PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Tebay*, 2020 NSPC 43

Date: 20200918
Docket: 8304798
Registry: Halifax, Nova Scotia

Between:

Her Majesty the Queen

v.

Anthony Tebay

DECISION ON SENTENCE

Judge: The Honourable Judge Michael B. Sherar

Decision: September 18, 2020

Charges: Section 320.14(1)(b) *Criminal Code of Canada*

Counsel: Jennifer Crewe, for the Crown
Luke Merrimen, for the Defence

By the Court:

[1] Mr. Anthony Tebay was arrested by police authorities on January 2, 2019 and charged with impaired operation of a conveyance, contrary to s. 320.14(1)(a) and unlawfully having a blood alcohol concentration within two hours after having operated a conveyance, contrary to s. 320.14(1)(b).

[2] The Crown and defence in this case agree with the following facts:

[3] On the date in question, police followed a vehicle around 11:45 p.m., eventually pulling the vehicle over. Mr. Tebay was identified as the driver of the vehicle wherein there were two other passengers. Following a demand by the police, Mr. Tebay produced a fail on a roadside screening device. He was arrested, chartered, and cautioned. He was transported to the police headquarters and provided access to legal counsel in private. He consented to providing a sample of his breath for analysis. At 0053 hours or 12:53 a.m., January 3, 2019, Mr. Tebay provided a sample of his breath and a reading of 230 milligrams of alcohol in 100 millilitres of blood was obtained. Subsequently, at 1:15 a.m. a second valid sample was obtained in the amount of 220 milligrams of alcohol per 100 millilitres of blood.

[4] The Crown proceeded summarily on the two charges. Mr. Tebay pled guilty to the offence under s. 320.14(1)(b) on August 23, 2019. This court imposed a driving prohibition on the Defendant that day for a period of one year.

[5] Today the issue is what is a fit and proper sentence for the offence in light of the sentencing regime mandated by Parliament and the personal circumstances of the Defendant.

[6] Effective December 18, 2018, less than a month before the incident involving Mr. Tebay occurred, Parliament brought in new sentencing requirements for charges under s. 320.14(1)(b).

[7] Section 320.14(1) is a hybrid offence and in this case the Crown proceeded summarily, as earlier indicated.

Section 320.19(1) states:

> Everyone who commits an offence under section 320.14(1) …
>
> (b) an offence punishable on summary conviction is liable to a fine of not more than $5,000 or to imprisonment of not more than two years less a day or to both and to a minimum punishment of
>
> (i) for a first offence, a fine of $1,000 ...

Section 320.19(3) further mandates:

> Everyone who commits an offence under s. 320.14(1)(b) is liable, for a first offence, to
>
> (b) a fine of not less than $2,000 if the person's blood alcohol concentration is equal to or exceeds 160 mg of alcohol in 100 mL of blood.

[8] The evidence before the court is that this current offence is a first charge for Mr. Tebay under s. 320.14 and its predecessor legislation.

[9] Since Mr. Tebay had an alcohol/blood ratio of at least 220 mg, the mandatory minimum penalty is a fine of $2,000.

[10] Under the provision of s. 320.23 of the *Criminal Code*, if both the prosecutor and Defendant agree sentencing can be postponed and an order of driving prohibition imposed. If the Defendant successfully completes a provincially approved treatment program then something other than the mandatory minimum punishment can be ordered by the court, including a further driving prohibition, but in no case can a discharge be granted to the Defendant, pursuant to s. 730 of the *Criminal Code*. Interestingly enough, as of this date the Province of Nova Scotia has <u>not</u> set up an approved treatment program for a Defendant to participate in.

[11] Accordingly, the minimum penalty the Defendant faces under the current regime is a fine in the amount of $2,000.

[12] In this instance the Crown is seeking a fine be imposed on Mr. Tebay of $2,000 and a one-year period of probation supervision with conditions.

[13] The defence is requesting that the Defendant receive a conditional discharge with the provision for probation supervision for a period of three years.

[14] The imposition of a fine results in the Defendant receiving a criminal record. If a discharge were ordered by the Court, a conviction would not be recorded.

