PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. Robinson*, 2021 NSPC 29

Date: 20210527
Docket: 8371949
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Nathan Robinson

DECISION ON SENTENCE

Judge: The Honourable Judge Jean M. Whalen

Heard: March 30, 2021

Decision: May 27, 2021

Charge: Section 320.15(2) of the *Criminal Code*

Counsel: Michelle MacDonald, Crown Attorney
Stanley MacDonald, Defence Attorney

By the Court:

I Facts/Introduction

[1] Mr. Robinson was charged that he on or about July 29, 2019 at or near Waverly, Nova Scotia, did

1) Operate a conveyance while his ability to operate it was impaired to any degree by alcohol or drug or by a combination of both and while operating the conveyance caused bodily harm to M.T., contrary to section 320.14(2)

2) And further that he at the same time and place aforesaid, did knowing that a demand had been made, fail or refuse to comply with demand made to them by a peace officer under section 320.27 or 320.28 of the *Criminal Code* and at the same time of the failure or refusal, know or was reckless as to whether they were involved in an accident that resulted in bodily harm to M.T., contrary to section 320.15(2) of the *Criminal Code.*

[2] I found Mr. Robinson not guilty of count 1 and guilty of count 2 after trial. The RCMP were dispatched in the early morning hours to a motor vehicle accident on Waverley Road. Upon arrival the police observed a Toyota flipped over on its roof in the middle of the road. Mr. Robinson was the driver, his friend, M.T., was the passenger. He suffered an injury to his right hand (crushed middle finger), a laceration to the back of his head, and a loss of consciousness. The Agreed Statement

of Facts stated that M.T. needed surgery to repair his hand and remove pieces of glass.

[3] I found at trial due to an odor of alcohol and the accident, the police officer formed the required suspicion and gave the defendant the alcohol screening demand (ASD). I also found upon walking back to the police vehicle that the defendant said, "I had a couple of drinks hours ago". The defendant failed the ASD and he was given the breath demand. After exercising his right to counsel he refused to comply with the demand.

[4] I also found at trial that there was overwhelming evidence that M.T. had suffered bodily harm due to the accident, and Mr. Robinson knew that.

II Statutory Range of Penalty

[5] Section 320.2 states:

> **320.2** Every person who commits an offence under subsection 320.13(2), 320.14(2), 320.15(2) or 320.16(2) is guilty of
>
> (a) an indictable offence and liable to imprisonment for a term of not more than 14 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; or

(b) an offence punishable on summary conviction and liable to a fine of not more than $5,000 or to imprisonment for a term of not more than two years less a day, or to both, and to the minimum punishments set out in subparagraphs (a)(i) to (iii).

[6] Section 320.22, Aggravating Circumstances for Sentencing Purposes states:

320.22 A court imposing a sentence for an offence under any of the sections 320.13 to 320.18 [all conveyance offences] shall consider, in addition to any other aggravating circumstances, the following:

(a) the commission of the offence resulted in bodily harm to, or the death of, more that one person;

(b) the offender was operating a motor vehicle in a race with at least one other motor vehicle or in a contest of speed, on a street, road or highway or in another public place;

(c) a person under the age of 16 years was a passenger in the conveyance operated by the offender;

(d) the offender was being remunerated for operating the conveyance;

(e) the offender's blood alcohol concentration at the time of committing the offence was equal to or exceeded 120 mg of alcohol in 100 mL of blood;

(f) the offender was operating a large motor vehicle; and

(g) the offender was not permitted, under a federal or provincial Act, to operate the conveyance.

[7] Section 320.24(1) states:

Mandatory prohibition order

320.24(1) If an offender is found guilty of an offence under subsection 320.14(1) or 320.15(1), the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating the type of conveyance in question during a period to be determined in accordance with subsection (2).

Prohibition period

(2) The prohibition period if

(a) for a first time offence, not less than one year and not more than three years, plus the entire period to which the offender is sentenced to imprisonment;

(b) for a second offence, not less that one year and not more than three years, plus the entire period to which the offender is sentenced to imprisonment; and

(c) for each subsequent offence, not less that three years, plus the entire period to which the offender is sentenced to imprisonment.

…

Discretionary order of prohibition- other offences

(4) If the offender is found guilty of an offence under section 320.13, subsection 320.14(2) or (3) or under any sections 320.16 to 320.18, the court that sentences the offender may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating the type of conveyance in question during a period to be determined in accordance with subsection (5).

