Date: 2017 06 07
Docket: S-1-CR-2016-000 118

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JOHN WILLIAM GULLY

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

I) INTRODUCTION

[1] This is an appeal from a sentence imposed on the Appellant following his guilty plea on a charge of having had the care and control of a motor vehicle while impaired by alcohol.

[2] The Notice of Appeal was filed after the expiration of the appeal period and the Appellant has applied for an extension of time. The Crown, quite fairly, did not oppose this application. I am satisfied that the request for extension of time should be granted.

[3] The Appellant raised a number of issues in his Factum, but abandoned several of them in oral argument. This Memorandum of Judgment addresses only the issues that were pursued at the hearing of the appeal.

II) THE SENTENCING HEARING

[4] The circumstances alleged by the Crown and admitted by the Appellant were that on April 22, 2013, shortly before 8:30AM, the R.C.M.P. in Tuktoyaktuk received a complaint of an impaired driver driving erratically on the main road in the community. Patrols were made and the Appellant's vehicle was found on the road with its left turn signal on.

[5] The Appellant was in the driver's seat. His hands were on the steering wheel and his head was tilted down. His speech was very slurred and his eyes were bloodshot and glassy. The police officer noted a strong smell of alcohol on his breath. The Appellant had difficulty getting out of his vehicle. He had to be assisted walking to the police vehicle.

[6] The Appellant was charged with being in the care and control of a motor vehicle while impaired. He was served with a Notice of Intention to Seek Greater Punishment. Given the Appellant's criminal record, this triggered a mandatory minimum sentence of four months imprisonment. As the Crown proceeded summarily, the maximum sentence was eighteen months. *Criminal Code*. s. 255.

[7] The Appellant's criminal record consisted primarily of convictions for driving offenses. Those most relevant to this appeal are the following:

Date of conviction	Offence	Sentence
July 16, 1979	Drive while over .08	1 week jail
Sept. 6, 1983	Impaired driving	$750.00 fine
	Refuse to provide breath sample	$250.00 fine
Aug. 26, 1987	Drive while over .08	30 days intermittent
	Drive while over .08	60 days intermittent (consecutive)
July 29, 1991	Drive while over .08	$1200.00 fine

Jan. 18, 1993	Drive while over .08	9 months jail
	Drive while disqualified	1month jail (consecutive)
April 3, 1997	Drive while disqualified	$100.00 fine
June 2, 2008	Drive while over .08	$1500.00 fine

[8] In submissions at the sentencing hearing, the Crown sought a jail term in the range of four to six months. The Sentencing Judge, before hearing Defence submissions, advised the Appellant's counsel (not counsel on this appeal) that he was considering imposing of a longer jail term than what the Crown was seeking.

[9] The Appellant's counsel made submissions about the Appellant's personal circumstances, noting his very good work history. He also explained that the Appellant is a residential school survivor who uses alcohol to cope with issues from his past. He suggested that under the circumstances, a jail term of six months would be a fit sentence.

[10] The Sentencing Judge imposed a term of imprisonment of one year, followed by a driving prohibition of five years.

[11] The Appellant argues that the Sentencing Judge overemphasized the criminal record, placed insufficient weight on the mitigating factors, and imposed a sentence that was excessive. He argues the sentence should be reduced to what his counsel sought, or, at the most, to a sentence of seven or eight months.

[12] The Crown does not resile from the position it put forward at the sentencing hearing. It argues that while the sentence it sought in the court below would have been fit and within the range, so was the sentence imposed by the Sentencing Judge. That being so, the Crown argues that the sentence should not be disturbed.

III) ANALYSIS

[13] The standard of review on sentence appeals is well established. The appellate court will only interfere with a sentence if it discloses an error in principle, it fails to consider a relevant factor, it overemphasizes an appropriate factor, or the sentence imposed is demonstrably unfit: *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at paras. 89-90; *R. v. L.M.*, 2008 SCC 31 at para. 14.

1. Alleged Errors

[14] The Appellant argues that the Sentencing Judge placed insufficient weight on the guilty plea and overemphasized the criminal record.

