

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** R. v. Morash, 2011 NSSC 99

**Date:** 20110303

**Docket:** CRH 318789

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Leonard Warren Morash

**Judge:** The Honourable Justice Patrick J. Murray

**Heard:** March 3, 2011, in Halifax, Nova Scotia

**Oral Decision:** March 3, 2011

**Counsel:** Susan MacKay, for the Crown  
Patrick MacEwen, for the defendant

**By the Court:**

[1] I have considered the submissions of counsel, Ms. MacKay, Mr MacEwen and as well the victim impact statements which have been read into the court record today. I want to thank counsel and those who read the victim impact statements, as I have already done.

[2] The following is my decision with respect to Leonard Warren Morash. I will say at the outset that it is a bit lengthy as these are serious offences and I do want to cover certain aspects of the evidence that has been presented.

[3] Leonard Warren Morash, 49, of West Dover Road, Nova Scotia has been charged with impaired driving causing death to his friend Barry Morash and of impaired driving causing harm to Stephen Francis and to Mable Francis. These events occurred on December 23<sup>rd</sup>, 2007 at or near Peggy's Cove, Nova Scotia. Mr. Morash has entered a guilty plea to both of these charges. There are a total of three counts on the indictment.

[4] The court accepts the plea of Mr. Morash and now must sentence Mr. Morash for these offences which are serious and which have had grave and serious

consequences both for the victims and their families and of course for Mr. Morash himself.

[5] The specific recommendation by both Crown and defence is for six years in custody on the causing death count and three years concurrent on each of the second and third counts of causing bodily harm.

[6] The facts in this matter are undisputed. On Saturday afternoon December 22, 2007 shortly before Christmas at West Dover Mr. Morash's vehicle collided with an oncoming vehicle which was driven by Mable Francis. Barry Morash, a passenger in Mr. Morash's vehicle was killed and the two occupants of the other vehicle, Mable Francis and her husband Stephen Francis, were injured causing them bodily harm.

[7] Mr. Morash has plead guilty to causing the death of Barry Morash and to causing the bodily harm to Mable Francis and the other injured party, victim, her husband Stephen Francis.

[8] Shortly before the collision Mr. Morash had been seen driving in the area in a manner that was described by several witnesses, and I am paraphrasing here, as all of the road. When Mr. Morash was himself taken to hospital after the collision, 30 grams of marijuana was found on him. He later plead guilty to simple possession in relation that and received a fine. According to the expert evidence that was obtained and which is undisputed, Mr. Morash's blood alcohol readings were believed to be between 235 and 309 milligrams of alcohol per 100 milliliters of blood or at least three to four times the legal limit of .08.

[9] The Crown has made some additional points. This accident occurred in the late afternoon when traffic was light. They stated that neither party in the Morash vehicle was wearing a seat belt. According to Mable Francis she rounded a turn and she saw the Morash vehicle coming at her on her side of the road. She attempted to avoid the collision by swerving to the other side of the road. Mr. Morash also swerved his vehicle back to his own side of the road and that's when the two vehicles collided. The force or angle of the collision, the impact, caused the vehicles to separate with the Francis vehicle going off the side of the road with the driver's door up against an embankment. We have heard from Ms. MacKay that Mr. Francis had to pull his wife over him and out the passenger side.

[10] Mrs. Francis was originally from the area and knew Leo Morash. She recognized him right after the collision. When she saw him, Leo Morash was sitting in driver's side of the vehicle, door open with his feet on the ground.

[11] The Crown made mention of two other vehicles that spotted the Morash vehicle driving earlier that afternoon. The first was that driven by Percy and Lorraine Young and Mr. Young recognized both occupants of the Morash vehicle. They had said that he had been on their side of the road but returned to his side in time for the two vehicles to pass without colliding. Here I would suggest that this is one of the near misses with which Ms. MacKay referred to in her summation, that she seen over her many years as a Crown Attorney.

[12] The second vehicle was driven by Janet Wilson. Janet Wilson and her friend were returning home through the same area and they followed a new grey Chevie Avio believed to be Mr. Morash's vehicle, a smaller vehicle, for several minutes behind him. His vehicle had two occupants. As they followed him, they noticed he was driving erratically and dangerously and in the direction where the collision occurred. She kept her distance from the vehicle that she saw, and once again she

was wise enough to keep her distance to avoid another near miss, I suppose, eventually.

[13] I will turn now to discuss the circumstances of the offender Mr. Morash. We have his presentence report. It has been filed with the Court. I have read it carefully and it has been referred to by his lawyer, Mr. MacEwen, in his able submission to the Court. Mr. Morash is 49 years of age. He has recently married, in February of 2011. He has had two previous relationships. He has two children, ages 14 and 19. His relationship with the mother of those children is somewhat estranged. He has not seen his oldest boy in over a year and on occasion he does see his youngest son.

