COURT OF APPEAL FOR YUKON

Citation: *R. v.Lommerse*,
2013 YKCA 13

Date: 20130903
Docket: 13-YU719

Between:

Regina

Appellant

And

Petrus Mackenzie Lommerse

Respondent

Before: The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

On appeal from: Territorial Court of Yukon, June 24 2013
(*R. v. Lommerse*, 2013 YKTC 49, Whitehorse No. 12-005411)

Oral Reasons for Judgment

Counsel for the Appellant:	E. Marcoux
Counsel for the Respondent:	G.R. Coffin
Place and Date of Hearing:	Vancouver, British Columbia September 3, 2013
Place and Date of Judgment:	Vancouver, British Columbia September 3, 2013

Summary:

Crown appeal from a sentence of a fine in the amount of $1500 imposed following the accused's guilty plea on a charge of impaired driving causing bodily harm. Held: Appeal allowed. The sentence was outside the ordinary range for the offence, and was unfit. Sentence varied to 4 months imprisonment.

[1] **GROBERMAN J.A.**: This is a Crown application for leave to appeal, and, if granted, an appeal from a sentence imposed following the accused's guilty plea on one count of impaired driving causing bodily harm. The accused received a fine of $1,500, and a driving prohibition of 15 months. He was placed on probation for a period of 18 months, for the first four months of which he was prohibited from consuming alcohol and had a 10:00 p.m. curfew. The probation order also required Mr. Lommerse to perform 120 hours of community service.

[2] The Crown contends that sentences for the offence of impaired driving causing bodily harm should not, absent exceptional circumstances, be less than four months imprisonment, and seeks a sentence of that length in this case.

Circumstances of the Offence

[3] The offence occurred at about 1:30 a.m. in the Marsh Lake area. The accused, along with four friends were driving around a parking lot at a community centre in an all-terrain vehicle, doing "burnouts" and "doughnuts". They had been drinking. At the time of the offence, the accused's blood alcohol content was at least 150 mg of alcohol per 100 ml. of blood.

[4] At the time of the offence, Mr. Lommerse was driving and his friend, Mr. Kotylak was his passenger. It appears that Mr. Lommerse was driving at considerable speed – Mr. Kotylak stated to the RCMP that he had asked Mr. Lommerse to slow down, but he did not do so. Mr. Kotylak was leaning over and hanging outside the ATV when it became unbalanced and flipped. Mr. Kotylak was pinned under the vehicle.

[5] Mr. Lommerse and his friends lifted the vehicle off of Mr. Kotylak, who appeared, at first, not to have suffered any serious injuries. Soon, however, he was

in considerable pain, and ultimately it was determined that he had broken a rib and punctured his lower intestine.

[6] Mr. Kotylak was hospitalized for a period of six days, and fully recovered from his injuries after a short time.

Circumstances of the Offender

[7] Mr. Lommerse was 21 years old at the time of the offence. He had no prior criminal history. He had graduated from high school and completed a six-month pre-apprenticeship program in welding. His work history was described by the judge as "sporadic". He was, at the time of sentencing, still living with his parents.

[8] The pre-sentence report quoted Mr. Lommerse as indicating that as a teenager, he tended to drink on weekends at friends' places or at bush parties, but that after turning 19, he reduced his drinking to about once a month with friends in bars.

[9] As a teenager, Mr. Lommerse was a fairly heavy user of marijuana, including daily use while at high school. It appears that his heavy use of marijuana also ceased after he turned 19.

[10] The sentencing judge appears to have concluded that Mr. Lommerse's past use of alcohol and marijuana was not a cause for major concern. He considered Mr. Lommerse to be at low risk of re-offending.

[11] The judge was also satisfied that Mr. Lommerse was genuinely remorseful. He noted that Mr. Lommerse was cooperative with the police, assisted in the investigation, and pleaded guilty and accepted full responsibility.

[12] Mr. Kotylak spoke in support of Mr. Lommerse at the sentencing hearing. He noted that Mr. Lommerse was with him at the hospital the night of the accident, and that he visited him every day thereafter. Mr. Kotylak considers the accident to have been at least equally his own fault. He says that both Mr. Lommerse and he have learned from the accident.

[13] The judge was also of the view that Mr. Lommerse had learned from the experience and did not require a sentence focussed on specific deterrence or rehabilitation. He was completely satisfied that Mr. Lommerse had taken responsibility for his actions and that he was not a risk to the community.

Sentencing Consideration

[14] The offence of impaired driving causing bodily harm carries a maximum sentence of 14 years imprisonment. Under ss. 255(1)(a)(i) and 255(3.3) of the *Criminal Code*, R.S.C. 1985, c. C-46, all impaired driving convictions carry a minimum punishment of a fine of $1,000; the statute does not prescribe any minimum sentence of imprisonment. The offence is a "serious personal injury offence" as defined in s. 752 of the *Code*, and accordingly, not one for which a conditional sentence of imprisonment may be imposed under s. 742.1.

[15] The sentencing judge acknowledged that, in general, a conviction for impaired driving causing bodily harm will result in a jail sentence of several months:

> [25] Numerous cases were before me which indicate that the sentences imposed in the Yukon for impaired driving causing bodily harm usually fall within a range of four to ten months' incarceration. This is a general range and does not preclude the imposition of sentences that are outside of this range in appropriate circumstances.