Prohibition period

(5) The prohibition period is

(a) if the offender is liable to imprisonment for life in respect of that offence, of any duration that the court considers appropriate, plus the entire period to which the offender is sentenced to imprisonment;

(b) if the offender is liable to imprisonment for more that five years but less than life in respect of that offence, not more than 10 years, plus the entire period to which the offender is sentenced to imprisonment; and

(c) in any other case, not more than three years, plus the entire period to which the offender is sentenced to imprisonment.

…

Minimum absolute prohibition period

(10) A person may not be registered in an alcohol ignition interlock device program referred to in subsection 320.18(2) until the expiry of

(a) in the case of a first offence, a period, if any, that may be fixed by order of the court;

General sentencing principles

[8] In *R v Boudreau*, 2019 NSPC 69, Judge Atwood states:

> *[6] Sentencing is a highly individualized process: R v Ipeelee, 2012 SCC 13 at 38 (Ipeelee).*
>
> *[7] In determining a fit sentence, a sentencing court ought to take into account any relevant aggravating or mitigating circumstances; that is prescribed by 718.2(a) of the Code. The court must consider also objective and subjective factors related to the personal circumstances of the person being sentenced and the facts pertaining to the particular case: R v Pham, 2013 SCC 15 at 8.*
>
> *[8] Assessing moral culpability is an extremely important function in the determination of any sentence. This is because a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender; that fundamental principle is set out in s. 718.1 of the Criminal Code.*
>
> *[9] In Ipeelee at 37, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation. Proportionality promotes justice for victims and proportionality seeks to ensure public confidence in the justice system.*
>
> *[10] In R v Lacasse, 2015 SCC 64 (Lacasse), the Supreme Court of Canada confirmed that proportionality is a primary principle in considering the fitness of a sentence. The severity of a sentence depends upon the seriousness of the consequences of a crime and the moral blameworthiness of the person who committed the act. The Court recognized at 12 that determining proportionality is a delicate exercise, because either overly lenient or overly harsh sentences might have the effect of undermining public confidence in the administration of penal justice.*

[11] In many respects, the Lacasse decision comes close to constitutionalizing the principle of proportionality in the imposition of just and fair sentences.

[12] In determining an appropriate sentence, the court is required to consider, pursuant to 718.2(b) of the Criminal Code, that a sentence should be similar to sentences imposed on similar persons for similar offences committed in similar circumstances. This is the principle of sentencing parity.

[13] The court must apply the principle that a person to be sentenced not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances; furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstances.

[14] It is essential to recognize that restraint is an organizing principle of the law of sentencing. This requires necessarily that the court consider the effect of the modification of Part XXIII of the Code in SC 1995, c 22, s 6, in force 3 Sep 1996 in virtue of SI/96-79, introduced originally in the House of Commons as Bill C-41. This amendment carried into effect, among other provisions, s 718.2, particularly (c)-(e); these values of restraint, as explained in R v Gladue, 1999 CanLII 679 (SCC), [1999] 1 SCR 688 at 39 and 48, were part of the first significant reform of sentencing principles in the history of Canadian criminal law. This remedial provision helped carry into effect Parliament's intention to reduce the use of prisons for non-violent persons, and its resolve to expand the use of restorative-justice principles in sentencing. See also, R v Proulx, 2000 SCC 5 at 15, and particularly 16, where the Court held unanimously:

16 Bill C-41 is in large part a response to the problem of overincarceration in Canada. It was noted in Gladue, at para. 52, that Canada's incarceration rate of approximately 130 inmates per 100,000 population places it second or third highest among industrialized democracies. In their reasons, Cory and Iacobucci JJ. reviewed numerous studies that uniformly concluded that

incarceration is costly, frequently unduly harsh and "ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals" (para. 54). ... Prison has been characterized by some as a finishing school for criminals and as ill-preparing them for reintegration into society... iv. In Gladue, at para. 57, Cory and Iacobucci JJ. held:

Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate. The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(e) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions. [Emphasis by Lamer C.J.]

17 Parliament has sought to give increased prominence to the principle of restraint in the use of prison as a sanction through the enactment of s. 718.2(d) and (e). Section 718.2(d) provides that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances", while s. 718.2(e) provides that "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". Further evidence of Parliament's desire to lower the rate of incarceration comes from other provisions of Bill C-41: s. 718(c) qualifies the sentencing objective of separating offenders from society with the words "where necessary", thereby indicating that caution be exercised in sentencing offenders to prison . . . .