[14] Mr. Morash has somewhat of a positive employment history. He is highly skilled at what he does. He was described as a top foreman at D and A Morash Steeplejacks, which is a cousin's business. He has supervised a crew of 14 men. He earns \$23.00 an hour and the report says he interacts well with his co-workers and the operator says he can do just about everything required at that business. The operator also indicated that he felt that Mr. Morash has lost a lot as a result of

this incident. He has been employed there for about 20 years and they trust him to do whatever job that they give him and he has a very good skill set.

[15] Mr. Morash does have some family problems. He also has health problems. He has diabetes, stress, high blood pressure and he takes medication for these. His doctor of 30 years described him as having sarcoidosis, which is a lung problem. In his current marriage Mr. Morash says he is happy, and that it is the “best ever”. He says he had a rough childhood. His parents did not drink to excess, but they did drink socially. His current wife believes that Mr. Morash never really received any direction in his life as a young person.

[16] The most obvious thing that stands out from the presentence report is the issues that Mr. Morash has had with alcohol. His doctor of 30 years said he was aware of these issues and said that Mr. Morash can drink to excess on occasion, but it has not impacted his job or resulted in any alcohol related physical health issues.

[17] For his part, Mr. Morash says he was addicted but is not now. That is what is contained in the report and I take what his lawyer has said today as well about the need perhaps for more recognition of the problem by Mr. Morash. Initially he

said in the report he knows he should not have been drinking, but he believes that he did not cause the accident, and this was confirmed by his wife Kathleen Clark. Once again, the report did indicate that he believed the accident was not his fault but he did take responsibility because he was drinking.

[18] I have heard his lawyer today speak on his behalf and I accept that his lawyer indicated that there was perhaps some misunderstanding or misinterpretation in the presentence report. I note that Mr. Morash has apologized today to the victims of the family, and in so doing I think that is a recognition there, to some degree, that he accepts responsibility for and did cause the accident. I have considered what his lawyer has told me as to his position, and in respect to Mr. Morash.

[19] In the conclusion, the author of the report, Mr. Foulkes indicated, and what is somewhat troubling I suppose, is that despite the accident Mr. Morash continues to use alcohol and continues to present a very serious threat to the public. Perhaps he was taking into account, the remorse or the degree of remorse that he felt was being shown, or not shown by Mr. Morash in saying that. One thing is clear there

is an issue there that sooner or later has to be recognized and dealt with by Mr. Morash, with respect to alcohol.

[20] In terms of the impact on the victims and the community, I have read and listened carefully to the victim impact statements read by Barry Morash's daughter, Carrie Ann Shubley, and by his son Cory read into the record by Ms. MacKay. In those victim impact statements they describe a loving father and grandfather, a real family man and one who loved the outdoors. He wanted what all parents want, and that is what is best for their children. It is indeed hard to measure in words the profound loss that they must be feeling. They gave an account of their father today of whom they were so proud and of how much he will be missed.

[21] Similarly I have heard from Mable Francis, through Ms. MacKay. In her statement she expressed how much the accident has changed her life and, certainly not for the better. She has lost valuable things, sentimental things that cannot be replaced and the long awaited honeymoon she had been planning was ruined. She never got a chance to take it. She now lives in constant pain and this has affected her relationship with her grandchildren and with others. In this way she must face

everyday the damaging impact of this tragic event that occurred, for the rest of her life.

[22] Once again the Court acknowledges and thanks the victims for their positions. I am entitled, and I have taken these into account.

[23] As Ms. MacKay has indicated recent amendments to the **Criminal Code** have resulted in judicial sentences which reflect an overall general increase in the sentences for drinking offences in the communities across this country. Each case, however, must be decided on its own facts taking into consideration the principles of sentencing in the **Criminal Code of Canada** and the common law as well.

[24] Under s.255(3) of the **Criminal Code** impaired driving causing death the maximum penalty is life imprisonment. Under s.255(3), impaired driving causing bodily harm, the maximum penalty is 10 years imprisonment. These penalties of life imprisonment in 10 years demonstrate the seriousness of these types of offences. Here the Crown submits that a six (6) year term of imprisonment is appropriate for the causing death offence and three (3) years each for the two

offences of causing bodily harm. The defence agrees as part of the joint submission with these sentences to be served concurrently, or at the same time.

[25] As the sentencing judge I am not bound by the joint submission. I have discretion to depart from it, but I should give it very serious consideration and depart from it only where there are cogent or sufficient reasons for me to do so.

[26] In the end the underlying consideration for me, the Court, is as set out in s.718.1 of the **Criminal Code** which is referred to as the fundamental principle of sentencing. “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” In plain words it must be a fit and proper sentence. In determining that I must look at and consider the fundamental purpose of sentencing and the objectives, which are also set out in the **Criminal Code** and there are six of them.

