

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. MacNeil*, 2017 NSPC 57

**Date:** October 12, 2017

**Registry:** Sydney

**Between:**

Her Majesty the Queen

v.

Liam Alexander MacNeil

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**DECISION ON SENTENCE**

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**Judge:** The Honourable Judge Amy Sakalauskas

**Place Heard:** Sydney, Nova Scotia

**Date Heard:** September 14, 2017

**Oral Decision:** October 12, 2017

**Charge:** s. 140(1)(b) *Criminal Code*

**Counsel:** Steve Melnick, for the Crown  
Christa Thompson, for the Defence

**BY THE COURT:**

[1] Liam MacNeil plead guilty to one count of Public Mischief contrary to **section 140(1)(b)** of the *Criminal Code*. This matter was before me for a sentencing hearing on September 14, 2017. The Crown and Defence presented a joint recommendation that Mr. MacNeil serve an 18-month Conditional Sentence Order, to include house arrest with various exceptions.

**FACTS**

[2] Police responded to a 911 call on September 25, 2016. The report was of a motor vehicle accident on a wooded pathway between South Bar Highway and Brown's Lake, often used by four wheelers. The call came from Liam MacNeil's father, Clayton MacNeil, as he had his son on another line. Eventually, the 911 operators were able to speak to both men at the same time, on their separate lines. Liam MacNeil was at the accident scene. The operators learned that Liam MacNeil was upset and the other passenger in the vehicle was trapped under it. With the assistance of the South Bar Fire Department, the 911 operators determined the location of the accident and emergency responders were able to attend.

[3] While on the phone with 911, Clayton MacNeil asked his son who was driving the vehicle. Liam MacNeil advised that his friend, Willie Gittens, was driving. He also advised that Willie Gittens was thrown from the vehicle and pinned, and he believed his friend to be dead.

[4] When police arrived, they saw liquor bottles, beer cases, two cell phones, a cell phone case, broken and sealed bottles, near the pathway. They also saw a set of keys next to Mr. Gittens, who was sticking out from under the vehicle (a 2013 Chevy Suburban). The vehicle had roll over damage and there were impact marks on the ground.

[5] EHS responded. They noted that Liam MacNeil was alert and orientated, but anxious about Mr. Gittens. He told them that he had been in the front passenger side of the vehicle. They noted no basic indicia of impairment in Mr. MacNeil, although he confirmed that he had consumed alcohol.

[6] Liam MacNeil was taken to hospital by EHS. Police attended there to speak with him, but he had already been released. As such, it was a couple days after the accident that Mr. MacNeil provided a formal statement to police. In it, he maintained that Mr. Gittens was the driver.

[7] The police continued their investigation. It included witness interviews, examination of the vehicle, and accident reconstruction. They determined that the cause of the accident was that the vehicle hit a rut or pothole, or the like, went off the wooded road, subsequently rolling three times. Mr. Gittens was not wearing a seatbelt.

[8] Two months after the accident, police presented Mr. MacNeil with findings that contradicted his statements that he was in the passenger seat. Mr. MacNeil then admitted that he was the driver. He was charged with public mischief, for giving false statements.

[9] I reviewed four Victim Impact Statements, one of which was also read in Court. As counsel noted, their contents were not directly related to the charge before the Court, but Mr. MacNeil did not want to stand in the way of the family presenting them. They told me that the family is devastated by the loss of Mr. Gittens.

[10] I have the benefit of a Pre-Sentence Report prepared by David E. Arsenault, Probation Officer, dated August 24, 2017.

[11] Mr. MacNeil addressed the Court at the end of submissions. He said he was not trying to ask for forgiveness for his actions, but reiterated that he was very sorry and wished he could

take them back. He was emotional at times throughout the hearing, most notably when Mr. Gittens' wife read the Victim Impact Statement of one of his children.

### **JOINT RECOMMENDATIONS**

[12] I am mindful of my obligations when considering a joint sentencing recommendation. As the Supreme Court of Canada explained in *R. v. Anthony-Cook* 2016 SCC 43, I am to ask whether the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. I am not to simply substitute my opinion or tinker with what is proposed.

