.*). Proportionality will be achieved by means of a "complicated calculus" whose elements the trier of fact understands better than anyone. The trial judge's position in the sentencing process justifies the respect owed to the reasoned exercise of his or her discretion and a deferential approach that appellate courts should take in such matters.

[9] Now it's important to keep in mind as well the legal context, if you will, and that relates to the nature of the offender, Mr. Morine, and the offences committed.

The sentencing of any person under the *Criminal Court of Canada* requires in its broadest sense a focus on the circumstances of the offences and the circumstances of the offender. These aspects are the focus because the *Criminal Code*, the criminal justice system, has as its roots regarding both responsibility for criminal offences and the consequences therefor, moral blameworthiness or culpability.

[10] Now, one can imagine a spectrum of moral blameworthiness insofar as the responsibility for criminal actions are concerned, spanning - on the one end, those persons unfit to be tried; then leading into children less than 12 years of age who are unable to be tried under the *Criminal Code*; next, adult persons, yet not criminally responsible, who are dealt with separately under the *Criminal Code*. Then we have children between the ages of 12 and 18 years, who are considered to have a diminished moral culpability or blameworthiness, based on their immaturity-heightened vulnerability. And lastly, we have persons 18 years or older, who are presumed to be in a fit state of mind and able to distinguish right from wrong and, thus, are responsible as adults for the consequences of the offences they commit.

[11] This summary is taken in part from the Supreme Court of Canada case, **R. v. D.B.** 2008 SCC 25, at paras. 41 and 106.

[12] What is moral blameworthiness? In **R. v. Ruzic** [2001] 1 SCR 687, Justice LeBel for the Supreme Court of Canada, in discussing the defence of duress (not relevant in this case), framed the discussion as follows:

> As we will see below, this Court has recognized on a number of occasions that moral blameworthiness is an essential component of criminal liability which is protected under s.7 [of the *Charter of Rights and Freedoms*] as a "principle of fundamental justice". [at para. 32]

He continued:

> What underpins both these conceptions of voluntariness is the critical importance of autonomy in the attribution of criminal liability, [and I'm omitting the citations]. The treatment of criminal offenders as rational, autonomous and choosing agents is a fundamental organizing principle of our criminal law. Its importance is reflected not only in the requirement that an act must be voluntary, but also in the condition that a wrongful act must be intentional to ground a conviction. Like voluntariness, the requirement of a guilty mind is rooted in respect for individual autonomy and free will and acknowledges the importance of those values to a free and democratic society: [Martineau, at pp. 645 to 46]. Criminal liability also depends on the capacity to choose - the ability to reason right from wrong. As McLachlin J. observed in **Chaulk** . . . at p. 1396, in the context of the insanity provisions of the *Criminal Code*, this assumption of the rationality and autonomy of human beings forms part of the essential premises of Canadian criminal law:
>
> > At the heart of our criminal law system is the cardinal assumption that human beings are rational and autonomous: . . . This is the fundamental condition upon which criminal responsibility reposes. Individuals have the capacity to reason right from wrong, and thus choose between right and wrong. Ferguson continues (at p. 140):

> It is these dual capacities - reason and choice - which give moral justification to imposing criminal responsibility and punishment on offenders. If a person can reason right from wrong and has the ability to choose right or wrong, then attribution or responsibility and punishment is morally justified or deserved when that person consciously chooses wrong.

[13] And then there's a relevant citation here from Justice Sopinka, in dissent, in the **R. v. Daviault** [1994] 3 SCR 63, commenting on the Court's consensus that:

> The first requirement of the principles of fundamental justice is that a blameworthy or culpable state of mind be an essential element of every criminal offence that is punishable by imprisonment. This principle reflects the fact that our criminal justice system refuses to condone the punishment of the morally innocent.
> . . .
>
> The second requirement of the principles of fundamental justice is that punishment must be proportionate to the moral blameworthiness of the offender.
> . . .

That's at paras. 104 and 106.

[14] In summary, our criminal justice system assigns responsibility for criminal actions on a proportionate basis. The greater the capacity of the person for reason and choice, the greater the responsibility. Moreover, since the punishments must also be

proportionate to the gravity of the offence and the degree of responsibility of the offender, according to s. 718.1 of the *Criminal Code*, the penalty for criminal actions is also determined upon a proportionate basis.

