

Citation: *R. v. Charlie*, 2019 YKTC 32

Date: 20190705
Docket: 17-10037
Registry: Watson Lake
Heard: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

TANYA APRIL CHARLIE

Appearances:
Amy Porteous
Lynn MacDiarmid

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] CHISHOLM C.J.T.C. (Oral): Tanya Charlie has pleaded guilty to one count of dangerous driving causing bodily harm. She committed this offence on June 26, 2017, however it appears that Ms. Charlie only became aware of the charge on August 2, 2018. She elected to proceed in Territorial Court and pleaded guilty on October 17, 2018.

Summary of the Relevant Facts

[2] Ms. Charlie and family members were at a campground near Watson Lake when this offence took place. Naomi Charlie, the offender's stepsister, and her daughter, the victim in this matter, were also present.

[3] Although Tanya Charlie had consumed alcohol, she was not intoxicated. At some point, she took her three-year-old niece and put her on an All Terrain vehicle (“ATV”). She drove away with the child on the ATV, despite having been warned by one family member not to do so. The child was not wearing a helmet. The child’s mother was concerned with the speed at which they had left the campground. As a result, she followed them in her vehicle while honking the horn in an effort to have the offender stop. Naomi Charlie indicated that she was driving at approximately 80 km/h on the gravel road while following the ATV.

[4] Tanya Charlie continued down a hill and around a corner in the road. At this point, Naomi Charlie lost sight of the ATV. Naomi came upon the ATV which had flipped in the ditch beside the road. She noted her stepsister lying on the ground and her young daughter unconscious in the bushes. The victim regained consciousness relatively quickly and complained of a sore arm. The victim’s body was swollen due to multiple abrasions on her body. Medical personnel employed a sling to immobilize her right shoulder which was causing her discomfort. Despite the pain, the victim suffered no fractures.

[5] Tanya Charlie suffered a minor concussion as a result of the accident.

Positions of the Parties

[6] The Crown suggests that the appropriate penalty in this case is 90 days imprisonment, noting that the principles of denunciation and deterrence are the primary factors for the Court to consider. The Crown initially sought a longer jail term, but after learning more about Ms. Charlie’s background, the sentencing position was revised.

[7] Counsel on behalf of Ms. Charlie argues that considering the early guilty plea, numerous *Gladue* factors and the efforts by Ms. Charlie to rehabilitate herself, a suspended sentence plus three years of probation is an appropriate response to this crime.

Personal Circumstances

[8] Ms. Charlie is 29 years of age and is a member of the Ross River Dena Council. I have the benefit of a vetted *Gladue* Report prepared for the sentencing of Ms. Charlie's brother in 2017. When Ms. Charlie was very young, her stepfather (who is referred to as her father in the redacted *Gladue* Report) committed suicide in front of the family. Her mother commenced drinking alcohol more heavily after this tragedy and was unable, for periods of time, to adequately parent. Ms. Charlie's great-grandparents did become involved in her upbringing. Based on what I understand, this was a positive development for her as her great-grandparents exposed Ms. Charlie and her brother to aspects of a traditional lifestyle.

[9] On the other hand, Ms. Charlie has experienced significant trauma in her life. Her maternal grandmother burned to death while heavily under the influence of alcohol. She had attended Lower Post residential school in B.C. in her youth. Her maternal grandfather attended residential school in Whitehorse.

[10] One of Ms. Charlie's stepsisters was killed in Whitehorse in the recent past. That matter is before the criminal courts.

[11] In early May 2017, her partner of six years passed away due to complications resulting from alcohol abuse. His death, which occurred less than two months prior to the offence before the court, significantly impacted Ms. Charlie. She medicated herself daily with a small amount of alcohol around this time. Since this incident, her biological father died.

[12] Although no medical documentation was filed, defence counsel also submits that Ms. Charlie suffers from anxiety for which she is taking medication.

[13] Ms. Charlie and her stepsister, Naomi, have made amends since this offence was committed. Counsel submitted that they have focused on healing.

[14] Importantly, Ms. Charlie has come to grips and is dealing with her severe alcohol addiction. When her great-grandmother died, Ms. Charlie was 16 years of age. She began to seriously abuse alcohol, so much so that she developed liver problems which required hospitalization and medical intervention in 2018.

[15] To Ms. Charlie's credit, as of early May 2018, she ceased using alcohol. Since then, she has participated in and completed a five-week Intensive Treatment Program in Whitehorse, through Mental Wellness and Substance Use Services.

[16] On a voluntarily basis, Ms. Charlie continues to receive local counselling in Watson Lake.