[13] This approach recognizes that the accused person gave up his or her right to a trial in exchange for a joint submission on sentence. An agreement that is near certain to be accepted is appealing to both the Crown and Defence, is common, and joint submissions are of major benefit to the administration of justice. Knowing all of this, I am to exercise restraint and reject a joint submission only if what is proposed is so out of line that it would cause a reasonable person who knows about the circumstances to lose faith in our criminal justice system.

### **SENTENCING PRINCIPLES**

[14] The purpose and objectives of sentencing and the principles to be considered are set out in s. 718, 718.1, and 718.2 of the Criminal Code.

[15] Section 718 sets out that the fundamental purpose of sentencing is to protect society and to contribute to respect for the law and maintenance of a peaceful society. It also states that sentences should attempt to do one or more the following: denunciation, deterrence, separation from society where necessary, rehabilitation, reparations to victims/community, promote a sense of responsibility and acknowledge harm done to victims/community.

[16] s. 718.1 mandates that the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[17] s. 718.2 provides further sentencing principles, including that:

- aggravating and mitigating factors should be taken into account;
- parity;
- an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances;
- all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims' community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

### **SENTENCING RANGE**

[18] The Crown proceeded by indictment. This offence carries a sentence of up to 5 years imprisonment.

[19] In ***R. v. Ambrose***, [2000] A.J. No. 1148, the Alberta Court of Appeal explained that this offence is serious because it “pervert[s] the whole regulating system for behavior of everyone in Canada”. This is an offence against the administration of justice and as such, denunciation and deterrence are important factors.

[20] Counsel provided me with the following caselaw in support of their recommendation:

- ***R. v. Bimb***, [2014] B.C.J. No. 2571 (“*Bimb*”)
- ***R. v. Rajendram***, [1999] O.J. No. 4001 (“*Rajendram*”)
- ***R. v. Thomson***, [2002] A.J. No. 600 (“*Thomson*”)
- ***R. v. Delacruz***, 2010 ONSC 3060 (“*Delacruz*”)

[21] I will also reference:

- ***R. v. Thompson***, 2017 NSPC 18 (“*Thompson*”)
- ***R. v. B.B.***, 2012 PCNL 1310A00540 (“*B.B.*”)
- ***R. v. Mayo*** 2011 CarswellNfld 227 (“*Mayo (2011)*”)

- ***R. v. Gould*** 2011 CarswellNfld 119 (“*Gould*”)
- ***R. v. Mayo*** 2006 CarswellNfld 168 (“*Mayo (2006)*”)
- ***R. v. Heatherington***, 2005 ABCA 393 (“*Heatherington*”)

[22] In ***Bimb***, the accused was stopped at a roadblock and asked to pull over, because the officer smelled marijuana. Instead, he sped away. The next morning, he called police and falsely reported that his car was stolen. The accused was charged with dangerous driving, public mischief, and making a false police report. The accused stuck to his false story right up to trial. He was sentenced to a \$1,000.00 fine, a one year driving prohibition, and to pay restitution to an insurer. The accused was young, had no criminal record, and showed late remorse.

[23] In ***Rajendram***, the accused drove a car while impaired by alcohol. The car went off the highway and rolled, seriously injuring a passenger. The accused told the police that the unconscious passenger was the driver. When the passenger regained consciousness, he told police that the accused was the driver. At his sentencing for dangerous driving causing bodily harm and public mischief, the accused was sentenced to 18 months to be served in the community by way of a Conditional Sentence Order. The Crown had opposed the CSO and asked for the accused to be incarcerated. The accused had an exemplary background and many character witnesses spoke to his work on behalf of his community.

[24] In ***Thomson***, the accused was driving his car and struck an 11-year-old child who was running across the street to catch his school bus. The child died. The accused then took his car to another area of the city, abandoned it so that it looked like it collided with a lamppost, and reported it to police as stolen. He plead guilty to hit and run, public mischief, and careless driving under a provincial statute. The accused was 18 at the time of the offence, he was employed and furthering his education, and he had no criminal record. He was sentenced to 18 months to be served in the community on the public mischief charge, concurrent to the same sentence for the hit and run.

