

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R v. Jesso*, 2016 NSPC 61

**Date:** 2016-10-31

**Docket:** 2966612, 2966613

**Registry:** Bridgewater

**Between:**

R.

v.

MANUEL JOSEPH JESSO

**Judge:** The Honourable Judge Paul B. Scovil, J.P.C.

**Heard:** October 31, 2016, in Bridgewater, Nova Scotia

**Charge:** 253(1)(a) CC, 253(1)(b) CC

**Counsel:** Michelle MacDonald, for the Crown  
Chris Manning, for the Defence

**By the Court:**

[1] Section 255(5) of the Criminal Code provides that if the Court considers a person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it is not contrary to the public interest, that the person be discharged under section 730 on conditions prescribed in a probation order.

Justice Ayotte in R.vs Stupar (1990) 26 M.V.R. (2d) 81 said the following:

“It will be seen immediately that this provision, unlike it’s companions in the fight against the impaired driver, attempts to encourage treatment rather than to threaten detection and punishment. How are we to interpret this island of rehabilitation floating, as it were in a sea of deterrence?”

[2] Mr. Jesso comes before this Court asking for refuge on that island of rehabilitation. The waters that he navigates are difficult ones indeed. For the reasons below, however, I have determined that a curative treatment discharge is an appropriate remedy in this case.

[3] Mr. Jesso was stopped and charged as a result of a routine impaired driving investigation. An employee at a local fast food outlet advised the police that the accused had gone through the drive-through window in an intoxicated state. They reported to the authorities that the individual was in such a state of intoxication that he was having difficulty holding his debit card. He was stopped by police and after the normal investigative procedure was shown to

have the readings of 220 milligrams of alcohol in 100 millilitres of blood and a further reading of 210 milligrams of alcohol in 100 millilitres of blood. He was accordingly charged with 253(1)(b) and entered a guilty plea. A pre-sentence report was ordered and obtained. A sentencing hearing was held on August 29, 2016.

[4] The Crown in this matter has indicated that they are seeking a period of custody of six months in the provincial institution followed by a period of probation. Additionally they are seeking a five-year driving prohibition. Mr. Jesso is seeking a curative treatment discharge after a probationary period of 30 months. There was no objection to the period of driving prohibition suggested by the Crown.

[5] At sentencing the crown introduced evidence of the accused's record and also a notice of intention to seek a higher penalty which was served on the accused pursuant to section 253(3) of the Criminal Code.

[6] The record of the accused is as follows:

- 253(a) - offence date 2005/08/23 – conviction date 2006/06/28 – jail 121 days – Driving prohibition 2 years

- 249.1(1) - offence date: 2005/08/23 – conviction date: 2006/06/28 – jail 121 days
- 255(3) – offence date: 2005/08/06 – conviction date: 2006/09/12 – jail three years, driving prohibition 5 years
- 430(4) x 4 – offence dates: 2010/06/12 – sentence date: 2010/08/18 – suspended sentence and probation of one year.

[7] A Pre-Sentence Report was completed and prepared on August 18, 2016. It shows the accused to be a 33-year old male. He has a grade 12 education. Interviews with his family indicated that the accused had begun consuming alcohol in his teenage years. In the Pre-Sentence Report the accused himself admits that his teenage years were spent drinking and partying. His mother, Mrs. Lillian Barrow, indicates the accused had accepted responsibility for his actions and displays remorse regarding what is now before the Court. She indicated he has been doing well and working hard and is concerned of him losing his employment.

[8] His girlfriend indicates he is attending addictions counselling which he apparently genuinely wishes to attend. She does not allow alcohol in their

home and she understands the accused is not currently consuming alcohol. She feels the counselling would assist him in his recovery from alcohol addiction.

[9] The accused received his grade 12 at the Nova Scotia Community College in Bridgewater in 2012. He is currently employed with Michelin North America in Bridgewater as a forklift driver. He has held that position for the past 14 months. Past history appears to show he has an attachment to the workforce. His employer confirmed that he is a good worker and gets along well with his co-workers and that they are not aware of any substance abuse issues. They termed him a “valuable employee”.

[10] The probation officer who completed the Pre-Sentence Report contacted the accused’s clinical therapist, Deborah Payzant regarding the report. Ms. Payzant reported that the accused attended Mental Health and Addictions services in 2015 to initiate the process of obtaining his driver’s license back. She indicated that he completed a two-day program and assessments and was classified as a medium risk to re-offend. Mr. Jesso returned to counseling in June 2016 for a “Choice Appointment” and again on August 8, 2016 to discuss relapse prevention triggers.

[11] The writer of the Pre-Sentence Report indicated the accused presented himself as cooperative and offered his responses in a sincere manner. He admitted responsibility for the offences before the Court and regretted his activities.

