

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Delorey, 2011 NSSC 319

Date: 20110810

Docket: CR Ant 312887

Registry: Antigonish

Between:

Her Majesty the Queen

v.

Kyle Anthony Delorey

SENTENCING DECISION

Judge: The Honourable Justice Glen G. McDougall

Decision Rendered: Wednesday, August 10, 2011 at 10:30 a.m., Antigonish,
Nova Scotia

Counsel: Allen Murray, for the Provincial Crown
Adam Rodgers, for the Accused

By the Court:

[1] Kyle Anthony Delorey was convicted on both counts of a two-count indictment as follows:

THAT on or about the 4th day of June A.D. 2008 at, or near Cape George, Antigonish County, Nova Scotia, did operate a motor vehicle on a highway to wit: Highway 337, Cape George, Antigonish County, Nova Scotia, in a manner that was dangerous to the public and thereby caused bodily harm to Robert Michael MacEachern contrary to Section 249(3) of the Criminal Code

AND FURTHERMORE THAT on the same date and place did operate a motor vehicle on a highway to wit: Highway 337, Cape George, Antigonish County, Nova Scotia, in a manner that was dangerous to the public and thereby caused death to Patrick Derek MacEachern contrary to Section 249(4) of the Criminal Code

[2] The convictions were entered on June 13, 2011 following a trial that took place over three days commencing on Monday, February 21, 2011 and ending on Wednesday, February 23, 2011.

SUMMARY OF THE FACTS OF THIS CASE:

[3] I will provide a brief summary of the facts of this case.

[4] Late in the evening of June 4, 2008 a motor vehicle being driven by Kyle Anthony Delorey (henceforth “Mr. Delorey”) and carrying four other passengers left the road and after rolling or flipping over several times struck and severed a power pole finally coming to rest on its wheels.

[5] Mr. Delorey and three of the four passengers were ejected from the vehicle as it rolled out of control after leaving the travelled portion of the Highway.

[6] The accident occurred on Highway 337 near the Town of Antigonish, in Antigonish County, Nova Scotia.

[7] Mr. Delorey admitted to being the driver of the vehicle at the time the accident occurred.

[8] It was also admitted that there was alcohol in Mr. Delorey’s blood measuring 10.86 millimoles of alcohol per litre of blood serum as measured in a blood sample taken at 1:50 a.m. on June 5, 2008. A Forensic Alcohol Specialist testified that this represented between 72 and 112 mg of alcohol in Mr. Delorey’s blood when extrapolated back to the approximate time of the accident at 10:40 p.m. the evening immediately before.

[9] The Defence did not challenge the fact that Patrick Derek MacEachern died as a result of the injuries he sustained in the accident or that Robert Michael MacEachern suffered bodily harm as a result of the injuries he sustained in the same accident.

[10] Based on the evidence of excessive speed, weather and road conditions at the time of the accident and the presence of alcohol in Mr. Delorey's blood, the Court found that he had operated the vehicle in a manner that was dangerous to the public.

[11] Furthermore, the Court found that this objectively dangerous conduct amounted to a marked departure from the standard of care expected of a reasonably prudent driver in the circumstances. Consequently, Mr. Delorey was found guilty on both counts.

[12] It now remains for this Court to sentence Mr. Delorey for these two offences.

[13] Dangerous operation of a motor vehicle is contained in section 249, sub-section (1), para (a) of the **Criminal Code**. Where bodily harm is caused, sub-section (3) of the section provides a potential sentence of up to 10 years.

[14] If death ensues, the term of imprisonment could be for up to 14 years.

[15] The **Criminal Code** has a number of provisions that deal with the purpose and principles of sentencing. They are found in sections 718 to 718.3. Section 718 states:

718. 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.

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

718.2 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, ...

...

(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.

[16] Section 718.3 deals with punishment generally and need not be recited here other than to say the Court has considered the general intent of this particular section in reaching its decision today.

