C.A. No. 105419

NOVA SCOTIA COURT OF APPEAL

Matthews, Jones and Pugsley, JJ.A.
Cite as: R. v. McCrae, 1994 NSCA 216

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - MARK DAVID MCCRAE Respondent	)	Kenneth W. F. Fiske, Q.C. for the Appellant Kevin G. Coady for the Respondent Appeal Heard: November 16, 1994 Judgment Delivered: November 30, 1994

THE COURT: Leave to appeal is granted and the appeal is dismissed as per reasons for judgment of Pugsley J.A.; Matthews, J.A. concurring and Jones, J.A. dissenting.

PUGSLEY, J.A.:

Mark David McCrae, age thirty-nine, was convicted by Judge Curran, on January 31, 1994, on a charge of refusing a breath sample demand contrary to s. 254(5) of the **Criminal Code**.

Mr. McCrae was ordered to serve a term of imprisonment of 90 days intermittent (Tuesday to Friday) in the Halifax Correctional Centre, followed by three years probation. We are advised that the term of imprisonment was fully served at the end of September. A driving prohibition pursuant to s. 259(1) of the **Code**, of three years was also imposed.

The Crown had proceeded by way of indictment and Mr. McCrae accordingly faced sentencing under s. 255(1)(b) of the **Code**. The Crown had given the appropriate notice that it was seeking an increased penalty by reason of previous convictions and Mr. McCrae was therefore subject to a minimum punishment of imprisonment for not less than 90 days pursuant to s. 255 (1)(a)(iii) of the **Code.**

The Crown appeals submitting that, in view of Mr. McCrae's lengthy criminal record (51 convictions against the **Criminal Code** and the **Narcotics Control Act**) and in particular, 7 prior convictions, for drinking and driving offences, none of which involved fatalities or injuries to third persons, the custodial sentence was grossly inadequate. Judge Curran, it is argued, erred in principle in failing to consider the effect of general deterrence on the custodial sentence which in part was mandated by law in these circumstances.

Judge Curran clearly was aware of the past record of Mr. McCrae:

> "The thing that takes this matter out of the ordinary on the one hand is Mr. McCrae's very considerable record, both his criminal record in general, which of course, is rather dated at this point and his driving record for drinking and driving offences which is somewhat more recent."

It is necessary to examine the circumstances of this unique case to ascertain what persuaded Judge Curran to impose a sentence, that, on the face of it, would appear, manifestly inadequate.

Mr. McCrae was raised initially by his grandparents, placed in training school at age 12 due to unmanageability, and at age 16 relocated to London, Ontario, where he lived independently of his family.

He obtained a bachelors degree in computer science from the University of Western Ontario in the early 1970's.

He is married and has one daughter with whom he still maintains contact. He has resided in Nova Scotia since 1981.

He presently lives in an apartment in Clayton Park, is unemployed, and has been receiving Provincial family benefits since 1993.

He is eligible to receive assistance under the medical disability section.

He held a variety of jobs up until 1991, but his medical problems have prevented him from securing, let alone maintaining, any work since then.

In addition to a detailed presentence report, Judge Curran had the benefit of a report from Dr. Caroline Abbott, a psychiatrist, who has been treating Mr. McCrae since February 1993, as well as ***viva voce*** evidence from Dr. Christine Langley, a family physician, who has been looking after him since October 1992.

Dr. Abbott writes:

> " His complaints are of extreme anxiety and fearfulness which frequently reaches panic proportions. ... He sleeps poorly with frequent nightmares. He experiences a lack of trust in almost everyone but especially the police and other authority figures. He leads a very withdrawn life, only going out to accomplish essential business and to keep appointments.
>
> He suffers constant depression with suicidal ideation and has taken several serious overdoses since I have known him. Two, necessitating medical treatment. . . .

> His stress level has a major effect on his gastrointestinal tract causing stomach pains, inability to eat and hence malnutrition. He has lost over 35 lbs. During a medical admission to Camp Hill Hospital last year he was thoroughly investigated for muscle pain and a final diagnosis of fibrositis was made. He has been taking Tylenol with codeine on a regular basis for this complaint.... His other medications consist of an anti-depressant and anxiolytic drugs.
>
> Diagnostically, Mr. McCrae has a generalized Anxiety Disorder with Panic Disorder and agoraphobia. He also has a Major Depressive Disorder and Mixed Personality Trait Disorder. ...
>
> ... He has had a rocky course; his withdrawn, anxious nature along with lack of trust make it difficult for him to participate in the therapeutic relationship. His depression, sense of hopelessness and low self-esteem lead to frequent suicidal ideation. He has resisted psychiatric hospitalization since I have known him because of his fears."

