

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

TONY ROBERT BERNHARDT

Transcript of the Reasons for Sentence delivered by The Honourable Justice S. H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 17th day of December, A.D. 2012.

APPEARANCES:

Ms. W. Miller: Counsel for the Crown

Mr. M. Hansen: Counsel for the Accused

(Charges under s. 253(1)(a), 259(4) and 355(a) of the Criminal Code of Canada)

1 THE COURT: This morning, Mr. Bernhardt
2 re-elected to judge alone, pled guilty to counts
3 1 and 3 on the Indictment; that is operating a
4 motor vehicle while his ability to drive was
5 impaired by alcohol and having possession of a
6 van knowing that it was stolen. I must now
7 sentence him for these offences.

8 The events that led to those charges date
9 back to March 3rd of this year. At approximately
10 1:55 p.m., the RCMP in Aklavik received a report
11 of a suspected impaired driver. The complaints
12 that were received was that someone had driven
13 the ambulance into the ditch. The RCMP responded
14 and observed the ambulance in the ditch. The
15 pictures in Exhibit S3 depict what the officers
16 saw. The ambulance was stuck in the snow, the
17 right rear tire was stuck in the soft shoulder,
18 and the accused was in the driver's seat. The
19 accused showed signs of impairment: slurred,
20 slow speech; a strong odour of alcohol on his
21 breath; slow motor skills; wobbly when standing;
22 and staggering while walking. He was placed
23 under arrest. Subsequent investigation showed
24 that the accused had taken the ambulance, without
25 permission, in Inuvik. He had driven to Aklavik,
26 which is an approximately one-and-a-half-hour
27 drive and stopped at the Northern Store in

1 Aklavik to buy cigarettes, and when he left, got
2 the vehicle stuck in the ditch in the snow.

3 The accused was initially released on these
4 charges but failed to appear on his court date of
5 June 6th, 2012. He was arrested on a warrant
6 that same day. Mr. Bernhardt subsequently
7 consented to his remand, reserving his right to
8 show cause. He has been in custody since then
9 some 195 days.

10 Impaired driving pursuant to Section
11 253(1) (a) of the Criminal Code is punishable when
12 the Crown proceeds by indictment by a maximum of
13 five years' imprisonment. Possession of property
14 obtained by crime pursuant to Section 355 when
15 the value exceeds \$5,000 is punishable by up to
16 ten years' imprisonment. There is also a
17 mandatory driving prohibition.

18 In this case, there is a joint submission of
19 three years' imprisonment less credit for remand
20 time and a lifetime driving prohibition.

21 Mr. Bernhardt is 48 years old and he has a
22 significant record of driving while under the
23 influence of alcohol. This record goes back
24 almost 30 years to 1983 where he was convicted of
25 driving while impaired and received an \$800 fine.
26 He was also convicted of dangerous driving at the
27 same time. Since then, he has accumulated eight

1 more drinking and driving convictions. In 1991,
2 he was convicted of driving with more than 80
3 milligrams of alcohol in his blood and received
4 60 days of jail intermittent. In 1991, he was
5 again convicted of the same offence. He received
6 a fine this time. 1991 again, he received
7 another conviction and received 21 days in
8 custody.

9 The next entry on his criminal record for
10 drinking and driving is in 1993. At that time,
11 he received five months' imprisonment. In 1996,
12 he received a sentence of a year. In 1999, he
13 received a sentence of a year. In 2001, he
14 received a sentence of 18 months. In 2010, he
15 received a sentence of two years less six months'
16 credit. All along with this, he has been
17 receiving driving prohibitions which have
18 gradually increased so that he is now currently
19 on a ten-year driving prohibition.

20 In addition to these convictions, he also
21 has nine convictions for driving while
22 disqualified, and, as well, there are numerous
23 convictions for other offences against the
24 administration of justice. He has a prior
25 conviction for taking a motor vehicle without
26 consent and, also, for theft.

27 As noted in his criminal record with respect

1 to the drinking and driving convictions, he has
2 receive sentences of increasing terms of
3 imprisonment, culminating in his most recent
4 conviction in November 2010, which I have
5 referred to.