[15] The Defendant argues that the inability of a court to impose a discharge for a first offender for an impaired charge in general and in the particular circumstances of the Defendant amounts to a violation of s. 12 of the *Charter of Rights and Freedoms*.

"Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

[16] The onus is on the Defendant – Applicant to establish that there has been a violation of their rights under s. 12 of the *Charter*.

[17] What is the authority of a judge of the Provincial Court in regards to a s. 12 *Charter* application? In *R. v. Lloyd*, 2016 SCC 13, the Supreme Court of Canada decided that a Provincial Court has the power to "consider the constitutional validity of the challenged sentencing provision in the course of making his decision on the case before him."

[18] However, the court is not required to do so if it decides that the mandatory minimum is a fit and proper sentence for the offender before the court.

[19] At paragraphs 18 and 19 of *Lloyd*, Chief Justice McLachlin (as she was then) speaking for the court:

> [18] To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied. If an issue arises as to the validity of the law, the provincial court judge has the power to determine it as part of the decision-making process in the case. To compel provincial court judges to conduct an analysis of whether the law could have any impact on an offender's sentence, as a condition precedent to considering the law's constitutional validity, would place artificial constraints on the trial and decision-making process.
>
> [19] The effect of a finding by a provincial court judge that a law does not conform to the Constitution is to permit the judge to refuse to apply it in the case at bar. The finding does not render the law of no force or effect under s. 52(1) of the *Constitution Act, 1982*. It is open to provincial court judges in subsequent cases to decline to apply the law, for reasons already given or for their own; however, the law remains in full force or effect, absent a formal declaration of invalidity by a court of inherent jurisdiction.

[20] Counsel here referred to two cases under the previous penalty provisions for impaired driving offences which considered the applicability of s. 12 of the *Charter*.

[21] In *R. v. Luke*, 2019 ONCJ 514, in the case of a young female Aboriginal first-time offender, the Court concluded that the minimum sentence was contrary to s. 12 in that circumstance.

[22] Later, in *R. v. Sabattis*, 2020 ONCJ 242, another Court considered the circumstances of a young female first-time Aboriginal offender and came to the conclusion that the mandatory minimum sentence was not a grossly disproportional sentence for that offender or others in reasonably foreseeable fact situations.

[23] What is the test that the Applicant must meet to be successful?

[24] In *R. v. E.J.B.*, 2018 ABCA 239, concluded it will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the *Charter*.

[25] Once again in *Lloyd, supra*:

> To be considered grossly disproportionate the sentence must be more than merely excessive. The sentence must be so excessive as to outrage standards of decency and disproportionate to the extent that Canadians would find the punishment abhorrent or intolerable.

[26] Further, the Supreme Court of Canada in *R. v. Latimer*, 2001 SCC 1 at paragraphs 76 and 77 applied Justice Cory's reasoning in *Steele v. Mountain Institution*:

> 76 …
>
> It will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the *Charter*. The test for determining whether a sentence is disproportionately long is very properly

> stringent and demanding. A lesser test would tend to trivialize the *Charter*. [Emphasis added.]
>
> 77 In emphasizing the deferential standard for the s. 12 review, this Court has repeatedly adopted the following passage from *R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont. Dist. Ct.), at p. 238, *per* Borins Dist. Ct. J. (cited at *Smith*, *supra*, at p. 1070; *Luxton*, *supra*, at p. 725; *Goltz*, *supra*, at p. 502):
>
> It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the *Charter* is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.

[27] With the foregoing in mind, the Court must first consider what is a fit and proper sentence for the accused, mindful also of the principles of sentencing outlined in s. 718 and s. 718.2 of the *Criminal Code*, emphasis being placed upon:

[28] Section 718.2(b): “A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.”

[29] While the Canadian public may not be shocked if a Defendant was sentenced to pay a fine for an impaired driving offence, would they reasonably be appalled if this Defendant was so punished?

[30] Mr. Tebay was born in Ireland on July 7, 1972. He immigrated to Canada in 1999 and became a permanent resident in 2015. He has a 12-year-old Canadian daughter with a former partner. He has a stable current relationship and is employed through a temporary help agency. He keeps in contact with his elderly father who, of Irish descent, is now resident here as a Canadian citizen. Other family members are located in Canada.