[15] Where Parliament has created a statutory remedy, one that is more than merely a codification or declaration of existing common-law principles, sentencing courts must give effect to that remedy and must recognize, necessarily, the effect the modernisation of the law

> *will have had on the precedential weight of appellate penal benchmarks that predated it. Stated simply, a statutory revision may overtake what had been prescriptive appellate ranges*

Offence Seriousness

[9] Part VIII.I of the *Criminal Code* entitled Offences Relating to Conveyances of which section 320.15(2) is included begins at section 320.12:

> **Recognition and Declaration**
>
> **320.12** It is recognized and declared that
>
> (a) operating a conveyance is a privilege that is subject to certain limits in the interests of public safety that include licensing, the observance of rules and sobriety;
>
> (b) the protection of society is well served by deterring persons from operating conveyances dangerously or while their ability to operate them is impaired by alcohol or a drug, because that conduct poses a threat to the life, health and safety of Canadians;
>
> (c) the analysis of a sample of a person's breath by means of an approved instrument produces reliable and accurate readings of blood alcohol concentration; and
>
> (d) an evaluation conducted by an evaluating officer is a reliable method of determining whether a person's ability to operate a conveyance is impaired by a drug or by a combination of alcohol and a drug.

[10] Section 320.15(2) is the aggravating form of the offence, that is the defendant knew or was reckless about their involvement in an accident in which another person suffered bodily harm.

[11] The following was published by the Government of Canada prior to the passage of the new drinking and driving offences, entitled *Backgrounder: Changes to Impaired Driving Laws:*

> *Backgrounder*
>
> *April 2017*
>
> *Impaired driving is the leading criminal cause of death and injury in Canada. The Government has committed to creating new and stronger laws to punish more severely those who drive while under the influence of drugs, including cannabis. Today, the Government has gone one step further by introducing proposed legislation that would reform the entire impaired driving regime in the Criminal Code. It would strengthen existing drug-impaired driving laws and create a regime that would be amongst the strongest in the world, particularly where cannabis is legal. Proposed changes include, new "legal limit" drug offences and new tools to better detect drug-impaired drivers. Other changes would apply to alcohol-impaired driving and would make the law easier to enforce, as well as simpler, more coherent and efficient.*
>
> *To support these measures, the Government will undertake a robust public awareness campaign so that Canadians are well informed about the dangers of driving under the influence of cannabis and other drugs. It will also work with provinces, territories, municipalities and local communities to train and equip law enforcement so that Canada's roads and highways are safe for all Canadians.*
>
> *The first part of the proposed legislation would ensure that a robust drug-impaired driving regime is in place before cannabis legalization occurs.*

The second part of the proposed legislation would reform the entire Criminal Code transportation regime to create a new, modern, simplified, and more coherent system to better deter drug and alcohol-impaired driving.

…

Part 2 – Transportation Offence Reform (drug and alcohol impaired)

The proposed legislation would reform the entire Criminal Code regime dealing with transportation offences, including impaired driving. It would:

- *Repeal and replace all transportation offences with a modern, simplified and coherent structure*
- *Authorize mandatory alcohol screening at the roadside where police have already made a lawful stop under provincial law or at common law*
- *Increase certain minimum fines and certain maximum penalties*
- *Facilitate investigation and proof of blood alcohol concentration*
- *Eliminate and restrict defences that encourage risk-taking behaviour and make it harder to enforce laws against drinking and driving*
- *Clarify Crown disclosure requirements*
- *Permit an earlier enrolment in a provincial ignition interlock program*

Modernized structure of the transportation provisions

The current transportation regime was developed over decades, through piecemeal approaches and is very challenging to read and understand even for legal practitioners. The proposed legislation would create efficiencies by enacting a modern and coherent

framework addressing transportation offences including impaired driving.

Mandatory alcohol screening

The proposed mandatory alcohol screening provisions would authorize law enforcement officers who have an "approved screening device" at hand to demand breath samples of any drivers they lawfully stop, without first requiring that they have a suspicion that the driver has alcohol in their body. As research shows that many impaired drivers are able to escape detection at check stops, this authority would help police detect more drivers who are "over 80" and reduce litigation regarding whether or not the officer had a reasonable suspicion. The result of a test on an approved screening device would not, by itself, lead to a charge. It would lead only to further investigation, including a test on an approved instrument at the police station.