[25] In *Delacruz*, the accused made false allegations of sexual assault regarding his daughter over a two-month period. It was “highly calculated” and “diligently pursued”. The accused showed no remorse. The accused was 38 years old with a significant criminal record, mostly in relation to his former wife. The public mischief charge also related to his former wife. It was his second conviction for this offence. He was sentenced to 18 months custody, followed by one year of probation.

[26] In *Thompson*, a recent Nova Scotia decision, the accused misled police in a homicide investigation by telling them the deceased left her home when in fact, he was shot in her living room. She was not the driving force behind the false story, going along with it in a state of shock and fear. Her false story contributed to the investigation being protracted for over two months while police pursued unnecessary inquiries. She was 23 years old, genuinely remorseful, and cooperated with police after she admitted her lie. She was sentenced to an 18-month conditional discharge, without curfew conditions (the Crown requested an 18-month conditional sentence).

[27] In *B.B.*, the accused falsely reported to police that her boyfriend assaulted her. She was sentenced to a conditional discharge and 12 months probation, after consideration of mitigating factors. Judge Gorman noted, at paragraph 29, that periods of imprisonment for the offence of public mischief are usually imposed, and noted examples of sentences for 3 months, 6 months, 10, months, and 12 months.

[28] In *Mayo (2006)*, the accused stole a motorcycle and blamed it on someone else. He later admitted his lie after the other person was arrested and investigated. He was sentenced to six months in jail.

[29] In *Mayo (2011)*, the accused was sentenced for his second public mischief offence by giving a false statement to police in 6 years. He received 90 days in jail.

[30] In *Heatherington*, the offender made false reports to police of being staked and sexually harassed. The trial judge sentenced the offender to 20 months imprisonment, to be served conditionally in the community, for one count of public mischief. This included 8 months of house arrest and an order to perform community service. The conditional sentence was reduced to 12 months on appeal.

[31] Although there is a variance in sentences given for it, there is a clear consensus that public mischief is a very serious offence. *Delacruz* provides a useful discussion:

*[28] In reviewing the relevant case law, there appears to be two categories of public mischief. The first is where the offender attributes a crime to some anonymous individual, in order to evade his own liability. The second is like this case, where the offender directly impugns a named individual, out of a desire to punish or avenge them. Courts understandably treat the second category more seriously, as it implicates an innocent person in a criminal act, with potentially disastrous consequences.*

*[29] Most of the precedents urged upon me by the defence fall in the first category. In R. v. Oliver, [2000] O.J. No 5989 (S.C.), a truck driver received a 12 month conditional sentence after he partook in a fake high-jacking to cover up a theft of cargo. R. v. Power (supra) involved a nightclub owner who stole \$23,000 from his company and then reported that it had been lost in a robbery. He was convicted of theft and public mischief and received five months imprisonment. And in R. v. States, [1988] O.J. No. 5077 (S.C.), where the accused struck a pedestrian but then left the scene and reported his car stolen, the court imposed 45 days imprisonment, to be served intermittently.*

*[30] The one exception provided by the defence is R. v. Rajendram [1999] O.J. No. 4001 (S.C.) where the court imposed an 18 month conditional sentence for dangerous driving causing bodily harm and mischief. The offender, while impaired, drove his car off the highway but then told police that an unconscious passenger was actually the driver. However, that offender had no criminal record, was steadily employed and produced exemplary character references.*

*[31] The cases proffered by the Crown fall in the second category, and suggest that where the offender targeted a specific individual the courts may impose a meaningful prison sentence...*

[32] In considering Mr. MacNeil's actions, the Crown likened them to offences in the first *Delacruz* category. I accept that characterization. Mr. MacNeil said what he did to evade his own liability. He was not seeking to punish someone else.



[33] Sentences for public mischief by misleading police with false statements have been both custodial and non-custodial, as recognized in *Thompson* (commencing at paragraph 38), and vary greatly. Any custodial term I saw was less than 2 years, with 18 months being the longest.