6 Mr. Bernhardt's extensive, related criminal
7 record is the most aggravating feature of this
8 case. It is also aggravating that Mr. Bernhardt
9 was under a ten-year driving prohibition at the
10 time of this offence, and it is aggravating that
11 this offence occurred approximately four months
12 after his release from his last conviction which
13 was for the same offence.

14 The Supreme Court of Canada, in the cases of
15 Gladue and Ipeelee, require courts to consider
16 the circumstances of aboriginal persons in
17 passing sentence. I take judicial notice, as I
18 am required to, of systemic factors that have
19 unfortunately caused many aboriginal people to
20 become involved with the criminal justice system.
21 Mr. Bernhardt's counsel advises that he is of
22 Inuvialuit descent, that he attended residential
23 school, and was both a witness to and a victim of
24 abuse at residential school and at home. I am
25 well aware of the devastating impact that
26 residential schools have on aboriginal people,
27 their families and their lives. The impact is a

1 long-lasting one and can take years to deal with.

2 This is not a situation where either counsel
3 is suggesting that sanctions other than
4 imprisonment could adequately achieve the
5 objectives of sentencing. So having regard to
6 these considerations, I have not been presented
7 with any other options besides imprisonment.
8 Certainly, given Mr. Bernhardt's record,
9 sanctions other than imprisonment would not give
10 proper effect to the other sentencing principles.

11 Turning to those other sentencing
12 principles, protection of the public must be the
13 primary consideration in this situation.
14 Mr. Bernhardt, I do not know that I can say
15 anything that has not been said to you before.
16 You have heard what I am about to say before and
17 likely many times. It does not seem to have an
18 impact. You continue to drive while impaired,
19 putting the safety of the public at risk. The
20 people of Aklavik, Inuvik, Yellowknife, all the
21 places where you have consumed alcohol and then
22 got behind the wheel of a vehicle, the people of
23 those communities -- of all the communities in
24 the North, really, they need to have protection
25 from you and people like you. You put their
26 lives at risk every time you do this, and you
27 probably say, "Yeah, yeah, I know. I won't do it

1 again," but you continue to do it. The reality
2 is that drinking and driving places innocent
3 people at risk and every year there continue to
4 be accidents, injuries, and deaths across Canada
5 because of actions of people like yourself who
6 drink and drive.

7 Another sentencing principle that I need to
8 consider is deterrence, deterrence of
9 Mr. Bernhardt and others like him who drive when
10 they have been drinking.

11 Now, Mr. Bernhardt, I do not know when or if
12 the message will get through to you that you
13 should not be doing this, but I do know that the
14 sentences will continue to get longer and longer
15 until you make a change to your behaviour. You
16 are 48 years old. It is time for you to start
17 making that change.

18 Denunciation is another important principle;
19 that is, expressing society's condemnation of an
20 unlawful conduct and of drinking and driving in
21 particular.

22 Proportionality is another principle that I
23 must consider. The sentence must be
24 proportionate to the gravity of the offence and
25 to Mr. Bernhardt's degree of responsibility. The
26 ongoing pattern of driving over almost 30 years
27 demonstrates the seriousness of the offence.

1 Mr. Bernhardt has been told repeatedly about the
2 risks of this behaviour. He has received
3 increasing sentences, but these have had no
4 effect. He continues to persist in this type of
5 behaviour. So his level of responsibility is
6 high.

7 Mr. Bernhardt has recently begun to address
8 his issues with alcohol and, while this is a
9 recent effort, he is to be commended for that.
10 You should continue to pursue alcohol treatment.
11 So far it has not been successful, as evidenced
12 by your latest conviction, and that is
13 unfortunate, but right now that is not my primary
14 concern. Alcoholism is a disease, and you may be
15 unable to stop drinking right now, but driving
16 while drunk is not, and you have the ability
17 within you to change that behaviour.