It is of particular importance that Dr. Abbott expresses the opinion that there has been "no pattern of alcohol abuse during the time I have known him."

While noting that he has made every effort to keep his appointments to try and assist himself, "most of the times he feels overwhelmed by his mental state and situation".

Dr. Abbott concludes what one can only characterize as a gloomy prognosis by stating:

> "I would be deeply concerned if this man was incarcerated because of the precariousness of his mental state... I feel I can definitely predict that incarceration would have an adverse effect on his already precarious mental state with a high risk of suicide." (emphasis added)

Dr. Langley's diagnosis is entirely consistent with that of Dr. Abbott.

Dr. Langley testified:

> "Mr. McCrae's mental illness at present would be severe depression, chronic insomnia, anxiety. He has been through numerous medications from myself and the psychiatrist, Dr. Caroline Abbott, all with attempts to try to lessen his depression, lessen his insomnia and his anxiety, all of which have not been very successful."

He takes a substantial variety of medications including elavil (anti-depressant) nozinan (anti-psychotic medication) mogadon (for sleeping) as well as four Tylenol number 3 each day, to relieve chronic pain resulting from a condition known as fibromyalgia.

Dr. Langley described a lifestyle which although extremely confined, leaves Mr. McCrae exhausted. He is unable to work, unable to sleep and becomes very anxious if he leaves his apartment.

His anxiety is so overwhelming on occasion, that it has led to suicide attempts.

Of significant importance is Dr. Langley's conviction that Mr. McCrae is honest with the recitation of his complaints to her.

She stated "that we are very concerned about his mental health if he is incarcerated. He is severely depressed at present..."

She has seen him every two weeks for approximately two years and has never observed any indication that he had been drinking alcohol prior to his attendance at her office.

Mr. McCrae in testimony before Judge Curran testified that in 1992, he was sentenced to a period of incarceration at the Lower Sackville facility for a period of 90 days. After three and one half weeks, he had a break down and was hospitalized at the Nova Scotia Hospital. The breakdown may have been due to those in charge at the correctional centre interfering with the delivery of medication prescribed by his physicians.

Mr. McCrae also advised that he had not been drinking for approximately 12 months.

In the course of his decision, Judge Curran noted that:

> "as a general proposition, I think it can be said that persons who repeatedly drive under the influence of alcohol can

> expect today to receive increasingly large, lengthy sentences. ... Mr. McCrae has a serious genuine illness and at the present time one of those ailments does not seem to be active alcohol abuse. So, at this point, it would seem to me, that there is not the need that there, perhaps, might have been once, to protect the public in the future, at least in the foreseeable future .... from that type of activity on the part of Mr. McCrae. There is, in that sense, some prospect of rehabilitation."

Judge Curran also made the further point:

> "It would seem to me to be clear, however, that any time spent by Mr. McCrae in custody would almost certainly have a much greater effect on him than a similar amount of time spent by nearly anyone else. I think a sentence of 90 days for Mr. McCrae would be as significant in its effect as a sentence of nine months to a year for most people. I think I can take that into account in sentencing him . . .."

I consider the following matters critical in assessing this appeal:

1) The physicians who have seen Mr. McCrae on a continual basis are convinced that he is genuine and not exaggerating his complaints.

2) Mr. McCrae testified that he has not consumed alcohol since May of 1993. This assertion is supported, in part, by the evidence of Dr. Langley.

3) Mr. McCrae is an extremely ill man. He is incapable, as a consequence of both mental and physical disabilities, of functioning in a social environment or a work environment.

4) The medical evidence accepted by Judge Curran leads to the conclusion that incarceration would have "an adverse effect on his already precarious mental state with a high risk of suicide."

This Court in the past has taken into account the medical condition of a person like Mr. McCrae, when considering the element of rehabilitation (**R. v. Sleep** (1978), 23 N.S.R. (2d) 639; **R. v. Boudreau** (1978), 25 N.S.R. (2d) 63).

Judge Curran noted that Mr. McCrae's fragile mental condition would cause confinement for him to constitute a more serious punishment than for others not so impaired. This was a valid consideration (**R. v. Sanders** (1982), 26 C.R. 176 (Alta. C.A.)).