MATERIALS FILED WITH THE COURT:

[17] The Court has been provided with sentencing briefs from both Crown and Defence counsel. I appreciate counsels' efforts to bring to the attention of the Court various cases dealing with the range of sentences imposed by various trial and appellate level courts in cases similar to the one presently before me. They offer a wide range of sentencing options all the way from conditional sentences to incarceration in a Federal institution. I again want to thank both Crown and Defence counsel for the many courtesies they have shown to me, not only here today but during the conduct of the trial. The trial that lasted almost three days is the only trial I have participated in and probably ever will participate in where there was not one

objection made by either counsel of any question or any decision made by the other side. That is truly remarkable. It demonstrates the professionalism of both Mr. Murray and Mr. Rodgers. The way that they have conducted themselves shows not only respect for one another but respect for the Court as well. It is very much appreciated.

[18] For reasons that I will expand upon later, I have ruled out the appropriateness of a conditional sentence in this instance.

[19] In addition to the foregoing the Court has had the benefit of counsels' oral representations supporting the position taken in their respective sentencing brief.

[20] I have also had the opportunity to review the Pre-sentence Reports prepared by Probation officer, Mark Coffin, prior to sentencing by The Honourable Justice Douglas L. MacLellan on January 6, 2010 and the more current PSR prepared by Probation officer, Ms. Mindy Morgan. I appreciate the efforts of both these individuals. PSR's are a very useful tool in providing relevant, background information that is of great assistance to the Court in arriving at the appropriate sentence.

[21] Finally I have read the Victim Impact Statements filed by Clara S. Hurst – sister of Patrick and Robert MacEachern – and one from Shayna MacLean – Patrick MacEachern's fiancée and the mother of his two young sons. In reading these two statements one gets a sense of the anguish and pain, as well as the tremendous feelings of loss, experienced by the family and loved ones left behind to mourn the tragic death of such a young man and the serious injuries suffered by another.

[22] Unfortunately the Court can do very little to ease the pain nor can it be allowed to unduly influence the Court's proper approach to sentencing. The **Criminal Code** provides for the filing of such statements. By doing so, our elected representatives recognize the importance of allowing the victims of crime to place before the Court the impact that crime has had on their lives. They cannot be used as a plea for a stiffer sentence than what would otherwise be appropriate in the circumstances.

REVIEW OF THE CASE LAW:

[23] Defence counsel have presented the Court with a number of cases in which the offender was sentenced to a Conditional Sentence, often referred to as house arrest.

[24] In the circumstances of this case I do not feel a conditional sentence would be appropriate. As counsel submitted it is not even applicable under the circumstances but even if it was open to consideration I do not think a conditional sentence would be appropriate.

[25] First of all, the Court would have to be of the opinion that the appropriate sentence should be less than two years and also be satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing. (Reference is made to section 742.1 of the **Code**)

[26] I do not feel, given the seriousness of the two offences of which Mr. Delorey has been convicted combined with the fact that he has a significant criminal history going back to 1994, that a sentence of less than two years would be appropriate.

[27] Since the events of June 4, 2008 which resulted in these latest two convictions, Mr. Delorey was convicted of two counts of assault as well as failing to comply with a condition of release and one count of breach of probation for which he was sentenced to a total of seven months incarceration along with two additional months concurrent. This sentence was imposed on Mr. Delorey on the 11th day of January, 2010 for events which took place on 15 April 2009. I am not convinced that the safety of the community would not be endangered or that a conditional sentence would be consistent with the fundamental principles of sentencing given Mr. Delorey's track record and his apparent lack of remorse and refusal to accept responsibility for his actions that resulted in the death of Patrick MacEachern and the serious injuries sustained by Robert MacEachern.

[28] Crown counsel has also referred a number of cases to the Court that have resulted in sentences ranging from conditional sentences to lengthy periods of incarceration in a Federal institution.