18 Other aggravating factors are the
19 circumstances of the offence. The accused was
20 driving on a Saturday, in the afternoon, on the
21 highway from Inuvik to Aklavik, which is a
22 somewhat a lengthy drive, through Aklavik to the
23 Northern Store, finally getting stuck in the
24 ditch in full view of nearby houses. As I
25 mentioned earlier, the potential for tragedy is
26 heightened every minute you were behind the wheel
27 of that vehicle.

1 There are also mitigating factors. The most
2 significant one is that Mr. Bernhardt has taken
3 responsibility and pled guilty. You waived your
4 preliminary inquiry and made arrangements to
5 re-elect and plead guilty today. You have
6 avoided the time and expense associated with a
7 jury trial. So far in this case, no witnesses
8 have had to testify either at a preliminary
9 inquiry or at a trial. So Mr. Bernhardt should
10 get full credit for his guilty plea.

11 In all the circumstances, it is necessary
12 that a substantial period of incarceration be
13 imposed as well as a lengthy driving prohibition.
14 The joint submission is for three years'
15 imprisonment and a lifetime driving prohibition.
16 In the circumstances, taking into account
17 Mr. Bernhardt's criminal record, his prior
18 convictions for related offences, and the offence
19 that is before the Court, I think that this is a
20 reasonable sentence.

21 With respect to credit for pre-trial
22 custody, the accused has been in custody for 195
23 days or six months and a little over a week.
24 Mr. Bernhardt seeks enhanced credit of one and a
25 half to one on the basis that he has been unable
26 to take programs and was a well-behaved prisoner.
27 The Crown takes no position on the credit for

1 remand time. This is not a situation where the
2 accused has been detained because of his record.
3 He has been on consent remand since being
4 arrested on the warrant of June 6, 2012.

5 The information provided by Mr. Hansen, on
6 behalf of Mr. Bernhardt, indicates that he spoke
7 to a Mr. Baisi who works at the North Slave
8 Correctional Centre and is familiar with the
9 accused. Mr. Baisi reports that Mr. Bernhardt
10 had been unable to take any programs while on
11 remand because priority had been given to serving
12 prisoners and there was no room available for him
13 on the programs. He also reports that
14 Mr. Bernhardt has been well behaved and a good
15 prisoner and there is no record of any management
16 problems with respect to Mr. Bernhardt. From
17 this, I can conclude that he would have earned
18 remission if he had been a served prisoner. The
19 Crown does not dispute the information provided
20 by Mr. Hansen. In the circumstances, I am
21 satisfied Mr. Bernhardt should receive credit in
22 excess of the one-to-one mandated in Section
23 719(3) of the Code. Therefore, Mr. Bernhardt
24 will receive credit of nine months for his
25 pre-trial custody.

26 Mr. Bernhardt, if you could please stand.

27 On the charge of impaired driving, contrary to

1 Section 253(1)(a), it is the sentence of this
2 court that you be imprisoned for a period of
3 three years. I give you credit of nine months'
4 imprisonment for your time in remand; therefore,
5 your remaining sentence is two years and three
6 months. For the offence of possession of
7 property obtained by crime, pursuant to Section
8 355, the sentence is also three years'
9 imprisonment to be served concurrently. Again, I
10 give you credit of nine months for the time spent
11 in remand. Your remaining sentence is two years,
12 three months. Again, concurrent. For the
13 impaired driving, there will also be a driving
14 prohibition. It will be a lifetime prohibition.
15 Given your history, I do not think it would ever
16 be safe for you to operate a motor vehicle. The
17 risk to the public is simply too high. You may
18 sit down, Mr. Bernhardt.

19 Given the sentence I have imposed, I am
20 waiving the victim of crime surcharge.

21 Is there anything else that I need to
22 address, Counsel?

23 MS. MILLER: No thank you, Your Honour.

24 MR. HANSEN: Nothing that occurs to me.

25 THE COURT: All right. Thank you for your
26 submissions, Counsel, and good luck to you,
27 Mr. Bernhardt.

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Certified Pursuant to Rule 723
of the Rules of Court

Jane Romanowich, CSR(A)
Court Reporter