[15] It has also been said that “mens rea”, that is, guilty mind:

> . . . connotes volition on the part of the accused, that is to say, given an awareness that certain consequences will follow (or will probably follow) if he acts, an accused who chooses to act when he has the alternative of not acting "intends" those consequences in the sense of choosing to bring them about . . .. Mewett and Manning, Criminal Law, (Second Edition, 1985 at p. 113)

[16] This idea of a spectrum also relates to the **state of mind** of an offender or in the nature of the offence. For example, one can see the spectrum of deliberation, if you will, or thought, and the *mens rea* underlying it, as including ranges running from **criminal negligence** under ss. 219 and 221 of the *Criminal Code*, which requires that one, in doing anything or omitting to do anything one has a legal duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

[17] Next, we might have what’s called **penal negligence**, such as unlawful act manslaughter, where there is a deliberate intention to do the underlying act and, on top

of that, there is objective foreseeability of the consequences thereof to others that are neither transient nor trivial and which do, in fact, cause death.

[18] And we also have offences where **actual intention** or **deemed actual intention** to do a criminal act are involved, such as those involving wilful blindness or recklessness which equate, if you will, or are deemed to be the actual intention to do prohibited acts.

[19] We can also consider a spectrum of deliberation as to **consequences**. Most criminal offences are what are traditionally called general intention offences, where it is sufficient to be found guilty if you intend to do the prohibited act and then you are responsible for whatever consequences are caused thereby. An example of this would be dangerous driving causing death - **R. v. Beatty** [2008] 1 SCR 49.

[20] There are a limited number, but still some criminal offences which are traditionally called specific intent offences, and those are ones like murder, where not only do you intend to do the underlying act, but you intend the consequences as well, which is the intention to kill, in that case.

[21] This context, although it seems abstract, does allow the Court to see where an offender such as Mr. Morine sits on the spectrum of moral blameworthiness generally and how his responsibility individually should be adjusted for the circumstances of the offence and his own circumstances, to result in a specific moral blameworthiness, if you will, for him, in these circumstances.

[22] To me, the degree of offender responsibility and the gravity of the offence are at the core of what is moral blameworthiness. To this I add the specific circumstances of the offence and the offender before applying the relevant law to determine an appropriate sentence.

[23] Now, with that background, I'm going to canvass briefly the principles that are applicable to this sentencing from the *Criminal Code*, and they are applicable to each of the four offences.

SENTENCING PRINCIPLES

[24] We have s. 718 of the *Criminal Code*, and it reads:

> 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:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[25] Next, we have s. 718.1. It reads:

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

And 718.2, Other Sentencing Principles, reads:

> A court that imposes a sentence shall also 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,

[the listed deemed aggravating factors are not applicable to the case at Bar]

However, it does say,

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (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.

And lastly, 718.3 (4):

> The court or youth justice court that sentences an accused may direct that the terms of imprisonment that are imposed by the court or youth justice court or that result from the operation [and there are some unrelated sections here] shall be served consecutively, when
>
> (a) [and that's not applicable here];
>
> (b) [is not applicable here];

> (c) [is applicable] the accused is found guilty or convicted of more than one offence, and
>
> . . .
>
> (ii) terms of imprisonment for the respective offences are imposed;
>
> . . .

[26] So those are the principles directly from the *Criminal Code of Canada*.

[27] I might note, as the Crown pointed out in this case, that in **R. v. Adams**, 2010 NSCA 42, according to Justice Bateman for the Court, at paras. 21 to 28 and para. 30, there is a proper approach to sentencing for multiple offences. Justice Bateman mentions it at para. 23:

> In sentencing multiple offences, this Court has almost without exception endorsed an approach to the totality principle consistent with the methodology set out in C.A.M. . . .

She goes on to say:

> The judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, concurrent. The judge then takes a final look at the aggregate sentence. Only if concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced.

And she goes on to say:

> This Court has addressed and rejected any approach that would suggest that, when sentenced for a collection of offences, the aggregate sentence may not exceed the "normal level" for the most serious of the offences.

[28] I do note as well that specifically in relation to the spitting on the officer offence, s. 270 (2)(a), s. 718.02 is also applicable. And that section reads:

> When a court imposes a sentence for an offence under subsection 270(1) [then it goes on to other sections] the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

[29] Now having said all that, I certainly acknowledge that Mr. Morine is a relatively youthful first offender and that I must carefully consider his rehabilitative prospects as a result. On the other hand, I also consider the impact on the victims here, particularly Elizabeth Burden Morrisette and her family, and Robert Wayne Milbury.

CIRCUMSTANCES OF THE OFFENCES

[30] What are the facts of these offences?

[31] Mr. Morine has pled guilty and thereby confirms his admission to criminal responsibility insofar as only the essential elements of each criminal offence herein

are concerned. To supplement these bare admissions, I have received, pursuant to s. 726.1 of the *Criminal Code*, the Crown's Brief, which contained its asserted facts, and a Defence Brief, which contained its asserted facts, in which the Defence counsel observes at p. 2 that there was going to be an issue regarding the speed.