[29] In arguing against a conditional sentence Crown counsel has rightly pointed out the provisions of s. 742.1 which precludes a conditional sentence for a serious personal injury offence. A serious personal injury offence is defined in s. 752 of the **Code** to "include an indictable offence involving conduct likely to endanger the life or safety of another person and for which the offender may be sentenced to imprisonment for 10 years or more." The **Criminal Code** was amended to preclude serious personal

injury offences from the conditional sentencing provisions effective December 1, 2007 which is prior to the commission of the offences that Mr. Delorey was convicted of and for which he stands before me today to be sentenced. For this and the other reasons previously stated I reject the initial defence plea for a conditional sentence but acknowledge that defence counsel has recognized that a conditional sentence is not even applicable in these circumstances. Given the circumstances of this case and this particular offender I feel a period of incarceration is needed to send a message of specific and general deterrence and to hold the offender accountable for his unlawful and senseless act.

[30] In reaching this conclusion, I have considered the various aggravating and mitigating circumstances that exist, including the following:

Aggravating Circumstances:

- The offender's obvious disregard for the well-being and safety of his four passengers as well as that of anyone else who might have been travelling on the highway where the accident occurred on that night;
- The presence of alcohol in the offender's blood at the time of the accident;
- The offender's refusal to accept responsibility for his actions and his apparent lack of remorse;
- The offender's prior and post-offence criminal record including his prior conviction for operation of a motor vehicle while having in excess of 80 milligrams of alcohol in 100 millilitres of blood; and
- the opportunities of rehabilitation offered to Mr. Delorey in the past have demonstrated little success;

Mitigating Circumstances:

- The offender's own medical condition and general health and the fact that he, too, suffered significant brain injuries in the same accident that claimed the life of Patrick MacEachern and seriously injured Robert MacEachern;

- The fact that Mr. Delorey has a nine year-old daughter and although she resides primarily with her mother, it appears that he has regular contact with her based on the Pre-Sentence Report; and
- Mr. Delorey has participated in some programs to assess and treat his alcohol and illegal drug use including an Addiction Services program in November, 2009 and a 28-day program at Crosby House also in 2009 at a personal costs of \$6,500.00.

DISPOSITION AND SENTENCE:

[31] After taking into consideration all of these factors and keeping in mind the general principles of sentencing I have determined that the appropriate sentence to be meted out is as follows:

[Court asks Mr. Delorey to stand - gives Mr. Delorey another opportunity to address the Court]

MR. DELOREY: I would just like to clarify that charge. I was sentenced for in October of 04, that blood alcohol over 80, I don't believe, I wasn't driving, I was a passenger. I got one speeding ticket cause I was rushing from the airport, that's my driving record. I don't feel it's humane to put me in jail right now in the condition that I'm in, especially with an appeal on the way. But I respect your decision either way. And I would just like to thank Clara for reading the victim impact and Shayna as well for writing those. That's all I've got to say. Thank you Your Honour.

THE COURT: Thank you Mr. Delorey and as I said, if you would continue to stand.

[32] On the more serious charge of dangerous operation of a motor vehicle resulting in the death of Patrick Derek MacEachern, contrary to s. 249(4) of the **Criminal Code** I sentence you to 26 months incarceration;

[33] On the charge that you operated a motor vehicle in a manner that was dangerous to the public and thereby caused bodily harm to Robert Michael MacEachern, contrary to s. 249(3) of the **Criminal Code** I sentence you to a period of incarceration of four months to be served consecutive to the previous sentence just handed out.

[34] You are to receive a three month credit for time already served which equates to 27 additional months from today's date. So, the total was 30, a credit of three months for a total of 27 additional months from today's date.

MR. DELOREY: So we're back to square one with the original sentence basically.

[35] In addition I am relying on the fact that should Mr. Delorey require any medical treatment while serving his sentence that it is expected that he will receive any appropriate medical treatment that he requires and that is available to him and to all other inmates.

[36] I will also order that a DNA sample of Mr. Delorey's blood be taken so that there will be a permanent record of that analysis. That is pursuant to section 487.04 of the **Criminal Code**. And, in addition, you will be prohibited from driving a motor vehicle for a five year period to commence on the day of your release from prison. And this is in addition to the approximately 12 ½ months you have already been suspended since gaining your release on a recognizance with conditions on July 29, 2010. So an additional five years starting the day of release on parole.

McDougall, J.