[17] Ms. Charlie has a low-end criminal history. The one conviction of relevance for these proceedings is a conviction in 2015 for driving with a blood alcohol level greater than the legal limit.

Sentencing Principles

[18] Sections 718 to 718.2 of the *Criminal Code* set out the purpose and principles of sentencing, including:

718. The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[19] As stipulated in *R. v. Ipeelee*, 2012 SCC 13, and *R. v. Gladue*, [1999] 1 S.C.R. 688, a sentencing court must impose a sentence that fits the offence, the offender, the victim, and the community.

[20] A sentencing court must consider all relevant sentencing principles in determining an appropriate sentence. The fundamental principle of sentencing is set out at Section 718.1 of the *Criminal Code*. It stipulates that a sentence is to be proportionate to the seriousness of the offence and the degree of blameworthiness of the offender. The Court in *R. v. Swaby*, 2018 BCCA 416 found that a "...sentence

should be proportionate to the circumstances of the offence, including its gravity, and the circumstances of the offender.” (para. 69)

[21] A sentencing principle that applies in any sentencing is the principle of restraint. In this vein, section 718.2(d) states that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances”.

[22] And section 718.2(e) states that:

all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[23] I must also be cognizant when dealing with Aboriginal offenders of the principles enunciated by the Supreme Court of Canada in *Ipeelee* and *Gladue*. The presence of *Gladue* factors may diminish the offender's moral blameworthiness. As stated recently in *R. v. Sellars*, 2018 BCCA 195, at para. 33:

...However, the unique circumstances of Aboriginal offenders can diminish their degree of moral blameworthiness for an offence and therefore the weight to be given to those principles of sentencing.

Gravity of the Offence

[24] The offence of dangerous driving causing bodily harm is a serious matter and the case law in this area recognizes that this type of criminal activity must be denounced and deterred (*R. v. Bhalru*, 2003 BCCA 645; *R. v. Bosco*, 2016 BCCA 55).

[25] As stated in *R. v. Rawn*, 2012 ONCA 487, at para. 41:

...Dangerous driving puts the public at great risk of harm. The crime is all the more egregious when people, often innocent members of the public, are injured.

Degree of Responsibility

[26] As set out in *Bhalru* at para. 28 , an offender's moral culpability must be assessed:

... in part by considering the intentional risks taken by the offenders, the degree of harm that they have caused, and the extent to which their conduct deviates from the acceptable standard of behaviour...

[27] As expressed by Madame Justice Ryan in *R. v. Sadler*, 2009 BCCA 386, at para. 34:

... The cases also demonstrate the age of the offender, the circumstances of the accident, the duration of the deficient driving, the existence or not of a criminal record, the degree of aberration of the driving from the norm, the particulars of the highway and use of it, and the driving conditions, are all factors that bear upon the question of moral culpability. Further, the use of alcohol, even if not to the point of impairment, is a factor this Court will consider.

[28] Ms. Charlie engaged in this dangerous activity after being warned not to take the child on the ATV. At the same time, there is no indication that the driving was prolonged. She had consumed some alcohol, but was not impaired.

[29] Fortuitously, the injuries to the victim were not significant or permanent.

[30] I must also take into account Ms. Charlie's background in determining her moral blameworthiness. As noted, although she experienced some periods of stability in her

life, she has also suffered much trauma. However, when her great-grandmother, one of the few stable individuals in her life, died, she commenced severely abusing alcohol. She is the product of a small indigenous community that continues to suffer from the effects of the Indian residential school system.

[31] In my view, her tragic background factor has played a part in bringing her before the courts.

[32] I also take into account the progress that she has made in the last year to better her circumstances. I am advised that she is very remorseful for the harm she has caused.

[33] I find that her moral culpability is at the low end of the spectrum.

Case law

[34] Sentencing is a highly individualized process which reflects the circumstances of the offence and of the offender (see *Ipeelee* at para. 38 and *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 92). Sentencing is a "profoundly contextual process" wherein the judge has a broad discretion (*R. v. L.M.*, 2008 SCC 31 at para. 15; see also *R. v. Lacasse*, 2015 SCC 64 at para. 11).

[35] Section 249(3) of the *Criminal Code* is a straight indictable offence with a maximum sentence of 10 years' imprisonment. Amendments to the *Code* in 2012 restricted the availability of conditional sentences to certain offences, including to indictable offences causing bodily harm where the maximum term of imprisonment is 10 years. As such, the options available to me are either jail or a non-custodial sentence.