[32] Certainly, to the extent that there is any disagreement, the Crown is always obliged to prove beyond a reasonable doubt any aggravating factors. Otherwise, the general rule is, the party seeking to rely on other relevant facts has the burden to prove them on a balance of probabilities, according to s. 725 of the *Criminal Code*.

[33] I heard the submissions and received the exhibits regarding the speed of Mr. Morine's motor vehicle and am in a position to conclude, as a result of the agreements by counsel, that Mr. Morine's car speed was no less than 100 kilometers per hour in a 70 kilometer per hour zone, and in face of a warning sign of a sharp turn requiring no more than 40 kilometers an hour to safely make the turn, according to the sign. The photos in Exhibit #1 clearly show the path of the car though the crash actually occurred at night.

[34] The following facts emerging from the agreements by counsel are in summary, and I'm reading the, if you will, Crown version of these, slightly modified.

[35] On December 7, 2008, Mr. Christian Morine was operating a motor vehicle while impaired and his impaired driving caused his car to crash where his front passenger, Robert Milbury, suffered bodily harm and Robert Milbury's financée, Elizabeth Morrisette, was killed. Subsequently the Defendant assaulted a peace officer and refused to provide a sample of his breath for the purpose of determining the amount of any, if any, of alcohol in his body.

[36] That is, Mr. Morine and Mr. Milbury (date of birth April 7, 1986), and Ms. Morrisette (date of birth June 13, 1989), were at a friend's, Nelson's. From there, all three went to Garnet Penny's where Morine and Mr. Penny were drinking Moosehead Dry and from a two-liter pop bottle of homemade apple cider. From there, all three went with a friend Lisa to the liquor store in Kingston where Lisa purchased a bottle of White Shock and a 12-pack of Moosehead Dry. At this point, Mr. Morine was driving his green Neon. Lisa was in the front seat, the passenger seat, and Mr. Milbury and Morrisette were in the rear. They all drove to Lisa and Gerard Gouchie's home to help them move. While at Gouchie's, Mr. Morine drank about eight beers

out of the 12-pack that had just been purchased along with some vodka from the pint he was carrying in his pocket. When asked how much he had to drink during that night, Mr. Milbury had told police regarding Morine, "about 13 to 14 beers, vodka, White Shock, and homemade apple cider".

[37] Mr. Milbury testified at the Preliminary Inquiry that the apple cider was mixed with Captain Morgan Spiced Rum. When Morine, Milbury, and Morrisette left Gouchie's, Milbury attempted to get Morine to let him drive. However, Morine was insistent upon driving. Milbury told police that Morine had only stopped drinking just two minutes before leaving the house. Milbury asked Morine if he could drive, and Morine told Milbury that he was fine. Milbury told police that he knew Morine was "lying through his teeth" but that he and Morrisette couldn't stay at Gouchie's because they didn't have the room, so they had little choice but to go with Morine.

[38] At approximately 12:15 a.m., Mr. Morine got behind the wheel of the vehicle with Mr. Milbury seated in the front seat and Ms. Morrisette in the back seat. Both Milbury and Morrisette told Mr. Morine to slow down between the time they left Gouchie's and the time of the crash.

[39] Mr. Morine was driving his car, according to the admissions, at at least 100 kilometers an hour just before the crash. Mr. Morine was unable to maneuver a turn in the road, although he did brake a bit, which is shown by the skid marks; yet the vehicle went over the end of the guardrail onto the other side of the road, down an embankment where the vehicle went into the river. Mr. Morine and Milbury were successful in exiting the motor vehicle.

[40] The police accident reconstructionist believes, on all the evidence available, that Ms. Morrisette was likely thrown from the back seat through the back window. Her body was later located by Valley Search and Rescue on May 30, 2009, beside the river bed behind Middleton's Soldiers Memorial Hospital, approximately two miles downstream from the accident scene.

[41] It should be noted that a significant amount of resources were used in organizing a number of searches where hundreds of manhours were used to search the river beds and areas adjacent to the river before Ms. Morrisette's body was eventually found.

[42] There are references to Mr. Milbury's injuries and I'll get to those later - notably a broken nose and gashes on the nose.

[43] Regarding the offences of refusal of the breathalyzer and the assault of the peace officer -- after coming out of the water, Mr. Morine fled the scene of the accident. It is apparent that he did not make a conscious effort to look for Ms. Morrisette or call immediately for help. Mr. Milbury went to his nearby residence at 14 Todd Branch Road and phoned for assistance. Constable Wetzel was advised of the call shortly after arriving at the scene of the accident.