[15] A sentencing judge is presumed to know the law and need not refer to all applicable sentencing principles or all factors. Even if the Sentencing Judge had not mentioned the guilty plea at all, it would not be a reason to assume that he did not consider it. *Bugghins v HMTQ*, 2013 NWTSC 16, Paragraph 17. Here, the Sentencing Judge specifically said that he had taken into account the guilty plea. He simply found that other considerations were paramount.

[16] As for the Appellant's criminal record, the Sentencing Judge did give that factor considerable weight. That is understandable, however, given the number of related convictions that appeared on that record. There were a total of ten driving convictions, eight of which were for impaired driving, driving with a blood alcohol level in excess of the legal limit, or refusal to provide a breath sample. The two convictions for driving while disqualified were also a cause for concern. That offense demonstrates a disregard for driving prohibitions, which in turn raises concerns about public safety.

[17] In short, the extensive related criminal record was the most striking feature of this case. Not surprisingly, it caught the Sentencing Judge's attention and he placed considerable weight on it. He did not err in doing so.

[18] The Reasons for Sentence were not lengthy, but neither were the submissions of counsel. That is not surprising: this was a routine offence as far as drinking and driving offenses go. The circumstances were straightforward, with no unusual features or particular aggravating factors. It must be remembered that this sentencing hearing took place during a Territorial Court circuit. Often times, the volume of matters that are dealt with on those circuits is such that counsel's submissions and judges' decisions tend to be concise and focused on the key issues. This is what happened here.

[19] I find no basis to conclude that the Sentencing Judge committed any error in principle that would give rise to appellate intervention. The only issue on this appeal is whether the sentence imposed was demonstrably unfit.

2. Fitness

[20] For some categories of offenses, sentencing courts have the benefit of fairly specific and pointed appellate guidance on sentencing. Drinking and driving is not one of those areas. Counsel were not able to refer me to any cases from our Court of Appeal dealing with sentencing in cases involving recidivist drinking and driving offenders, and I am not aware of any. The fitness of the sentence imposed in this case must be assessed in the context of other trial level decisions. In that regard, two issues arose during submissions.

[21] The first has to do with the significance of the Crown election when comparing cases. The Appellant argues that the sentences imposed in cases where the Crown proceeded by indictment are of minimal relevance in assessing the fitness of a sentence imposed on a summary conviction offence. I disagree.

[22] The sentencing principles set out in the *Criminal Code* apply to sentencing for all offenses, whether they are summary conviction offences or indictable offences. Irrespective of the Crown election, the determination of a fit sentence has to be based on the fundamental sentencing principle of proportionality and the other principles of sentencing.

[23] The Crown election determines the range of sentence available in the event of a finding of guilt. Because an indictable election increases the accused's jeopardy, it triggers certain procedural rights and safeguards.

[24] It is reasonable to expect that an important driver in how the Crown elects is the sentence that it intends to seek if the accused is convicted. In that sense, the election is indicative of how the Crown views the level of seriousness of the case. That is not the same as to say that an indictable election actually makes the case deserving of a more severe sentence.

[25] The Crown may well proceed by indictment because it is of the view that the circumstances warrant the imposition of a sentence beyond what would be available if the election was summary. But that does not bind the Court. The Crown election makes a higher range of sentence available to the Court. It does not provide a stand-alone justification for imposing a longer sentence.

[26] To decide otherwise could lead to incongruous results: two similar offences, committed by two similarly situated offenders, would warrant different sentences simply because the Crown, for whatever reason, proceeded summarily on one and by indictment on the other. That would be inconsistent with the fundamental

principle of proportionality because the Crown's election does not change the objective seriousness of an offence, nor the level of blameworthiness of the offender. For different sentences to be imposed under those circumstances would also offend the principle of parity.

[27] For those reasons, I do not agree with the Appellant's position that sentences imposed in drinking and driving cases where the Crown proceeded by indictment are unhelpful in deciding this appeal. Cases involving similar circumstances to those of this case, committed by similarly situated offenders, are helpful in assessing the fitness of the sentence imposed in this case, whatever the Crown election was.

[28] The second issue that arose during submissions is the weight that cases from other jurisdictions should carry in setting the sentencing range in the Northwest Territories for drinking and driving offenses committed by recidivists.