[27] Section 718 of the **Code** 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 acknowledgement of the harm done to victims and to the community.

[28] Additional considerations are, what was referred to by counsel as aggravating factors and mitigating factors. A sentence should be increased or reduced to account for any aggravating or mitigating circumstances relating to the offence or to the offender. Also, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. There are others which I will not refer to verbatim, but one of those reflects a consideration that incarceration and the deprivation of liberty would be a last resort, except of course where warranted.

[29] I turn now to the case law which applies here and which has been provided to me. Crown Counsel, Ms. MacKay has provided a number of applicable cases and I thank her for her excellent representations in that regard. These cases are given to me to show how other courts have pronounced sentences having regard to these objectives which I have just mentioned in similar cases. I hasten to add, as I already have, that each case is different and must be decided on its own set of facts and circumstances.

[30] Ms. MacKay, for the Crown, has referred me to and provided copies of the following cases: **R. v. Bear**, [2008] S.J. No. 815 (C.A.); **R. v. Howe**, [2007] NBJ No. 515 (C.A.); **R. v. Levesque**, [2000] O.J. No. 2783 (C.A.); **R. v. McIlwrick**, [2008] A.J. No. 1318 (Q.B.). I have reviewed and considered all of these cases.

[31] I note in **R. v. Bear** the accused's truck was speeding and ran a stop sign striking another vehicle and killing the other driver. The accused had a prior substantial record related to alcohol and had readings of three times the legal limit and had failed to accept responsibility for what he did. The court there imposed a five year sentence, plus one year for time served for a total six years.

[32] In **R. v. Levesque** the accused was given a sentence of eight years, but it was reduced on appeal to six years, as eight years went beyond the range of these sentences imposed on similar offenders in similar cases. The factors there were serious consequences of the offence, prior criminal record, particularly his prior drinking and driving offences and the absence of any real remorse. In that case, one person was deceased, another was injured and not able to return to work and a third was continuing to suffer mentally and physically from the accident.

[33] In both these cases the primary sentencing principles taken in to account were denunciation of the crime and deterrence of offenders. Ms. MacKay has urged the Court today to place emphasis on those two factors. In **R. v. Cromwell** 2005NSCA 137, Bateman, J.A. of the Nova Scotia Court of Appeal stated at para 27 and 28 that:

[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.

[28] Drunk driving is an offence demanding strong sanctions...

[34] In addition Bateman J.A. referred to the decision of **R. V MacLeod** (2004)

222 NSR (2d) 56 where Cromwell, J.A. stated:

22 This and other courts have repeatedly said that denunciation and general deterrence are extremely weighty considerations in sentencing drunk driving and related offences...

[35] In terms of the range of sentence in this country I refer to a recent case of **R.**

**v. Stimson** 2011 ABCA 59. That court also stated at para. 21 that:

Denunciation and deterrence are the dominate objectives of sentencing in the context of impaired driving causing death.

[36] In **Stimson** the court referred to one of the cases referred to me by Ms.

MacKay. In **R. v. McIlwrick**, 2008 ABQB 724 Ross, J. stated at p. 66 that:

In Alberta the custodial sentence for impaired driving causing death range from six months to seven years.

In another Canadian jurisdictions the sentences range from 10 months to 10 years, depending on the circumstances. Ross J. concluded at para.68 that:

Sentences greater than four years were almost always reserved for offenders with previous impaired driving charges.

[37] In **McIlwrick** the offender received a four year sentence and a 10 year driving prohibition, even though the prior convictions were for drug possession and not for driving while impaired or other driving offences.

[38] Counsel also referred me to a recent Nova Scotia case, unreported, where a woman in June 2010 received a sentence totalling six years for getting drunk, driving, and killing a man as a result. The name of the case was **R. v. Beverlee Russell**. The woman had no prior convictions and expressed great remorse. She received a sentence of five years for impaired driving causing death and one year consecutive for leaving the scene of an accident. She also received concurrent sentences of three years, two years and two years each for impaired driving causing bodily harm. The victim was a man and a former teacher. He was killed while his car was stopped at an intersection in the left hand turning lane when the offender crashed into the back of his vehicle.

[39] Lastly, I was referred to the case of **R. v Naugle** 2010 NSPC 11, a recent decision of the Provincial Court Judge, Frank Hoskins. And this case was noted by the Crown in their brief. In that case Hoskins J. stated:

“in light of the circumstances surrounding the current offences and Mr. Naugle the paramount consideration must be protection of the public.”