[31] He has withdrawn his application for citizenship pending these proceedings.

[32] Mr. Tebay has previously been before the criminal courts of Canada and received a nine-month conditional discharge for an assault charge occurring in 2007. He has no other charges other than the current proceeding.

[33] Due to his immigration status as a permanent resident of Canada, Mr. Tebay does not want to acquire a criminal record. He has withdrawn his pending citizenship application after being arrested in January 2019 on this charge before the Court.

[34] In this case the Crown has proceeded by way of summary conviction.

[35] Under the provisions of the *Criminal Code* as recently revised, the offence before the court is a "hybrid" offence and the Crown had the option to proceed by way of indictment.

[36] If the Crown had proceeded by indictment, section 320.19(1) provides:

> Every person who commits an offence under subsection 320.14(1) or s. 320.15(1) is guilty of
>
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of
>
> (i) for a first offence, a fine of $1,000
>
> (ii) for a second offence, imprisonment for a term of 30 days, and
>
> (iii) for each subsequent offence, imprisonment for a term of 120 days.

[37] Defence counsel pointed out at paragraphs 27 to 30 of his brief:

> 27. Section 36(1)(a) of the *Immigration and Refugee Protection Act* states:
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> A permanent resident … is inadmissible on grounds of serious criminality for
>
> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed …
>
> 28. While the Crown has proceeded summarily in Mr. Tebay's case, the *Immigration and Refugee Protection Act* deems all hybrid offences to be indictable for the purpose of this analysis. Section 36(3) of the *Immigration and Refugee Protection Act* states:
>
> The following provisions govern subsections (1) and (2):
>
> [a] an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily …

> 29. As section 320.19(1) of the *Criminal Code* allows for a possible sentence of ten years imprisonment, a charge of having an unlawful blood alcohol concentration within two hours of driving now falls under the umbrella of 'serious criminality' under the *Immigration and Refugee Protection Act*.
>
> 30. A criminal record of conviction for such offences, even for first-time offenders, renders then inadmissible on grounds of serious criminality and subject to deportation from Canada.

[38] Counsel further suggests that a Canada Border Services officer could prepare an inadmissibility report following news of the entering of a conviction by the Court against Mr. Tebay. The Immigration and Refugee Board can make a finding that Mr. Tebay is criminally inadmissible to Canada resulting in a removal or deportation order. That order can be appealed to the Immigration Appeal Division if the appellant had originally received a sentence of six months' imprisonment or less. In this case the Crown is seeking a fine and probation and not incarceration. The Immigration Appeal Division can grant or reject the appeal and has the authority to stay the order of deportation.

[39] Basically, there must be a conviction entered for the process to start. The entering of an absolute or conditional discharge under the provisions of s. 730(1) of the *Criminal Code* does not constitute a conviction.

Section 730(1) states:

> Conditional and absolute discharge – Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

[40] In this case there is a minimal sentence and on the face of the legislation a discharge is not available for the Court to impose. Thus, the Defendant is seeking a constitutional exemption under the provisions of s. 12 of the *Charter of Rights and Freedoms* so that he could receive a discharge by way of sentence.

[41] In *R. v. Lacasse*, 2015 SCC 64, the Supreme Court of Canada commented on the sentencing of impaired driving case, at paragraph 3:

> The credibility of the criminal justice system in the eyes of the public depends on the fitness of sentences imposed on offenders. A sentence that is unfit, whether because it is too harsh or too lenient, could cause the public to question the credibility of the system in light of its objectives.

[42] At paragraph 7:

> The increase in the minimum and maximum sentences for impaired driving offences shows that Parliament wanted such offences to be punished more harshly. Despite countless awareness campaigns conducted over the years, impaired driving offences still cause more deaths than any other offences in Canada: House of Commons Standing Committee on Justice and Human Rights Ending Alcohol-Impaired Driving: A Common Approach (2009) at p. 5.

[43] At paragraph 73, the Court quoted their earlier decision in *R. v. Proulx*, 2000 SCC 5:

> Dangerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by otherwise law-abiding persons with good employment records and families. Arguably, such persons are the ones most likely to be deterred by the threat of severe penalties.