[44] When Constable Pyne attended 14 Todd Branch Road and spoke with Mr. Milbury. Milbury advised police that Morine had been driving while impaired, Constable Pyne repeated this information "over the air" when Constable Wetzel saw somebody walking on the other side of the river bank. Constable Wetzel left towards 14 Todd Branch Road and observed Mr. Milbury walking towards the residence. He told Milbury to return and both proceeded towards the residence.

[45] When Constable Wetzel arrived at that location, Mr. Morine was on the front step, where he was subsequently arrested. Mr. Morine was extremely uncooperative,

yelling at Constable Wetzel, "Fuck you", repeatedly, and "Fuck you, little bitch", while Constable Wetzel was attempting to read Morine his Charter of Rights, police caution, and breath demand. Constable Wetzel's Supplementary Police Report explains the facts arising from the arrest and explains the events which occurred at about 2:06 a.m.: "Constable Wetzel again explained to Chris in layman's terms that he had been arrested, his Charter of Rights, and the breath demand", to which Chris responded and stated, "No, fuck you", and spat in Constable Wetzel's face. Constable Wetzel could feel Chris' spit hit his face as it was a very massive amount, if you will, a noticeable amount, after Mr. Morine, in fact, made an effort to retrieve, if you will, what's referred to here as "heavy snot".

[46] Constable Wetzel stated to Chris he could not believe that he spit in his face and slammed the police cruiser door.

[47] Constable Wetzel's Supplementary Occurrence Report continues at 2:15 a.m. when they arrived at the Kingston R.C.M.P. detachment and states: "While Constable Wetzel was speaking with Constable Marin, he could hear Chris snort snot from his sinus into his mouth and throat. Constable Wetzel advised Chris he would not open the police car door if he was going to spit at him again. Mr. Morine flipped out and

started to kick the window of the police car". And later, when Chris was taken out of the vehicle, Chris again stated to Constable Wetzel, "Fuck you". Constable Wetzel again demanded Chris to exit the vehicle, to which he responded, "Fuck you. I'd spit in your face again if I had the chance."

[48] Before Chris Morine could get the chance to spit or kick further, Constable Wetzel pulled him out of the police car and forced him against the wall.

[49] And that is the summary of the circumstances from the Crown Brief.

[50] Mr. Morine did provide two statements to the police, December 7th and December 12th, 2008. He admitted that he was impaired and that his impairment caused the collision and Ms. Morrisette's death and Mr. Milbury's bodily harm.

[51] The medical records suggest that Mr. Milbury's injuries included two deep lacerations to his nose; stitches required; numerous abrasions; back pain; neck pain; and general aches.

[52] I note however, in spite of having provided the two statements to the police, Mr. Morine did not plead guilty until two years later on December 8, 2010, and after a Preliminary Inquiry was held March 23, 2010, and a re-election filed from judge and jury trial to judge alone, where "not guilty" pleas were entered on September 7, 2010. These facts are relevant to the timing of his expressed remorse as indicated by his late guilty plea.

THE CIRCUMSTANCES OF THE OFFENDER

[53] The Court ordered a Pre-Sentence Report pursuant to s. 722 of the *Criminal Code*. In Mr. Morine's Pre-Sentence Report, we find he lived in many different locations with many different people. He did have an unstable upbringing. He has struggled in the education system yet has completed numerous trade courses. He has been working and is considered a hard worker. He has limited contact with his mother and brother Josh Morine, although it appears that they are supportive.

[54] The Pre-Sentence Report notes that he drinks beer "once in a while" but that that is "nothing compared to his alcohol abuse at the time of the offences. He further went on to add he smokes marijuana daily." In fact, one month after the car crash, for

13 days, he attended the Lunenburg Detox Centre. Thereafter, he attended Al-Care, a residential sober house program in Halifax for 29 days. While in his early twenties, he attended Detox “for his marijuana use”.

[55] He believes he started smoking marijuana when he was 19 years old and only started drinking when he was 26 years old. The Report notes “he feels he is an alcoholic”.

[56] Ms. Catherine Pynch, Care Coordinator of Services for Persons with Disabilities, also gave extensive comments and, by paraphrasing her, I would sum up her position in the Pre-Sentence Report as follows:

> One, Mr. Morine struggles with learning disabilities and has never really taken part in any proper program to address those issues, as resources are limited.
>
> Secondly, his life skills are limited and he will tend to be a follower of other people.
>
> Thirdly, over the years, she has concluded that he is sometimes mouthy but “has a good side and is generally a good person”, who needs support and guidance, especially regarding substance abuse.