[12] The accused called evidence. Mr. Jesso's therapist is Ms. Deborah Payzant, M.Ed., RCT. Ms. Payzant put before the Court her curriculum vitae. She has been an addictions counsellor since 2001 and a clinical therapist since 2003. She indicated the accused came to her office for an assessment in 2015 regarding a driving under the influence charge. She, at that point, assessed him as a medium risk to re-offend. In June of this year he attended back with her indicating he wanted to work toward sobriety. Ms. Payzant indicated she noted a change in the accused from February and she has the impression that the accused wants to stay away from alcohol. She listed a number of external and internal factors relating to the accused which would cause him to focus on sobriety. External factors included the risk of jail, his wife leaving him and him losing his job. The internal factor she indicated was Mr. Jesso's own decision that he had made up his mind to follow sobriety. She indicated that he is engaged in "mindful relapse prevention" and that she is very hopeful for the accused. Therapy services are local and center on relapse prevention. She

believed the accused to be motivated in his quest for alcohol abstinence. She still listed him as a medium risk to re-offend but indicated that there are a lot of people who are medium risk, particularly those involved in the interlock program. She indicated that Mr. Jesso's level of motivation has increased since she first saw him.

[13] Section 255(5) of the Criminal Code states:

“notwithstanding subsection 730(1), a court may, instead of convicting a person of an offence committed under section 253, after hearing medical or other evidence, if it considers that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest, by order direct that the person be discharged under section 730 on conditions prescribed in a probation order, including a condition respecting the person's attendance for curative treatment in relation to that consumption of alcohol or drugs.”

[14] Simply stated the section provides that a court may impose a curative treatment discharge where it is satisfied on the balance of probabilities that:

1. The person is in need of curative treatment for alcohol abuse; and
2. It would not be contrary to the public interest to grant a curative discharge

**Legal Principles and Application to Facts**

[15] **That the person is in need of curative treatment:** The evidence is clear both from the facts before the Court and that the testimony of Ms. Payzant that Mr. Jesso has an addiction for alcohol which he needs to be treated for. As indicated by Ms. Payzant, his therapy is ongoing and he still needs to be treated. It is not often an issue in these cases that the person is in fact in need of curative treatment. I find that Mr. Jesso is in fact in such need.

[16] **The Public Interest:** As was stated by then Judge Jamie Campbell in R v. Pearson, 2010 NSPC 14:

“25. The law recognizes however, that deterrence and strong sanctions are not the only way to protect the public against drunk drivers. There are those situations where a fine and driving prohibition will have the desired effect. Sometimes jail time has to be introduced. Even with those penalties, courts see repeat drunk driving offenders. For them, traditional sanctions of fines and imprisonment seem to have made little impact. Each time they drive the public is placed at risk.

26. The law recognizes that there are times when treatment, along with the incentive of a discharge can provide better long term protection to the public than fines or imprisonment. A fine and a driving suspension may do little to deter a first time offender who is addicted to alcohol. He or she can usually expect a minimum fine of \$1000.00, a one year driving prohibition, a criminal record and non-court imposed consequences such as higher insurance premiums. The untreated alcoholic may be undeterred from driving while drunk again. Court ordered treatment, with a driving suspension and the motivation that comes with knowing that the discharge is conditional, may result in a potential drunk driver being taken off the road permanently.



27. The court has to balance the continuing need for strong sanctions, with that positive potential. There will be times when the sanctions are simply more important. When a person has been involved in an incident where there has been damage to property or injury to another person the need for a strong statement may trump the potential for treatment. When the person has a record of such offences, that can be an issue as well.”

Those principles relevant to the assessment of the public interest have been articulated in the decisions of R.v.Storr, [1995] A.J. No. 764(CA) and R.v. Ashberry, [1989] O.J. No. 101 (CA). These factors and principles identified in these decisions have been confirmed and implied by many courts in Nova Scotia.

[17] The court in Ashberry, confirmed that the public interest would inevitably be satisfied by a curative discharge where there was evidence that curative treatment would guarantee the offender would never drive again under the influence of alcohol. That court however, recognized an absolute certainty is an impossibility. In light of that, the court concluded that where the evidence demonstrates that the accused is in need of curative treatment and his rehabilitation is “probable”, that it would generally not be contrary to the public interest to grant a discharge subject to stringent terms of probation.

[18] The courts in both Ashberry and Storr set out factors which can lend themselves to a determination that a discharge is not contrary to the public interest. The factors are as follows:

1. **The circumstances of the offence and whether the offender was involved in an accident which caused death or serious bodily injury.** The need to express social repudiation of the offense where the victim was killed or suffered serious bodily injury will generally militate against the discharge of the offender.
2. **The motivation of the offender as an indication of probable benefit from the treatment.** One therefore has to look at the *bona fides* of the offender in agreeing to accept treatment. Therefore the offender's efforts to obtain treatment prior to conviction is also relevant.
3. **The availability and calibre of proposed facilities for treatments and the ability of the participant to complete the program.**
4. **The probability of the course of treatment being successful in that the offender will never again drive a motor vehicle while under the influence of alcohol.**
5. **The criminal record in particular the alcohol-related driving record of the offender.**

In addition to those factors listed above, courts have recognized that the general common-law principles of sentencing, as codified in section 718 of the Criminal Code continue to apply.