[29] Cases from other jurisdictions can always be of some assistance, in the absence of binding authority from this jurisdiction. That said, while the *Criminal Code* applies across the country, it is undeniable that with respect to sentencing in particular, there are regional differences. Sentencing ranges vary from jurisdiction to jurisdiction; some appellate courts provide guidance through starting points, others do not.

[30] In the Northwest Territories, the jurisprudence from the Alberta Court of Appeal has traditionally been considered very persuasive, because of the composition of our Court of Appeal. That does not mean that the jurisprudence from jurisdictions other than Alberta cannot also be helpful, but the sentencing practices in the Northwest Territories have traditionally been much closer to those in Alberta than, for example, those in British Columbia and in the Yukon Territory. These nuances must be borne in mind when examining cases from outside the Northwest Territories.

[31] In any event, attempting to identify an applicable range with any degree of precision in this area is fraught with difficulties. To illustrate, in *R v Van Bibber*, one of the cases referred to by the Appellant, the Territorial Court of the Yukon engaged in an extensive review of several sentencing decisions from that jurisdiction, and ultimately concluded:

> It is clear from all the above cases that there is a wide range of sentence available for repeat impaired driving offenders and each case will be marked by the similarities and differences between it and other cases.

R v Van Bibber, 2010 YKTC 49, para 67.

[32] Having reviewed the various cases that counsel have brought to my attention as well as others, I find that this comment is true of drinking and driving sentencing in general, in the Northwest Territories and elsewhere.

[33] Even if it was possible to identify a range, that would not be determinative of the outcome of this appeal:

> When sentencing ranges are concerned, although they are used mainly to ensure the parity of sentences, they reflect all the principles and objectives of sentencing. Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered "averages", let alone straitjackets, but should be seen instead as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case.
>
> (…)
>
> There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may have never been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case.
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> (…)
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> In other words, sentencing ranges are primarily guidelines, and not hard and fast rules.

R v Lacasse, 2015 SCC 64, paras 57-60.

[34] As already noted, the Appellant was a serious recidivist: this offence was his ninth conviction in the drinking and driving offenses category. In addition, he had two convictions for driving while disqualified. Some cases from the Northwest Territories, albeit somewhat dated, provide an indication of the sentencing approach

adopted by the courts of this jurisdiction in dealing with drinking and driving recidivists.

[35] In *R v Gaudreau* [2007] N.W.T.J. No.24, the accused pleaded guilty, on the day of trial, to a charge of having refused to provide a breath sample. He was involved in an accident that caused property damage and some injuries to his passenger. He had ten prior convictions for drinking and driving offenses. There was a gap of eight years since his last conviction. He was sentenced to 1 year imprisonment.

[36] In *Gaudreau*, the Court referred to other sentencing decisions from the Northwest Territories involving recidivists. *The Queen v Boline* [2001] N.W.T.J. No.7; *The Queen v Lafferty* [1989] N.W.T.J. No. 43.

[37] *Boline*, much like this case, involved an offence that did not have any particularly aggravating features. The offender was being sentenced on one charge of driving while disqualified, one charge of impaired driving and one charge of resisting arrest. What was most aggravating in his case were his personal circumstances.

[38] Mr. Boline had a significant criminal record which included many convictions for crimes of violence. The record also included four convictions for drinking and driving offenses, one of which was a conviction for impaired driving causing bodily harm. He also had one conviction for dangerous driving and three convictions for driving while disqualified. On the impaired driving charge, he was given credit for one year for the time he spent on remand and was sentenced to a further year of imprisonment, followed by a period of Probation. On the charges of driving while disqualified and resist arrest, he was given a conditional sentence, consecutive to the jail term, together with a term of probation.

[39] In *Lafferty*, the offender had six prior convictions for drinking and driving and was sentenced for three further such offenses that occurred within the span of a few weeks. On the first offence, he struck a parked vehicle but no one was injured. There were no particularly aggravating features about the other two offenses, aside from how close in time they were committed and the fact they were committed while he was on process for the first one. He was sentenced to concurrent jail terms of eight months, ten months and eighteen months for those three offenses which were his seventh, eighth and ninth convictions for drinking and driving offenses.