[44] At paragraph 7 of *Lacasse*, *supra*:

> As I mentioned in the introduction courts from various parts of the country have adhered to the principle that the objectives of deterrence and denunciation must be emphasized in imposing sentences for this type of offence.

[45] Despite the necessary emphasis on deterrence and denunciation, is the situation facing the Defendant, the possibility of deportation if a conviction is entered against him, not only harsh but cruel and unusual?

[46] Can the Defendant's unusual but not unique position of being a permanent resident accused of a crime under s. 320.14(1)(b) be considered in arriving at a fit and proper sentence?

[47] The answer to the latter question is a decided yes.

[48] In *R. v. Pham*, 2013 SCC 15, the Defendant was convicted of offences relating to the cultivation and possession of marijuana for the purposes of trafficking. The accused was an immigrant who had not at the time become a Canadian citizen. The sentencing judge was aware of the Defendant's immigration status at the time of sentencing and received a two-year sentence. At the Supreme Court of Canada the sentence was varied to two years less a day wherein the Defendant was then able to statutorily appeal his deportation order. The Supreme Court of Canada determined that collateral consequences such as deportation were to be taken into account if this was appropriate to proportionality and sentencing goals.

[49] At paragraph 11 of *Pham*, Chief Justice Wagner wrote:

> [11] In light of these principles, the collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender. They may be taken into account in sentencing as personal circumstances of the offender. However, they are not, strictly speaking, aggravating or mitigating factors, since such factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender (s. 718.2(*a*) of the *Criminal Code*). Their relevance flows from the application of the principles of individualization and parity. The relevance of collateral consequences may also flow from the sentencing objective of assisting in rehabilitating offenders (s. 718(*d*) of the *Criminal Code*). Thus, when two possible sentences are both appropriate as regards the gravity of the offence and the responsibility of the offenders, the most suitable one may be the one that better contributes to the offender's rehabilitation.
>
> [12] However, the weight to be given to collateral consequences varies from case to case and should be determined having regard to the type and seriousness of the offence. Professor Manson explains this as follows:
>
> > As a result of the commission of an offence, the offender may suffer physical, emotional, social, or financial consequences. While not punishment in the true

> sense of pains or burdens imposed by the state after a finding of guilt, they are often considered in mitigation. . . .
>
> The mitigating effect of indirect consequences must be considered in relation both to future re-integration and to the nature of the offence. Burdens and hardships flowing from a conviction are relevant if they make the rehabilitative path harder to travel. Here, one can include loss of financial or social support. People lose jobs; families are disrupted; sources of assistance disappear. Notwithstanding a need for denunciation, indirect consequences which arise from stigmatization cannot be isolated from the sentencing matrix if they will have bearing on the offender's ability to live productively in the community. The mitigation will depend on weighing these obstacles against the degree of denunciation appropriate to the offence. [Emphasis added.]

(*The Law of Sentencing* (2001), at pp. 136-37)

[13] Therefore, collateral consequences related to immigration may be relevant in tailoring the sentence, but their significance depends on and has to be determined in accordance with the facts of the particular case.

[14] The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.

[15] The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.

[16] These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a *de facto* if not a *de jure* special range of sentencing options where deportation is a risk.

…

[20] Accordingly, the sentencing judge is not compelled in all circumstances to adjust a sentence in order to avoid the impact of collateral immigration consequences on the offender. It remains open to the judge to conclude that even a minimal reduction, i.e. from two years' imprisonment to two years less a day, would render the sentence inappropriate for the particular offence and the particular offender. Collateral immigration consequences are but one relevant factor amongst

> many others related to the nature and the gravity of the offence, the degree of responsibility of the offender and the offender's personal circumstances.

[50] In light of the foregoing it appears to be clear that a sentencing court can consider immigration consequences for the Defendant as a result of the sentence intended to be imposed. Those consequences cannot dictate or override what an otherwise fit and proper sentence ought to be.