Penalties

The proposed legislation would enact some new and higher mandatory minimum fines, and some higher maximum penalties. Currently, the mandatory minimum penalties for impaired driving are:

- *First Offence: $1,000 mandatory minimum fine*
- *Second Offence: mandatory 30 days imprisonment*
- *Third Offence: mandatory 120 days imprisonment*
- *The proposed legislation would increase the mandatory fines for first offenders with high blood alcohol concentration readings:*

A first offender with a reading of 80 to 119 mg of alcohol per 100 ml of blood would be subject to the current mandatory minimum fine of $1,000

The mandatory minimum fine for a first offender with a reading of 120 to 159 mg of alcohol per 100 ml of blood would be raised to $1,500

The mandatory minimum fine for first offender with a reading of 160 mg or more of alcohol per 100 ml of blood or more would be raised to $2,000

A first offender who refuses testing would be subject to a $2,000 mandatory minimum fine.

…

Offences causing bodily harm:

- *Offences causing bodily harm would become hybrid offences allowing the Crown to decide whether to proceed summarily where the injuries are less severe (for example, a broken arm). This will also help to address the issue of reducing court delays because summary conviction proceedings are simpler and take less time.*

Eliminating and Restricting Defences

Currently, a driver may escape liability by claiming that they consumed alcohol just before or during driving, and were not over the legal limit at the time they were driving because the alcohol was not yet fully absorbed. It was only later, at the time of testing, that they reached an illegal blood alcohol concentration. This is often referred to as bolus *drinking or "drinking and dashing". The proposed legislation would remove this defence by changing the timeframe in which the offence of "over 80" can be committed. Instead of being "over 80" at the time of driving, the offence will be "at or over 80" within two hours of driving. This would discourage the risky behaviour of drinking immediately before driving, in the hopes of arriving home before being too impaired to drive.*

The proposed timeframe would also limit the "intervening drink defence". This defence can be relied upon when a driver can

> *demonstrate that they consumed alcohol after driving, but before providing a breath sample. Some individuals do this in an attempt to obstruct the course of justice making it challenging for the Crown to prove the blood alcohol concentration and often requiring the testimony of an expert witness. Recognizing that there may be situations where the post-driving consumption of alcohol was innocently done, the legislation provides for a more limited defence, (i.e., the driver drank after driving but had no reason to expect that they would be required to provide a sample of breath.)*
>
> …
>
> ***Permit an earlier enrolment in a provincial ignition interlock program***
>
> *Under the current law, a driver is permitted to drive during the period of prohibition if they are admitted into a provincial ignition interlock program. An ignition interlock device prevents the car from starting if the driver has been drinking. Currently, the driver must wait for a specified period before the province may consider an application. The proposed legislation would reduce the time an offender must wait before they can return to driving; there would be no wait for a first offence, three months for a second offence and six months for a subsequent offence. Evidence shows that ignition interlock devices reduce recidivism.*

[12] Courts have taken judicial notice of the danger inherent in substantive impaired driving. Section 718 directs that the "fundamental purpose of sentencing is to contribute, along with the crime prevention initiatives, to respect for the law and maintenance of a just, peaceful and safe society. It is too easy for otherwise law-abiding people to view what happened in this case as an "accident," an unfortunate

consequence of an error in judgement, rather than the commission of a criminal offence. Sentencing courts should be careful to ensure that they do not bolster that view."

[13] In *Boudreau* Judge Atwood states at paragraph 24:

> *[24] Drinking-and-driving offences which result in bodily harm are a serious class of offence, reflected in the statutory range of penalty; however, a class of offence cannot be aggravating in and of itself; were it otherwise, every such offence would be aggravating, which would nullify the principle of proportionality: R v Johnston, 2011 NLCA 56 at 18-20.*

[14] I am mindful that I am sentencing the defendant for a new section in the *Code*. It does not contain the element of "causation". Parliament removed that with an amendment on December 18, 2018.

III Position of the Parties

[15] Defence counsel argues "by removing the element of causation, Parliament lowered the threshold for proving the offence of refusal in circumstances involving bodily harm, and consequently, also lowered the gravity of the offence and degree of moral responsibility".

[16] The courts can no longer rely on the sentencing cases and ranges decided prior to the Bill C-46 Amendments. Defence counsel seeks a fine of $2,000.00, and one-year probation, and agrees with a two-year driving prohibition.