[57] Also in the Pre-Sentence Report were the comments of Candy Handspiker, who is the daughter of Mr. Morine's landlord and has known him for approximately the last year. Regarding alcohol, drugs, and mental health, she "feels there are no issues at present." She is supportive and noted Mr. Morine is really stressed at present.

[58] Mr. Morine's own interview reveals that "he does not believe his anger played a role in the offences nor does he have a temper." He "felt he may have been treated unfairly, by the police, that is, on the evening of his arrest. Otherwise, he has full respect for the police." Mr. Morine accepts responsibility. He calls his present life "a living Hell". He feels bad for the death of Ms. Morrisette. "It's on my mind all day every day. Not a day goes by that I don't think about it."

[59] In conclusion, I would say, respecting the content of the Pre-Sentence Report, that Mr. Morine is a vulnerable 32-year-old man. He is still not able to understand it was his alcohol abuse that caused this car crash. The alcohol impaired his decision making **before** he got in the car. He insisted he was okay to drive. He insisted on getting into the car. He insisted on letting Milbury and Morrisette come with him in the car. There was no time for sober second thought because, in fact, he had long been impaired before getting into his car that night.

[60] Whether he is an alcoholic requires an expert opinion and we have none here today, but there is no doubt that if he does not get the proper assessment and treatment, any likelihood that he is, or would become, an alcoholic will greatly increase. He is at a crossroads in his life. Given his learning disability, still developing life skills, he requires intensive assessment, guidance, and support. Otherwise the chances of his re-offending are likely.

[61] Overall, the Pre-Sentence Report is generally positive, that Mr. Morine has a good chance at rehabilitation, but only if he chooses to do something about it.

THE POSITION OF THE PARTIES

[62] In summary, the Crown is suggesting a five to seven-year period of custody for the impaired driving causing death; two years consecutive imprisonment for the impaired driving causing bodily harm; six months consecutive for the refusal to provide breath sample; and six months consecutive on the assault on the police officer involving the spitting.

[63] In relation to the DNA order, the Crown is requesting one as argued under s. 487.051(3)(b). The Crown argues that a global ten-year driving prohibition order under s. 259(2)(a.1) and 2(b) is appropriate.

[64] The Defence argues that in light of the lack of criminal record, and the remorse shown by Mr. Morine in particular, and his potential for rehabilitation, that a global sentence of two to three years custody in total is appropriate.

[65] Mr. Morine's counsel argues against the necessity for a DNA order and suggests the driving prohibition order should be only three to five years.

AGGRAVATING AND MITIGATING FACTORS

[66] I turn now to the aggravating and mitigating factors in this particular case.

[67] The aggravating factors in my view include that Mr. Morine made deliberate choices to:

1) consume alcohol while his only mode of transportation in a rural area was his own car;

2) consume excessive amounts of alcohol, thus increasing the likelihood that his judgment about whether to drive his car would be impaired;

3) drive his car after excessive consumption of alcohol that must have substantially impaired his ability to operate his car;

4) accept two passengers into his car after he was substantially impaired by alcohol;

5) drive his car in a manner that caused him to lose control of it and it crashing and causing the death of Elizabeth Morrisette and bodily harm to Robert Milbury;

6) to flee the scene before he found Elizabeth Morrisette to check on her condition to see if she required assistance. If nothing else, maybe her body would have been recovered that night had he made diligent efforts immediately;

7) a deliberate choice to spit into Constable Wetzel's face, to insult and mock him, and to later threaten to spit in his face again if he had the chance.

[68] Now, as to the mitigating factors, they are also noteworthy. Mr. Morine has no prior record. While that is to his credit, I will note that the courts have said that that

is not entirely unusual in the case of impaired driving cases and the reason that is important is because in those cases general deterrence rather than specific deterrence to the individual offender is what's considered paramount by the Appeal courts. Nevertheless, it's not something to be overlooked given his difficult and turbulent young life.

[69] We also see that he did provide two statements, on December 7th and 12th, 2008, implicating himself in the serious S. 255 *Criminal Code* offences. That is an indication of remorse. Similarly, he pled guilty ultimately on December 8, 2010, and he does seem generally remorseful as it's been brought out in the Pre-Sentence Report by the submissions of his counsel and the fact that he has been essentially trouble-free in the time since the offences, except for his marijuana use, which is, of course, an offence under the *Controlled Drugs and Substances Act*.

THE RANGE OF SENTENCES

[70] Well next, I turn to, what is the proper range of sentence for each of these offences separately?

[71] Well, people have argued about what is the "range of sentence" as a matter of definition. In **R. v. Cromwell**, 2005 NSCA137, Justice Bateman for the Court had this to say, at Para. 26:

> Counsel for Mr. Cromwell says this joint submission is within the range. He broadly defines the range of sentence, in these circumstances, as all sentences that might be imposed for the crime of impaired driving causing bodily harm. I disagree. In my opinion, the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender [and she quotes "sentences imposed upon similar offenders for similar offences committed in similar circumstances" and there's a citation].