[40] *R v Vegso*, 2012 NWTSC 77 is a more recent case, which, like this one, was the subject of a sentence appeal in this Court. The accused had seven prior related

convictions, but there had been a sixteen year gap since his last conviction. The accused had been arrested on a traffic related matter and was subject to a 24-hour driving suspension. Within hours from his release, and while his suspension was still in effect, he was arrested at the wheel of a vehicle. The concentration of alcohol in his blood was over the legal limit. He pleaded guilty at the first opportunity. The Crown sought a jail term of thirty days. The Sentencing Judge found this entirely inadequate given the criminal record, and imposed a sentence of nine months imprisonment.

[41] On appeal, the sentence was reduced to six months. The Court agreed that the sentence sought by the Crown at the sentencing hearing was inadequate, but concluded that the nine month sentence imposed was excessive, given the large gap in the criminal record, the early guilty plea, and the sentence imposed in *Gaudreau*, which the Court found involved more aggravating circumstances.

[42] Comparisons between cases are always imperfect, because of the constellation of similarities and differences between the offences and the offenders in each case. Still, *Lafferty*, *Boline*, and *Gaudreau* illustrate the range of sentences that have been imposed in this jurisdiction to drinking and driving recidivists. The sentence imposed in *Vegso* was shorter, but there was a much larger gap in the criminal record in that case than in all the others, and than in the present case.

[43] It is also worth noting that the Appellant had been treated with considerable leniency on his last two convictions for driving offenses: despite having received a global jail term of ten months in 1993 (nine months for "drive while over .08" and one month consecutive for driving while disqualified), he was sentenced to a very modest fine when he was convicted of driving while disqualified just four years later, in 1997. And when he was convicted again of "drive while over .08" in 2008, he was, again, given only a fine.

[44] The Sentencing Judge was alive to this, as he noted:

> The accused has had every penalty that is available by way of rehabilitation and deterrence. He has had some small fines. He has had large fines. He received nine months imprisonment in 1993, and yet none of that slows him down. He just keeps drinking and driving.
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> If the Court had any hope that a penalty could be imposed which would keep Mr. Gully out of vehicles and thereby protect the public, the court would do so; but with his convictions against the administration of justice, attempt to obstruct justice and driving while disqualified, it would appear fairly clear that driving prohibitions do not work in terms of keeping him off the road. What the

> prosecutor has said about the danger that impaired drivers present to society has been repeated and reiterated in every courtroom across the country. The court is not penalizing an evil man, but the court has to address the danger that is posed. It is a miracle that he has not hit someone given all these convictions over the years.
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> (…)
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> In my view, the primary factor for the court to consider is the protection of the public. That supercedes everything else in this case.

Transcript of Sentencing Hearing, p.8, line 8 to p. 9, line 10.

[45] Having regard to some of the sentences imposed in this jurisdiction to other offenders who repeatedly commit drinking and driving offenses, I am unable to conclude that a sentence of one year was out of line or disproportionate under the circumstances.

[46] It must be noted as well, when considering sentences imposed on more dated cases, that the sentencing regime for drinking and driving offenses has not become more lenient with the passage of time. On the contrary, over the years, Parliament has increased the penalties in this area of the criminal law. The reality is that drinking and driving continues to represent a serious problem in our communities. It continues to cause ravages on the roads. It continues to be an offence committed, often times, by otherwise law-abiding members of the community.

[47] The need to deter and denounce this potentially lethal conduct remains. Harm does not occur every time a person such as the Appellant chooses to get behind the wheel of a motor vehicle while impaired; many who commit this offence are, like the Appellant was in this case, lucky, and no one is harmed. But a significant risk of harm exists every single time someone makes the choice to drink and drive. That significant risk has to be reflected in the sentences imposed by the courts, especially in the face of seemingly incorrigible recidivism.

[48] The sentence imposed in this case was not demonstrably unfit. The appeal is dismissed.

L.A. Charbonneau

J.S.C.

Dated in Yellowknife, NT this
7th day of June, 2017

Counsel for the Appellant:	Charles Davison
Counsel for the Respondent:	Brendan Green

S-1-CR-2016-000 038

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MEMORANDUM OF JUDGMENT
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