[17] The Crown argues that despite causation not being required to be proven, it does not change the seriousness of the charge. “The defendant had the smell of alcohol and failed the ASD. Alcohol is a factor to be considered as well as the passenger’s injuries. The minimum penalty is not a fit or appropriate sentence.”

[18] The Crown seeks a period of custody to be served in the community because the defendant is youthful, has no record, and the victim was a friend who has recovered from his injuries. This is to be followed by a one-year probation and a two-year driving prohibition.

Denunciation and Deterrence

[19] Sentencing for drinking and driving offenses typically emphasize denunciation and deterrence. In *R v Burns*, 2020 NSPC 48, Judge Buckle states at paragraph 17:

> *[17] Denunciation is how a sentence communicates society's condemnation of conduct. A denunciatory sentence has been described as “a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic*

code of values as enshrined within our substantive criminal law." (M. (C.A., supra., at para. 81).

[18] The need for denunciation of drunk driving has been repeatedly addressed by the Nova Scotia Court of Appeal. In R. v. Cromwell, 2005 NSCA 137, the Court described it as a crime of "distressing proportions" that wreaks carnage and causes "significant social loss" (at para. 27). The Court went on to say:

29 The sentence must provide a clear message to the public that drinking and driving is a crime, not simply an error in judgment. Those who would maim or kill by driving their vehicles while impaired are as harmful to public safety as are other violent offenders. The proliferation of this crime and the risk that it will be seen by society as less socially abhorrent than other crimes heightens the need for a sentence in which both general deterrence and denunciation are prominent features.

[19] The goal of general deterrence is to discourage others from committing similar offences.

[20] In R. v. Proulx, 2000 SCC 5, the Supreme Court of Canada spoke about the efficacy of general deterrence for driving offences:

…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." (para. 129, internal citations omitted).

[21] In cases where denunciation and general deterrence must be emphasized, custody will often be the only option and in some cases only actual incarceration will suffice (Lacasse, supra., at para. 6; and, Proulx, supra., at paras. 102 – 107). However, incarceration

> *is not the only way the criminal justice system contributes to these objectives. Pre-sentence or extra-judicial consequences can be significant and meaningful. Probationary terms with a primary goal of assisting in rehabilitation or restorative justice, like curfews or community service, can also have a collateral punitive benefit (See: R. v. George (1992), 1992 CanLII 2621 (NS CA), 112 N.S.R. (2d) 183 (C.A.); R. v. Martin 1996 NSCA 207; R. v. R.T.M. (1996), 1996 NSCA 156; and, R. v. Voong, 2015 BCCA 285). Conditional sentences with punitive conditions and the constant threat of incarceration are capable of providing significant denunciation and deterrence (Proulx, supra., at paras. 22, 41 and 102 – 107).*

[20] Defence counsel states Mr. Robinson has accepted responsibility for his actions and has apologized to the victim. This was out of character and "you'll never see Mr. Robinson back in court again". When given an opportunity to address the court the defendant stated he accepts full responsibility and apologized to all who were impacted.

Rehabilitation

[21] Rehabilitation continues to be a relevant objective, even in cases requiring that denunciation and deterrence be emphasized as stated in *R v Lacasse* at paragraph 4:

> *[4] One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate.*

[22] The defendant had a positive upbringing, and he continues to have support of his family and friends. I was supplied with numerous letters from family, friends, and co-workers. All speak very highly of him. His mother stated this was out of character for him. He is in a positive relationship with his partner, Ms. Myers, and they live in Ontario.

[23] He has completed an undergraduate degree and hopes to become a CPA. The defendant is currently unemployed but has had steady work prior to this offence.

[24] There are no issues with mental health, alcohol, or drugs identified.

[25] Mr. Robinson acknowledged responsibility for his actions, telling the probation officer, “Yes, I accept responsibility, this was a big mistake and I have definitely learned from this. I wish I could take this back”.

Proportionality

[26] In *R v Burns* at paragraph 27, the court states:

> *[27] Section 718.1 says 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. It requires that a sentence not be more severe than what is just and appropriate given the seriousness of the offence and the moral blameworthiness of the offender. It also requires that the sentence be severe enough to condemn the offender’s actions and hold her responsible for what*

> *she has done (Lacasse, supra., at para. 12; and, R. v. Nasogaluak, 2010 SCC 6, at para. 42).*

[27] I must assess the seriousness of the offence and the defendant's moral culpability. There is no doubt that this is a very serious offence. This is reflected in numerous cases from our various levels of court. However, what is the defendant's specific offending behaviour?