She continues,

> The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range.

[72] Well, looking at firstly s. 270 (2)(a), spitting onto the police officer's face, the maximum is five years. I note that this was a deliberate act, done in anger out of disrespect, without any possible justification and which is profoundly insulting. That it was done to a uniformed police officer in these circumstances is a show of

disrespect and insult, not just to that officer but whatever officer Mr. Morine might have had contact with that night.

[73] I believe a review of the few cases that there are will show that the range of sentence runs from probation on the very low end to up to six months in custody for this spitting type of assault, and I take into account that there was a threatened second assault of spitting later, while the opportunity presented itself.

[74] I had the benefit of seeing the cases submitted as follows: **R. in Ali** [2006] A.J. No. 1396, where a gentleman had a prior record; received four months in custody; **R. v. Joseph** [2001] O.J. No. 5726 – the gentleman had a record and also received four months in custody; and **R. v. McKenna** [2010] N.S.J. No. 228 – it was unclear exactly how much of a sentence he received for the spitting because it was a global sentence of 12 months for a number of offences; and he did have a record.

[75] Frankly, to me, in an age where the prevalence of dangerous conditions that can be transmitted to others by spitting saliva is on the increase, and given my above-noted observations and the fact that the maximum is five years imprisonment, I find an appropriate range for an offence such as this, is between significant probation in

exceptional cases, where mitigating factors are persuasive, and where aggravating factors are persuasive, a period of custody ranging up to 12 months. I note that Parliament has only recently amended the *Criminal Code* in S. 718.02 to account for this specific type of offence against justice system participants. This is reflected in my view as to the appropriate range of sentence herein.

[76] Concerning the refusal to give a breath sample, the matter proceeded indictably and the maximum is a five years in jail and a minimum punishment of a $1,000.00 fine. I have found no cases where this offence is singled out in circumstances such as we have here. It would seem to me to be preferable not to artificially suggest what I believe should be the range. Nevertheless, I will say that the Crown's recommendation of six months in custody is not outside what I would've expected to find to be the reasonable range of sentence.

[77] Thirdly, and to the most serious offences, impaired driving causing bodily harm and impaired driving causing death.

[78] Firstly, dealing with impaired driving causing death. Of course, the maximum is life imprisonment. I've reviewed the following cases:

1) **R. v. Cooper** [2007] N.S.J. No.179, (S.C.) - Mr. Cooper had one stale-dated record or offence of record; and for two counts of impaired driving causing death, where he crossed the center line and hit head-on another motor vehicle, killing two people, he received a combined sentence of seven years in custody; he had a lifetime driving prohibition order and a DNA order.

2) **R. v. Hall** [2007] O.J. No. 49 (CA) - Mr. Hall had a prior related conviction and, for impaired driving and dangerous driving causing death, he received a sentence confirmed by the Ontario Court of Appeal at four years and ten months, and a ten-year driving prohibition order.

3) In **R. v. MacEachern** [1990] N.S.J. No. 82 (CA) - Our Court of Appeal affirmed a five-year sentence and ten-year prohibition on driving for Mr. MacEachern, who had a prior impaired driving and break and enter charge, and had been found guilty of criminal negligence causing death by killing a pedestrian who was in a crosswalk in Halifax.

4) **R. v. Nickerson** [1991] N.S.J. No. 48 (CA) - Our Court of Appeal upheld a five-year sentence in a case of impaired driving causing death. Mr. Nickerson had no prior record, was a hard-working young man; and

he also received, I might add, two years for an impaired driving causing bodily harm arising from the same incident.

5) **R. v. Junkert** 2010 ONCA 549 - a decision of the Ontario Court of Appeal, Mr. Junkert received a period of custody of five years for impaired driving causing death and three years concurrent for dangerous driving causing death, and a ten-year driving prohibition order. Regarding the range of sentence for first offenders, the Ontario Court of Appeal in that case, at paras. 39 to 49, indicated that the range runs up to four to five years.

6) **R. v. Ruizfuentes** 2010 MBCA 90 - a decision of the Manitoba Court of Appeal - one count of impaired driving causing bodily harm and a plea of guilty thereto, for an offender who had an unrelated very stale and minor record, the trial court imposed six years custody and 15 years driving prohibition order.

At paras. 13 to 18, the Appeal Court noted that it is claimed that the range for first offenders is one to four years, and if there is a prior record for impaired driving or serious personal injury offences, the range is five to six years for these offences.