[16] The judge also eloquently outlined the importance of deterrence and denunciation in sentences for impaired driving causing bodily harm:

> [71] On July 21, 2012, Mr. Lommerse made a decision to consume alcohol with his friends to the point where he had a blood alcohol level of 150 mg/%, far in excess of the legal limit of 80 mg/%. He was impaired. He then made a decision to drive an ATV with Mr. Kotylak as a passenger. By doing so he crossed the line of what may perhaps be socially acceptable behaviour and committed a criminal offence. Had no accident occurred, Mr. Lommerse likely would not have come to the attention of the RCMP and would not find himself convicted of a criminal offence. His actions, however, would have nonetheless been criminal. It is for this reason that denunciation and deterrence are almost invariably the leading objectives when sentencing an offender for an impaired driving offence. While impaired driving offences may often go undetected, and may often be committed by individuals with no related criminal history, the risk of harm associated with impaired driving, including the all-too-often grievous and catastrophic harm involving random

> individuals, is so great that the sentences imposed for impaired driving offences must be meaningful enough to convey a message to the offender and to others in society that has the effect of deterring them from operating motor vehicles while impaired.
>
> [72] Therefore, when an offender is being sentenced for an impaired driving offence in which death or bodily harm has resulted - the result being that which society most fears in relation to impaired driving - the sentence must clearly reflect society's abhorrence of impaired driving. It is for this reason that custodial dispositions are the norm for s. 255(2.1) offences.

[17] While the judge recognized that a conviction for impaired driving causing bodily harm will normally result in a custodial sentence, he decided to instead impose a fine in this case. In doing so, he outlined the aggravating and mitigating circumstances of the case:

> [76] There are no aggravating circumstances in this case, outside of those inherent in the offence itself, i.e. that bodily harm resulted. Mr. Lommerse's blood alcohol readings are under the level at which the *Code* requires that they be considered an aggravating factor. I recognize that his readings, however, are not at the low end of such readings and are close to what would be statutorily aggravating.
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> [77] There are the following mitigating factors:
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> - Mr. Lommerse's youth;
> - His lack of a prior criminal history;
> - His guilty plea;
> - His remorse and acceptance of responsibility;
> - His low level of problems related to alcohol and drug use;
> - His low risk of reoffending; and
> - His post-offence steps to take counselling through Alcohol and Drug Services

[18] The judge then provided reasons why he considered this offence to be less serious than a typical case of impaired driving causing bodily harm:

> [78] Without minimizing Mr. Lommerse's actions, as I consider them to be very serious, there is a difference between operating a motor vehicle on a street where other vehicles and pedestrians are likely to be present, or on a highway at a high rate of speed where other vehicles are likely to be present, and operating an ATV in a community parking lot in the early morning hours where there is not likely to be anyone present, other than the individuals involved.

> [79] It is normal for me to hear, in sentencing proceedings involving impaired driving offences, Crown counsel submit as aggravating factors the time of day and the likelihood of vehicles or pedestrians being present, or the fact that the offender was driving on the Alaska Highway at a high rate of speed where the consequences of an accident were likely to be catastrophic. If such factors are properly to be considered as aggravating due to the increased risk of harm, then surely the absence of such factors should be a matter for consideration as well. I am not saying that this is a mitigating factor; it is simply a factor that distinguishes the circumstances of one offence from another.
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> [80] Certainly the moral culpability of an offender who chooses to drive impaired through a school zone at lunch time on a school day at a high rate of speed is going to be higher, due to the risk of harm the offender chooses to accept, than the moral culpability of an offender who tries to drive his or her vehicle home late at night through quiet streets at a low rate of speed. While both offenders are sufficiently morally culpable to be convicted of an impaired driving offence, the sentence imposed on the one will be greater than that imposed on the other in accordance with the sentencing

[19] In my view, the judge understated the risks inherent in Mr. Lommerse's decision to drive while impaired, and consequently understated the level of moral culpability involved.

[20] It is true that driving an ATV in a parking lot entails different risks than driving an automobile on a public road. Mr. Lommerse was unlikely to injure members of the general public, for example. On the other hand, the ATV was an inherently unstable vehicle with limited protection for its occupants. Further, the nature of the driving – which was intended to provide thrills for the vehicle occupants – made impaired driving particularly risky. I do not see that the need for a sentence directed at general deterrence is in any way mitigated by the nature of the activity involved.

[21] As the British Columbia Court of Appeal recently emphasized in *R. v. Smith*, 2013 BCCA 173, deterrence and denunciation are important goals in sentencing for impaired driving offences. These offences are often committed by individuals who are normally law-abiding and have sympathetic backgrounds – but it is just such individuals who must be deterred from impaired driving. For that reason, custodial sentences are the norm for impaired driving causing bodily harm and impaired driving causing death.

[22] The parties accept that the ordinary range of sentence for impaired driving causing bodily harm in Yukon starts at four months. The sentence in this case – a moderate fine and a period of probation with limited conditions – is not a fit sentence.

[23] I would grant leave to appeal, set aside the sentence imposed, and substitute a sentence at the low end of the usual sentencing range – that is, one of four months imprisonment. The driving prohibition imposed by the trial judge is appropriate and should remain in place.

[24] In light of the judge's comments on the accused's rehabilitation and the unlikelihood that he will reoffend, there is no particular impetus in this case for the imposition of a period of probation. The Crown has agreed, in the course of oral submissions, that in the event a term of imprisonment is imposed there is no need for a probation order. Accordingly, there will be no period of probation.

[25] **CHIASSON J.A.**: I agree.

[26] **TYSOE J.A.**: I agree.

[27] **CHIASSON J.A.**: Leave to appeal is granted. The appeal is allowed to the extent of imposing a four month jail sentence eliminating the probation order and the fine but continuing the order for the driving prohibition imposed by the judge.

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The Honourable Mr. Justice Groberman