It is a factor to consider that Mr. McCrae has completed his 90 day intermittent sentence. To return him to prison could retard his efforts at rehabilitation (**R. v. Barktow** (1978), 24 N.S.R. (2d) 518.

Judge Curran, a judge of very considerable experience, correctly identified the relevant principles. He did not in my opinion err, by overemphasizing the importance of rehabilitation or by minimizing general deterrence.

Deterrence has not been totally overlooked. While the minimum sentence required under the law has been imposed, the terms of probation will operate to control Mr. McCrae's behaviour. Should he breach these terms he will face a very real risk of severe consequences.

It is relevant to note that in addition to the usual stipulations in the probation order (including alcohol and drug assessment, counselling and treatment) Judge Curran directed Mr. McCrae to attend for such "mental health assessment and counselling as directed by his Probation Officer".

I would grant leave to appeal, but in the circumstances dismiss the appeal.

J.A.

Concurred in:

Matthews, J.A.

JONES, J.A. (Dissenting)

I have read the reasons for judgment of Mr. Justice Pugsley. The appellant has a record of fifty-one convictions for offences against the **Criminal Code** and the **Narcotic Control Act** dating from 1972. He has been dealt with primarily by short periods of incarceration and probation. Notwithstanding this fact since 1983 he has been convicted for eight offences relating to drinking and driving. The probation report accurately summarizes his present condition as follows:

> "The subject has not always led an unproductive lifestyle. He attained an undergraduate degree in computer science and he enjoyed steady employment relating to his specialty. It is not known the exact cause of his medical demise however, it is apparent he now suffers from a host of illnesses. Consequently, his present lifestyle had been adversely affected and his daily existence is quite restricted.
>
> Conversely, the accused continues to involve himself in criminal activity, even in his 'agoraphobic' state. He attempts to avoid being held accountable for his actions by focusing the attention on his poor health. Although there is not a doubt a term of incarceration would be detrimental to the subject's mental health, it appears he continues to resist the efforts of his physicians to have him hospitalized.
>
> The accused has had the experience of being placed on previous probation, but he has not responded favourably. Supervision of his case was problematic and due to his present medical condition, it is not likely probation supervision would be of any benefit.
>
> Perhaps Mr. McCrae would benefit most if he was admitted to a facility such as a hospital or a group home, which would cater to his special needs."

In referring to that passage the trial judge stated:

> "The point made in the Pre-Sentence Report that Mr. McCrae can't continue to hide behind his ailments as a basis for receiving something less than he otherwise would in punishment for committing crimes, I think is well put, but I don't think it applies right now in this case. I think if Mr. McCrae persists ...I think if there are further instances of drinking and driving that the reasons that I'm advancing now for not imposing a longer sentence would simply be out the window. After all, the public is entitled to protection when it's on or around highways. Whatever the reasons a person chooses to drink and drive, ultimately the most important thing is that the public be protected, but right now, given the indications that Mr. McCrae is no longer drinking, I think the public can be adequately protected by a sentence of 90 days and that's the sentence I intent to impose."

While appropriate consideration must be given to the appellant's physical and mental condition, the primary consideration in this case must be the protection of the public. To suggest that the appellant does not have a problem with drinking and driving is to ignore the reality disclosed by his record. In **R. v. Nickerson** (1991), 101 N.S.R. (2d) 243 Hart, J.A. stated at p. 245:

> "The trial judge in determining his sentence was guided by the remarks of this Court in **R. v. MacEachern** (1990), 96 N.S.R. (2d) 68; 253 A.P.R. 68 (C.A.), where Macdonald, J.A., speaking for the Court, stated at p. 82:

...I have recommended a substantial increase in the sentence because I am now convinced that the sentences for drinking and driving offences, particularly those resulting in loss of life, must, as a matter of policy, be substantially increased for the greater protection of the public through the element of general deterrence.

> Although **MacEachern** was a case of criminal negligence causing death punishable by life imprisonment rather than impaired driving causing death punishable by 14 years or impaired driving causing bodily harm by 10 years, we are unanimously of the opinion that those remarks apply equally to all cases where drinking and driving are involved."

With respect the respondent cannot continue with his present conduct and expect to escape the consequences because of poor health particularly where he refuses more intensive treatment. Whether he will require further treatment upon incarceration is a matter for the prison authorities. I would grant leave to appeal, allow the appeal and vary the sentence by imposing a term of 12 months imprisonment to be followed by the period of probation as directed by the trial judge.

J.A.

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- and -

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REASONS FOR JUDGMENT BY:

PUGSLEY, J.A.