> " They concluded at para. 31 and similarly at para. 40: appropriate range of sentences for this type of offence is two to five years" for first offenders. In that case, they reduced the sentence to 4.5 years as Mr. Ruizfuentes had a lengthy related driving record (at para. 35).

[79] I conclude that, while there is some disagreement, across the country at least, in Nova Scotia, the appropriate range of sentence for impaired driving causing death in these circumstances is three to five years.

[80] Lastly, to the impaired driving causing bodily harm. I note that the Nova Scotia Court of Appeal, in **R. v. Martin** [1996] N.S.J. No. 389, affirmed a sentence of three years probation for impaired driving causing bodily harm. Since that time, the Nova Scotia Court of Appeal has revisited the **Martin** case in **R. v. Cromwell** *supra*, and at para. 56, Justice Bateman pointed out that those were exceptional circumstances.

[81] In the **Cromwell** case itself, Ms. Cromwell had pled guilty, I believe, to impaired driving causing bodily harm and breach of recognizance. While driving

impaired, Ms. Cromwell was responsible for an accident that injured four people. She had been released on bail and failed to appear for court and was arrested on a warrant for breach of recognizance. She had an untreated substance abuse problem which showed no sign of improvement.

[82] There was a joint submission by the counsel involved and it was rejected by the trial judge who imposed a sentence in total of five months custody and one year probation, plus a two-year driving prohibition and DNA order. At the Court of Appeal, Justice Bateman noted at para. 66 that the five months for the impaired driving causing bodily harm was "at the very low end of the reasonable range" for such offences.

[83] I also note that in **R. v. Nickerson**, which I referred to earlier, Mr. Nickerson received a period of custody of two years concurrent for impaired driving causing bodily harm in that case. Although again, it is difficult to be precise, but it appears to me, based on these cases, that the range for impaired driving causing bodily harm in these circumstances is between roughly five months custody and two years custody.

[84] Now, having said that, I will also note that I must bear in mind the guidance that our Court of Appeal has provided, specifically in cases of impaired driving; and in that respect, most recently, Justice Bateman's comments in **R. v. Cromwell** 2005 NSCA 137, at paras. 27 to 30, she said:

> 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. [I'll omit the citation]
>
> Drunk driving is an offence demanding strong sanctions. In **R. v. MacLeod**, (2004) 222 NSR (2nd) 56, . . . the Crown appealed an 18 month conditional sentence for impaired driving causing bodily harm and leaving the scene of an accident. Cromwell, J.A. [as he then was], 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:
>
> > This and other courts have repeatedly said that denunciation and general deterrence are extremely weighty considerations in sentencing drunk driving and related offences [and he cites a number of cases] . . . 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." . . . 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.

Bateman, J.A. goes on, at para. 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.

And she refers again to the Ontario Court of Appeal in **Biancofiore**, at para. 30:

> Denunciation as a component of sentencing is intended to communicate society's collective condemnation of the offender's conduct. [citations omitted]

VICTIM IMPACT

[85] Now, we don't have victim impact statements filed here, either by Mr. Milbury or the family of Ms. Morrisette. However, I did hear this morning that when her father, who is her remaining living parent, was asked, his comment was: "It won't bring her back, will it?"

[86] Certainly I can infer for a parent in these circumstances that the impact will be for the rest of their lives, and so very profoundly sad.

[87] I asked Mr. Morine if he wished to say anything and he did not. That is certainly neutral in my consideration of his sentence. I think he has spoken through his counsel, through the Pre-Sentence Report, and through his actions in the last two years since this tragic event.

CONCLUSION

[88] I come now to the conclusion regarding the appropriate sentence in this case.

[89] Perhaps, Mr. Morine, if you would stand up then. Thank you.

[90] Individually, I find these are the appropriate sentences which I will then revisit as a matter of totality.

[91] On the charge of refusing the breathalyzer, I find an appropriate sentence is three months in custody concurrent to the other periods of imprisonment I will impose.

[92] For the offence of assaulting the peace officer by spitting, three months consecutive in custody.

[93] For the offence of impaired driving causing bodily harm to Robert Milbury, nine months consecutive.

[94] For the offence of impaired driving causing the death of Elizabeth Morrisette, five years consecutive, for a total of six years custody.

[95] Now, considering that these are individual sentences and considering the aggravating and mitigating factors here, and the principles of sentencing, I revisit this sentence and apply the totality principle so that the sentence is not, as a total, excessive. I conclude on that basis that the overall sentence is excessive to the extent that I find a total sentence of five years to be a fit and appropriate sentence in this circumstance.