### **CIRCUMSTANCES OF MR. MacNEIL**

[34] Liam MacNeil is 30 years old. He has no criminal convictions. He had the benefit of conditional discharges in 2013 and 2014. Mr. MacNeil's pre-sentence report was largely positive. He is employed full time as a taxi dispatcher, has supportive family, enjoyed a positive upbringing, and showed great remorse when speaking of his offence. He has grade 10 and would like to further his education.

[35] Mr. MacNeil admits to regular marijuana use, concedes he might be dependent on it, and would be willing to attend counselling to explore the issue. He has never been treated for mental health issues and is in good physical health. He resides alone in a rental property owned by his father. There was a theme from his family and friends who participated in the PSR in their belief that Mr. MacNeil would benefit from counselling to deal with the accident and his offence.

[36] Mr. Arsenault, author of the Pre-Sentence Report, concluded that Mr. MacNeil was a suitable candidate for community supervision.

### **DECISION ON SENTENCE**

[36] I have the following mitigating factors before me:

- Mr. MacNeil plead guilty at an early opportunity;
- He has no prior convictions;
- He expresses remorse; and,
- His Pre-Sentence Report is largely positive.

[37] There are aggravating factors in that Mr. MacNeil kept up his lie for two months, including in more than one interaction with police. It was the third time he spoke to them that he told the truth, and only then because he was confronted with the investigation results. In the intervening time, the police had embarked on an extensive investigation into the real circumstances of the accident – details that Mr. MacNeil could have shared with them at an early opportunity. It would be months before the family of Mr. Gittens would have the opportunity to deal with the truth of the events that evening, and they had to do so with the knowledge that Mr. MacNeil had lied.

[38] Mr. MacNeil is not being sentenced for causing Mr. Gittens' death. The information I was provided indicate that Mr. Gittens' death was a terrible accident and tragedy. No doubt, the actions of Mr. MacNeil made it all the harder to deal with and greatly impacted on the investigation. For that, Mr. MacNeil is solely responsible and I find that the joint recommendation presented to me is a fit one to hold him accountable, to deter his decision, and to denounce his conduct and prevent others from embarking on the same troubling actions.

[39] As for the proposed duration of 18 months, I find that it is within the acceptable range of sentence. It is on the high end. No doubt this is reflective of the seriousness of the investigation interfered with and the length of time the falsehood was maintained by Mr. MacNeil.

[40] I have been asked to grant a conditional sentence order pursuant to section 742.1 of the *Criminal Code*, commonly considered "house arrest". I can only grant if I find that neither prison nor probation are appropriate in the circumstances (*R. v. Proulx*, [2000], S.C.J. No. 6, para 29).

[41] Probation would not be appropriate here, as this offence requires a punitive response to affect the purpose and principles of sentencing in the *Criminal Code*. A term of imprisonment is appropriate, and counsel have put forward a recommendation that this be served in the community, which is within the range of reasonable.

[42] Also, I must be satisfied:

1. The offence must not have a mandatory minimum;
2. The term of imprisonment imposed must be less than 2 years;
3. The safety of the community would not be endangered by the offender serving the sentence in the community; and,
4. A conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in section 718 and 718.2 of the *Criminal Code*.

[43] I find that these conditions are met in this case, the first two being obvious in that the offence does not have a mandatory minimum and the term requested is 18 months. As for the safety of the community, we have a person with no criminal convictions who has not had further criminal involvement since the offence date of September 25, 2016. He expressed a lot of remorse in his pre-sentence report. I do not believe that Mr. MacNeil is at a risk of re-offending. This offence was in the context of a unique situation and Mr. MacNeil appears to have taken the consequences to heart.

[44] A conditional sentence order has both punitive and rehabilitative features. House arrest is the obvious example of punitive conditions. The proposed conditions also include that Mr. MacNeil engage in services, and in his situation, it appears mental health counselling and addictions counselling would be most important. Mr. MacNeil himself has been through a very traumatic experience, both with the accident that claimed the life of his friend and the social and legal consequences of his actions in lying to investigators. There are things he needs to work through. He needs to move forward and better his situation. As his lawyer stressed, he is 30 years old and has a lot of room to grow. Our sentencing provisions recognize that a sentence should be crafted to the individual circumstances of the offender, and a conditional sentence order does that in this case.