[28] M.T. testified they had been hanging around the house all day playing video games and exercising. In the early morning hours, they drove to get cigarettes. M.T. saw the defendant drinking earlier in the day. At the scene, the police detected an odor of alcoholic beverage coming from the defendant. Mr. Robinson initially denied drinking when asked, but, as he was walking to the police vehicle he stated, "I had a couple of drinks hours ago". Despite that, Mr. Robinson still chose to drive M.T.'s car to the store. Mr. Robinson failed the ASD.

[29] Mr. Robinson chose to drive M.T.'s car to the store. That is solely his responsibility and his moral blameworthiness is high. However, I do not have any breathalyzer readings. Mr. Robinson initially agreed to comply but after speaking with counsel he refused. That was his constitutional right to seek the advise of a lawyer, I do not know what was said or what advice was given, all I know is after speaking with counsel for 20 minutes, he refused. That refusal has consequences.

[30] I found Mr. Robinson not guilty of impaired operation because I was left with reasonable doubt on the evidence. I do not know what "caused" the accident as the Crown did not call any evidence on that. The "snap oversteer" was proffered by M.T. However, the exact "cause" of the accident is not clear, nor did I make a finding that it was the "snap oversteer". I concluded that evidence along with the other circumstances left me with a reasonable doubt on the impaired charge.

Aggravating and Mitigating Factors

[31] Aggravating factors:

1. Odor of alcohol
2. He told the police officer he had "a couple of drinks hours ago"

[32] Mitigating factors:

1. The defendant is 24 years old
2. No record
3. Now accepts responsibility
4. Expressed remorse
5. Family support

Conditional Sentence Order

[33] The Crown is seeking a nine-month Conditional Sentence Order pursuant to section 742.1 because the defendant is young, he has no record, the victim is a friend and the type of injuries.

[34] In *R v Burns* Judge Buckle states beginning at paragraph 32:

> *[32] ... That provision includes technical and substantive pre-conditions. The technical pre-conditions are not a bar to a conditional sentence in this case: any custodial sentence would be less than two years; there is no mandatory minimum term of imprisonment; and, the maximum available sentence is two years. The substantive pre-conditions require that I be satisfied that allowing Ms. Burns to serve her sentence in the community would not endanger its safety and would be consistent with the fundamental purpose and principles of sentencing.*
>
> *[33] In R. v. Proulx, supra., at paras. 69 – 76, the Court identified factors that should be taken into account in assessing safety of the community. These were summarized by the Nova Scotia Court of Appeal in Cromwell, supra., at para. 38:*
>
> *- the risk of the offender re-offending;*
>
> *- the gravity of the damage in the event of re-offence;*
>
> *- whether the offender has previously complied with court orders;*
>
> *- whether the offender has a criminal record that suggests that [she/he] will not abide by the conditional sentence;*
>
> *- the nature of the offence;*
>
> *-the relevant circumstances of the offence, which can put in issue prior and subsequent incidents;*
>
> *- the degree of participation of the accused;*

> *- the relationship of the accused with the victim;*
>
> *- the profile of the accused, that is, his [or her] occupation, lifestyle, criminal record, family situation, mental state;*
>
> *- his [or her] conduct following the commission of the offence;*
>
> *- the danger which the interim release of the accused represents for the community, notably that part of the community affected by the matter.*
>
> *[34] Once a risk has been identified, I must ask whether conditions can be crafted that would reduce the risk to an acceptable level (Cromwell, at para. 39).*

[35] Defence counsel says it is not necessary to impose a jail sentence, that the principles of sentencing can be met with a fine and probation. He urges me to consider section 718(2)(e) of the *Criminal Code.*

[36] I put the defendant's risk of re-offending as very low. He has no criminal record, no alcohol or drug addictions. He has complied with all release conditions, and there are no outstanding charges. He is living in Ontario with his girlfriend and leading a pro-social lifestyle and plans to become a CPA.

[37] Defence counsel agues that an alcohol prohibition is not needed on any order imposed by the court. If I allow this, that means the defendant could drink alcohol, but the risk to the community is not drinking in of itself. It is drinking and driving.

[38] There is a possibility that the defendant may make the poor decision again but defence counsel says, “You will never see the defendant back in court again”.