[96] As to the driving prohibition order, I find it is appropriate to impose a driving prohibition order pursuant to S. 255 (2)(a.1) of five years plus the period to which Mr. Morine is sentenced to imprisonment, which is five years, for a total of ten years.

That is on the impaired driving causing death. On the impaired driving causing bodily harm, pursuant to s. 255 (2)(b) I similarly impose a period of five years driving prohibition plus the period to which Mr. Morine is sentenced to imprisonment, which is five years, for a total of ten years.

[97] As to the DNA order under s. 487.051(3)(b), the test is - what is in the best interests of the administration of justice? And, that I should consider on application, as it is now, the criminal record of Mr. Morine, which is - there is none; the nature of the offence or offences, which, in my view, are very serious, not just by their nature but certainly by their consequences. The circumstances of the offence themselves involved grossly excessive consumption of alcohol; injury causing bodily harm to Mr. Milbury; death to Ms. Morrisette; the fleeing of the scene; and failing to render assistance; reflect a high level of moral blameworthiness in my view.

[98] I look at the impact the order would have on Mr. Morine's privacy and security of the person. In fairness, his counsel conceded there was nothing out of the ordinary in Mr. Morine's case, respecting certainly his security of the person interests.

[99] The leading case in this area has for some time been **R. v. Hendry** (2001) 161 CCC (3rd) 275, an Ontario Court of Appeal decision. The reasoning in that case has been considered by me and essentially it may be boiled down to – given an adult offender's diminished expectation of privacy following conviction and the minimal intrusion onto the security of the person, as well as the important interests served by the DNA data bank, it is generally in the best interests of the administration of justice to order the DNA samples be taken. And I am satisfied that that should be done in this case as well.

[100] Lastly, let me say to Mr. Morine – you have said, Mr. Morine, that you want to give back. You want to give back to society. This car crash and the death and injuries it caused were not an accident. It happened because you deliberately drank alcohol that impaired your judgment and that judgment was impaired because you still insisted on driving your car; took passengers in your car in a situation where you controlled their fate, yet were impaired. You drove the car at excess speed of 100 kilometers an hour on an unlit secondary road which had a 70 kilometer per hour speed limit; and it appears the passengers were asking you to slow down. There is no question that, and I know you understand that, you caused the death and injuries here. And I think you probably could easily agree that, if you were sober, this would not have happened.

[101] So if you want to give back, if you want to show some respect for Elizabeth Morrisette and Robert Milbury, then the way to give back is to get your life in order. Put this behind you when it is behind you. Be sober. Be a good person. Be a good worker. Do good things for your community. There is hope for you, but you have to make the big changes in your life to get there. I believe from what I have before me that you have it in yourself to make a better life for yourself. That is how you can give back. And, as I say, that is how you can most respect the damage that you've done to Elizabeth Morrisette, her family, and Mr. Milbury.

[102] I think that concludes the sentencing then, gentlemen.

THE CROWN? I believe so, My Lord.

MR. MACLEOD? Yes, I believe so, My Lord.

THE COURT: All right. Thank you very much then for all your assistance.

(COURT CLOSES 3:41 P.M.)

(COURT RESUMES 3:50 P.M.)

THE CROWN: My Lord, for the record, the remainder of the charges for Mr. Morine, the Crown's offering no evidence on any of those charges, and I would invite – I note for the record that Mr. Morine has left the courtroom and Mr. MacLeod as well, and I've just realized it after, as a result of discussing it with the clerk, that I had forgotten to dismiss the charges, so I'd just like to put on the record that the Crown's offering no evidence in regards to the remainder of the charges for Mr. Morine.

THE COURT: All right. Thank you, Mr. Lombard. I don't see there'll be a problem with the absence of Mr. Morine or his counsel, and I would order those to be dismissed for want of prosecution then. And that means the only offences that remain are those for which Mr. Morine was sentenced, so thank you for bringing it to my attention.

THE CROWN: Yes, thank you, My Lord.

THE COURT: Appreciate it. Thank you. We can recess again then.

(RECESS 14:51 P.M.)

(COURT RESUMES 14:52 P.M.)

THE COURT: Thank you very much, counsel. I know Mr. Morine is not here. Mr. Lombard had pointed out to the staff and they reminded me of two things.

One was, we didn't deal with the remaining charges. I dismissed those for want of prosecution, according to Mr. Lombard's suggestion.

MR. MACLEOD: Thank you.

THE COURT: Secondly, about the ... I reduced the sentence from six to five years but I didn't say the manner in which ... it would be allocated between the different offences, and my thinking was, not articulated at the time but now articulated is, that the sentence would be five years on the impaired driving causing death, all the other sentences concurrent to that.

[Further immaterial discussion ensued]

Rosinski, J.