### **ASHBERRY FACTORS**

[19] 1. **The circumstances of the offence:** The accused was charged after a routine investigation in which workers at a fast food outlet had reported the accused going through a drive-through window in an intoxicated state. The accused was having difficulty holding a debit card. His blood-alcohol level gave a reading at its lowest level of 210 mg of alcohol in 100 ml of blood. He was stopped by the police without incident and was apparently cooperative with the police. It did not involve an accident or injury.

2. **The motivation of the offender as an indication of probable benefit from treatment:** The question that I must consider under this heading is whether there is “*bona fides*” of the offender’s motivation to stay sober and seek treatment. The public may look to this and say that any individual will say anything to stay out of jail and thus question the motivation of the accused. Here, however, we have the expert opinion of Ms. Payzant. She indicated that

the accused most recently has had a different attitude towards treatment.

She indicated that prior the accused appeared to be closed and defensive in relation to their ongoing therapy. She now has the impression that he wants to stay away from alcohol. That opinion is apparently based on both external and internal factors relating to the accused. At the end of the day she's quite hopeful for him and is now employing what she termed as a "mindfulness relapse prevention" program. Mr. Jesso is currently showing an openness in relation to her dealings with him. While she still feels that he is in a medium risk to reoffend, his level of motivation has increased. He now realizes that he may go to jail and unlike prior dealings with him, he now has an interest in stopping his reliance on alcohol.

**3. The availability and quality of proposed facility for treatment and the ability of the participant to complete programming:** Ms. Payzant outlined in her testimony the local services that are available and that Mr. Jesso would be able to continue therapy with her. As I have indicated earlier, she outlined the therapeutic programming that she is using and that she has reasonable hope this therapy will prevent relapse.

**4. The probability of a successful course of treatment and that the offender will not drive a motor vehicle again while under the influence of alcohol:** It

is difficult to measure. Courts have often commented on impossibility of predicting with absolute certainty the future sobriety of an individual in the position of Mr. Jesso. Ms. Payzant indicated that while earlier treatment was motivated simply to get a license back, Mr. Jesso has progressed to where he recognizes he can no longer continue to abuse alcohol as he does and he is in a position to commit to ongoing therapy. Ms. Payzant spoke of Mr. Jesso discontinuing treatment earlier when he was able to get his license back but now has a recognition that it is an ongoing matter that he has to deal with. She indicated that she was comfortable saying that he was committed to a successful course of treatment.

**5. Criminal record and related matters:** Of utmost concern in this matter is the prior record of Mr. Jesso regarding driving offenses under the influence of alcohol. As indicated above, he was convicted of impaired driving in 2006 with an accompanying driving while prohibited. Most worrisome is a conviction for impaired driving causing death. The mischief charges were from the same date in 2010 and there is nothing in evidence before me to indicate that they are alcohol-related.

[20] The public may again ask, “how can it be that someone who is driving drunk cause the death of an individual and now asked to be seriously considered for a

curative discharge?” It is a reasonable question. The answer lies in considering whether, for this individual, a further custodial period will deter the behaviour of drinking and driving an automobile or whether a rehabilitated Mr. Jesso will provide a larger measure of safeguard against drunk driving.

[21] Taking into account the provisions of 718 of the **Code** related to sentencing as well as the case law relating to curative treatment discharge, I note that Mr. Jesso’s prior record of drinking and driving, while tragic, took place some 10 years ago. He is employed, he is motivated to continue treatment and has presumptive understanding that a breach of the terms and conditions set out by the court would undoubtedly land him back in jail. On the other hand it is clear that the extensive jail term of three years that he had received prior had not deterred him up to now of drinking and driving. As envisioned in **Pearson**, I’ve decided to employ the curative treatments approach to best attempt to ensure the safety of the public. I find that Mr. Jesso has indeed met the criteria set out in **Ashberry** and others now give him an opportunity to complete a sentence based on a curative discharge. I therefore place him on a period of 30 months probation at the end of which a curative discharge will be granted provided he successfully completed the same. I will prohibit him from driving

a motor vehicle anywhere in Canada for a period of five years. Defence counsel have provided me with terms and conditions that include as follows:

1. Keep the peace and be of good behaviour;
2. Report to and be under the supervision of a probation officer and to report within two days of today's date to probation services, Bridgewater, NS, and thereafter as required by probation services;
3. He is to abstain absolutely from the use, consumption possession of alcohol and alcoholic beverages as well as non-prescribed drugs.
4. He is to remain away from any place where the primary function is the sale of alcohol.
5. He is to perform 50 hours of community service work at the direction of and approval of your probation officer. The 50 hours is to be completed within the first 18 months of the probationary period.
6. He is to make the best efforts to seek and maintain employment.
7. He is not to drive a motor vehicle nor is he to occupy the driver's seat of a motor vehicle.
8. He is also to submit for urinalysis or other alcohol or drug screening as directed by your probation officer;

[22] Should Crown counsel seek any additional terms to attach to the probationary period I welcome their input. As well the accused will pay a \$100 Victim Fine Surcharge which shall be paid within the next 90 days.

Paul B. Scovil, JPC