[39] The defendant told the probation officer “… this was a big mistake, and I have definitely learned from this”.

[40] If I were to impose a Conditional Sentence Order, any further risk could be addressed through conditions in a Conditional Sentence Order and a driving prohibition.

Parity/Range of Sentence

[41] Section 718.2 also requires me to consider the principle of parity which says that, within reason, similar offenders who commit similar offences should receive similar sentences. Ultimately, each sentence has to reflect the unique circumstances of the specific offence and specific offender. However, respect for the principle of parity is encouraged by situating a given case within the range of sentences generally imposed for a given offence. This promotes consistency, fairness, and rationality in sentencing.

[42] Mr. Robinson has no previous convictions and the Crown proceed by summary conviction, so the current theoretical minimum sentence is a fine of not

more than $5,000.00 and the maximum is a custodial sentence of two years less a day and a up to a three year driving prohibition (ss. 320.2(a) &(c) and 320.24(4) & (5)(c)). The range for a given offence is not that theoretical minimum to maximum but is narrowed by the context of the offence and the circumstances of the offender (*Cromwell, supra).*

[43] In *R v Burns*, the Crown referenced *R v Cromwell (supra.), R v Kerrivan* [2015], 375 Nfld. & P.E.I.R., 151 (pc), and *R v George*, 2016 NSCA 88. The defence had provided *R v Beals,* 2019 NSPC 68, and *R v Boudreau*, 2019 NSPC 69. In addition, I have reviewed *R v Martin*, *supra, R v Hamilton*, 2008 NSSC 2014, and *R v Davison*, 2006 NSPC 73. All of these cases involve sentencing for alcohol and related driving offences where bodily harm was caused.

[44] Here, bodily harm occurred but causation was not attributed to the defendant, even though it is not an element of this offence.

[45] Defence counsel argues “the punishment for these offences can no longer be equated where impaired drinking and driving and over 80 require proof of causation and a refusal does not”, sections 320.14(2); 320.14(3) and 320.15(2).

[46] Counsel goes on to say “refusing to provide a breath sample in circumstances where the defendant knows the accident resulted in bodily harm is still aggravating,

as the situation is more serious than one that did not involve bodily harm, but the court cannot punish the defendant for having caused that bodily harm where causation was not proven beyond a reasonable doubt.

[47] In *R v M(L)* 2012 NSSC 250 at paragraph 27 the court states:

> *If the crown does not call adequate evidence to establish the more aggravated circumstances beyond a reasonable doubt, the defendants version is to be accepted, unless there is some manifest reason why that interpretation is contrived or erroneous.*

[48] There are no cases found to date from my research, or counsels, but from the legislative changes, including the penalty for the offence, and stating it is the "aggravating form" of the offence signals that deterrence, denunciation and public safety are important.

Restraint and Totality

[49] In *R v Burns* at paragraph 51 Judge Buckle states:

> *[51] Finally, I have to consider the principle of restraint contained within s. 718.2. Restraint, in general, requires that the punishment should be the least that would be appropriate in the circumstances. More specifically, it requires that I consider all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community.*

VI Conclusion

[50] I have concluded that a fit and proper sentence for the defendant is a conditional sentence order, a period of probation and a driving prohibition. In the circumstances of this case, a non-custodial disposition would not be consistent with the principles of sentencing, specifically the objectives of general deterrence and denunciation.

[51] The defendant is a first-time offender with great prospects for rehabilitation; he has expressed remorse.

[52] I am satisfied allowing the defendant to serve his sentence in the community would not endanger its safety. Any risk of re-offence will be further mitigated by the fact that for a significant period of time he will be prohibited from driving, his driving privileges will be suspended, and he will be prohibited from possessing/consuming any alcohol while serving the sentence. Consumption of alcohol is not consistent with serving a custodial sentence.

[53] Given all the circumstances in this case, a conditional sentence order with punitive conditions adequately addresses the objectives of denunciation and general deterrence.

[54] The final disposition is a six-month conditional sentence order with conditions:

1. Reporting to a probation officer/sentence supervision
2. A positive residence requirement
3. No alcohol or drugs
4. House arrest for the first three months
5. Curfew for the remaining three months
6. Counselling
7. Carry a copy of the order on his person at all times

[55] This is to be followed by 12 months of probation with conditions including no alcohol.

[56] There will be a two-year driving prohibition and the victim fine surcharge is due within one year.

Jean M. Whalen, JPC.