[40] Mr. Naugle had a very lengthy record and much lengthier than the offender in this particular case. In that case the offender received five years for impaired driving and three years for driving while disqualified. This was reduced to 15 months, (21 months credit for time served), but the sentences were to be served consecutively, not concurrently for a total of 8 years.

[41] I turn now to consider the mitigating and aggravating factors in the case of Mr. Morash. I had earlier said that aggravating and mitigating factors can be used to alter a sentence up or down, depending on what factors are present in any given case. Here the aggravating factors are the accused's prior criminal record of which he has had four alcohol related convictions. There were two in the 1980's and two in the 1990's. These offences are certainly very relevant given the nature of the charges here. Another aggravating factor is the blood alcohol readings which by the expert's report were three to four times the legal limit.

[42] As for mitigating factors, the main one I would suggest is Mr. Morash's decision to plead guilty to these charges and plead guilty to all of them as they were originally laid. The timing of the guilty plea can also enhance or detract from this as a mitigating factor. The indication in the Crown's case is that he indicated his intention following the preliminary inquiry in October of 2009 before the trial. It was then that Mr. Morash indicated his intention to plead guilty to the three counts in the indictment.

[43] Regardless of exactly when his decision to plead guilty was made, it is a mitigating factor. It saves the Crown from not only having to prove its case, but it also spares the witnesses from having to recount the events and the families, of course, from having to endure a trial, with the associated costs. It is as well, of course, a form of admission of guilt.

[44] In terms of the remorse, as I have already indicated, on the one hand Mr. Morash was saying that he believed that he did not cause the accident. On the other hand he has said and I accept his response, that he accepts responsibility because he was drinking. This was not a clear statement of remorse. Remorse is contextual. One is entitled to form their opinion and the lack of remorse should not

necessarily be an aggravating factor. I accept, as I have already, and as has been expressed by Mr. MacEwen, that Mr. Morash is remorseful for what he has done. At any rate Mr. Morash has plead guilty to causing the death of Mr. Barry Morash and to causing the bodily harm to Mr. and Mrs. Francis. The Court will proceeding accordingly with its decision on that basis.

[45] In terms of my decision and the reasons for it I have considered the joint submission of six years as against the proper principles of sentencing. It is at the upper end of the range, and I believe therefore it denounces the conduct and as well deters the offender and others from committing offences. This is called general and specific deterrence. I believe it also reflects, to some extent, the impact of the offence on the victims which I am entitled to consider under the **Criminal Code**. It takes into account the prior record of the accused, as well as the high blood alcohol readings in this case.

[46] Finally, and most importantly I believe six years to be a fit and proper sentence for the impaired driving causing death.

[47] I have considered the submissions with respect to the two counts of impaired driving causing bodily harm, and I have earlier alluded to case law signifying the range of two to three years for these types offences. Having read the cases and considered the submissions, I am accepting the joint recommendation of Crown and defence to impose a three year sentence of imprisonment on each count of impaired driving causing bodily harm to be served concurrently with the sentence of six years for the impaired driving causing death.

[48] In summary I see no cogent reason not to accept the joint submission and I accept the joint submission as to sentence. I further impose a 15 year driving prohibition. I have reviewed the order which has been prepared, it will be endorsed. The DNA order which has been included as part of the submissions by both counsel will also be granted. In imposing this sentence I am mindful of the principle of proportionality referred to in the **Naugle** case and I believe there is a sufficient nexus on the facts of this case, to allow the sentences imposed to be served concurrently.

[49] In conclusion, I view the six years as a fit and proper sentence for this very serious offence and the three years concurrent to be a fit and proper sentence for

the offences of impaired driving causing bodily harm. All of them stem from a very tragic incident.

[50] I thank counsel for their submissions which were very helpful to the Court and I now must ask Mr. Morash to stand and I will formally sentence him.

[51] Leonard Warren Morash on the offence that you did on or about the 22<sup>nd</sup> day of December at or near West Dover in the County of Halifax, in the Province of Nova Scotia did unlawfully have the care and control of a motor vehicle while your ability to operate a motor vehicle was impaired by alcohol or drugs and did thereby cause death to Barry Morash contrary to s.255(3) of the **Criminal Code**. I sentence you for that offence to six years imprisonment.

[52] On the offence that you further at the same time and place did unlawfully have care and control of a motor vehicle while your ability to operate the motor vehicle was impaired by alcohol or drugs and did thereby cause bodily harm to Stephen Francis contrary to s.255(2) of the **Criminal Code**, I sentence you to three years imprisonment.

[53] And lastly, and at the same time and place that you did unlawfully have the care and control of a motor vehicle while your ability to operate a motor vehicle was impaired by alcohol or a drug and did thereby cause bodily harm to Mable Francis contrary to s.255(2) of the **Criminal Code** I sentence you to three years imprisonment.

[54] All the sentences to be served concurrently.

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Murray, J.