[51] Parliament has the exclusive authority to determine what a sentence can be under the provisions of the *Criminal Code*. In its wisdom the legislature has determined that impaired driving or care or control of a conveyance is a serious matter requiring serious sentences to deter potential law breakers. The current scheme for sentencing these types of offences in limited circumstances permits a court to direct a Defendant to participate in a rehabilitation program, and after such successful conclusion, permit the court to impose something other than the mandatory minimum penalty.

[52] Under section 320.23(1) the prior curative discharge provisions of then s. 255(1) of the *Criminal Code* were repealed and the following substituted:

Section 320.23(2):

> If the offender successfully completes the treatment program, the court is not required to impose the section 320.19 or to make a prohibition under section 320.24, but it shall not direct a discharge under section 730.

[53] Parliament has spoken quite clearly on the matter that it does not want a discharge available in the sentencing of impaired drivers.

[54] The courts still have the residual authority to review legislation to determine if it passes constitutional muster. Courts also have the obligation to fashion a fit and proper sentence mindful, in each case, of the particular offence and the particular offender. Courts can consider, where appropriate, how collateral consequences can become manifest depending on the sentence imposed on the particular offender.

[55] In the case before the Court, Mr. Tebay is a middle-aged gentleman who is a permanent resident of Canada. He has pled guilty to a charge under s. 320.14(1)(b) of the *Criminal Code*. His readings were 230 and 220 milligrams of alcohol in 100 millilitres of blood. His readings were two and a half times the legal allowable limit. His actions on the date in question did not result in the injury or death of anyone or the destruction of any property. However, he voluntarily took care and control of a motor vehicle and drove the vehicle containing two other passengers on the public streets of Halifax. Mr. Tebay has shown remorse for his actions and has participated in treatment programming for alcohol consumption. This is his first driving-related

offence though he has previously received a conditional discharge a number of years ago for a charge of assault, contrary to section 266.

[56] The entering of a mandatory minimum penalty of a fine would result in a criminal record for him. That record could result in a review of his permanent resident status and possibly lead to deportation, though such an order would be reviewable upon appeal.

[57] A criminal record is a permanent record which has significant repercussions for any person. In a summary proceeding such as this, someone who has received a criminal record can apply to the Parole Board of Canada to have the record suspended five years after the completion of all obligations and components of the sentence imposed by the court.

[58] In light of the legislative scheme for the punishment of impaired driver and those drivers who have blood alcohol ratio in excess of the legal allowable limit and in light of the particular circumstances of this offence and the personal circumstances of Mr. Tebay, it is the conclusion of this Court that the Court ought to impose a penalty in excess of the mandatory minimum. In these circumstances even if a conditional discharge were available its imposition would not be in the public interest. Mr. Tebay has demonstrated that he has participated in treatment

programming and need not be further supervised by the court. A driving prohibition of one year has already been imposed and by this date has been completed by the Defendant.

[59] A fit and proper sentence in this case is the imposition of a fine in the amount of $2,200. I will hear counsel as to any required time to pay. Five years after the fine is paid the Defendant can apply for a record of suspension of his resulting criminal record.

[60] Perhaps it is *obiter* to this decision, but while I have some sympathy for Mr. Tebay's situation I would echo the court in *R. v. Sabattis*, 2020 ONCJ 242, at paragraph 142:

> While the imposition of the mandatory minimum sentence, resulting in a conviction being entered, may be harsh or even excessive, I have no hesitance in finding that it is not grossly disproportionate on the facts of this case.

[61] And further at paragraph 142:

> To be considered "grossly disproportionate", the sentence must be more than merely excessive. A fine, a driving prohibition, and a criminal conviction for an impaired driver who endangers the lives of others, does not outrage standards of decency and is not so disproportionate that Canadians would find the punishment abhorrent or intolerable, even in circumstances such as these where there are significant mitigating personal circumstances. The mandatory minimum sentence in 255(1)(a)(i) *does not* go far beyond what is necessary to protect the public, to express moral condemnation, and to discourage others from engaging in such

conduct. The conduct poses a real risk of harm to the public. The mandatory minimum sentence on the facts of this case is not grossly disproportionate.

Order accordingly,
Dated at Halifax on the 25th day of September, 2020

Michael B. Sherar
Judge of the Provincial Court