[45] Under s. 742.6, an alleged breach of a conditional sentence order can carry serious consequences. As noted in *Proulx*, at paragraph 21, "If an offender cannot provide a reasonable excuse for breaching the conditions of his or her sentence, the judge may order him

or her to serve the remainder of the sentence in jail, as it was intended by Parliament that there be a real threat of incarceration to increase compliance with the conditions of the sentence”. An intermittent sentence, meaning that the remaining time would be served on weekends, is not available in the case of a breach of a conditional sentence order. And, a breach need only be proven on a balance of probabilities. Any offender subject to a conditional sentence order must be very aware of these realities.

[46] Although the term of the conditional sentence order is long, relatively speaking, it is tempered by the exceptions to house arrest being recommended by counsel. That being said, this is a significant amount time to be subject to conditions, and with the threat of jail time in the event of non-compliance.

[47] The terms of the Conditional Sentence Order are:

- House Arrest – remain in your residence at all times for 18 months (beginning today until April 11, 2019), except for:
  - When at regularly scheduled employment, which your supervisor knows about, and traveling to and from that employment by a direct route;
  - When attending a regularly scheduled education program, which your supervisor knows about, or at a school or education activity supervised by a principal or teacher, and traveling to and from the education program or activity by a direct route;
  - When dealing with a medical emergency or medical appointment involving you or a member of your household and traveling to and from it by a direct route;
  - When attending Court at a scheduled appearance or under subpoena, and traveling to and from by a direct route;
  - When attending a counseling appointment, a treatment program, or a meeting of Alcoholics Anonymous/Narcotics Anonymous, at the direction of or with the permission of your supervisor, and traveling to and from that appointment, program or meeting by a direct route; and,
  - For no more than 4 hours a week, on Saturday from 12:00 – 4:00 p.m., or another time as agreed by your supervisor, to attend to personal needs.
- You shall prove compliance with your house arrest by presenting yourself at the entrance to your residence within 3 minutes should your supervisor or a peace officer attend there to check.
- Keep the peace and be of good behavior.
- Appear before the court when required to do so by the Court.
- Report to a supervisor within 3 days and thereafter as directed by your supervisor and in the manner directed by your supervisor.

- Remain in the province of Nova Scotia unless written permission is obtained to go outside the province from either the court or your supervisor.
- Notify the court or the supervisor in advance of any change of name, address, employment/occupation.
- Abstain from the possession, use, or consumption of alcohol or other intoxicating substances or the possession or consumption of drugs as defined under the CDSA, except in accordance with a medical prescription. Any prescribed drugs are to be taken as directed on the prescription.
- Do not attend where alcohol is sold as a principal product.
- Abstain from owning, possessing, or carrying a weapon; surrender any FACs in your possession (or other license or permit permitting the acquisition, possession, sale, transport or storage to the Cape Breton Regional Police Service.
- Seek, accept, and complete any assessments and counseling that may be directed by the Probation Service, including but not limited to alcohol and drug counseling, and follow all doctors/health professionals' recommendations, appointments, and sessions.
- Sign all consents required by service providers to release information on your participation in any assessments, counseling, or programs to permit Probation Service to monitor your progress.
- Not associate with or have contact with anyone who has a record of conviction/discharge under the *Criminal Code*, the CDSA, or the YCJA, except immediate family, or incidental contact while attending an education, counseling, or treatment program.
- Have no contact, direct or indirect, with Morris Gittens, Rose Gittens, Christine Flemmington, Dakota Gittens, Stephen Gittens, Leah Gittens, Randy Gittens for any reason, except with their express consent.
- Participate in any form of electronic supervision, including but not limited to voice verification if directed to do so by your supervisor/probation officer.
- Carry a copy of your Conditional Sentence Order with you at all times when outside your residence.
- Do not occupy the drivers' seat of any motor vehicle during the first 12 months of this order, except when installing equipment for taxi and delivery vehicles.

[48] Mr. MacNeil shall have six months to pay the \$200 Victim Surcharge.