[36] Counsel have referred me to the cases of *R v. White*, 2018 YKTC 13 and *R. v. Giles*, 2012 BCSC 775. In *White*, the offender was sentenced, after trial, to 90 days' imprisonment and a \$500 fine for dangerous driving causing bodily harm. After having consumed two drinks of alcohol, he engaged in a thrill-seeking activity in his vehicle on slippery roads. As a result of the ensuing accident, his passenger suffered an ankle injury which required surgical intervention. At the time of the offence, Mr. White was subject to a probation order as part of a conditional discharge. Additionally, he had four previous speeding infractions on his record.

[37] In *Giles*, the offender was driving at an excessive speed when she leaned down to retrieve food that had fallen from her seat. Due to this inattention and speed, her vehicle collided with another causing severe injuries to herself and the three occupants of the oncoming vehicle. She had earlier consumed one beer. She also received a speeding ticket not long before purchasing the food that ultimately fell to the floor of her vehicle. The offender had been subject to two previous driving prohibitions. Her criminal record was not extensive and unrelated. The Court placed her on three years' probation after suspending the passing of sentence.

[38] I have also considered the following decisions: *R. v. Kloepfer*, 2017 YKSC 44, aff'd 2019 YKCA 7; *R. v. Schinkel*, 2014 YKTC 42, aff'd 2015 YKCA 2; *R. v. Harry*, 2018 BCSC 2069; *R. v. Smith*, 2015 ONCJ 11; *R. v. Whalen*, 2018 O.J. No. 2061; *R. v. Auguste*, 2018 ONSC 3965.

[39] In *Harry*, the offender drove his vehicle at a high rate of speed before losing control and crashing. The crash caused his passenger to be ejected from the vehicle

resulting in very serious injuries. The offender's father had attended Indian residential school where he suffered abuse. In turn, he abused his wife and children, especially the offender. The offender displayed signs of post-traumatic stress disorder, including anxiety and depression. He had a significant criminal history. The Court convicted him after trial for the dangerous driving causing bodily harm offence. He displayed remorse for what occurred. By the time of sentencing, Mr. Harry had taken meaningful steps to address anger and substance abuse issues.

[40] Mr. Justice Marchand found that Mr. Harry had a reduced level of moral blameworthiness because of his dysfunctional background. The Court found, at para. 37, that:

...Mr. Harry's traumatic childhood experiences are directly linked to the systemic and background factors sought to be addressed by s. 718.2(e) and cases like *Gladue* and *Ipeelee*.

[41] My review of the relevant caselaw establishes that the offence of dangerous driving causing bodily harm covers many different fact patterns and types of offenders, and results in a wide range of sentences.

Sentence

[42] The aggravating factors in this case include the fact that Ms. Charlie drove an ATV with a child, who was not wearing a helmet, after having been warned not to do so. She also had consumed some alcohol. Additionally, I consider her drinking and driving conviction in 2015.

[43] Regarding mitigating factors, she entered an early guilty plea. In addition to taking responsibility for her actions, as described by her counsel, she has displayed a significant amount of remorse.

[44] As already outlined, I find that the significant *Gladue* factors that are present due to Ms. Charlie's troubled background substantially reduce her moral culpability. As stated in *Ipeelee* at para. 37, "...the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender".

[45] Ms. Charlie has made considerable strides to deal with the addiction problem that has plagued her since the death of her great-grandmother some 13 years ago. I give much weight to the fact that she has successfully completed a residential treatment program. Despite her good work, having witnessed her in court, she clearly presents as a fragile person.

[46] Although the principles of denunciation and deterrence would tend towards imprisonment for this offence, in what may be described as the unique circumstances of this offender, I find that healing and rehabilitation must weigh heavily in this sentencing process.

[47] As stipulated in *R. v. Voong*, 2015 BCCA 285 at para. 39:

A suspended sentence has been found to have a deterrent effect in some cases. Because a breach of the probation order can result in a revocation and sentencing on the original offence, it has been referred to as the "*Sword of Damocles*" hanging over the offender's head. For example, in *R. v. Saunders*, [1993] B.C.J. No. 2887 (C.A.) at para. 11, Southin J.A. said:

Deterrence is an important part of the public interest but there are other ways of deterring some sorts of crime than putting someone in prison who has no criminal record as this appellant did not. The learned trial judge did not turn her mind to whether the deterrence which is important might be effected by certain terms of a discharge or a suspended sentence such as a lengthy period of community service.

[48] On balance, I find that it is appropriate in this case to suspend the passing of sentence and to place Ms. Charlie on probation for a period of three years. The probationary order will hold her accountable for her actions and ensure that there is reparation for the harm that she has caused. I want the community to be aware that her actions in driving dangerously and injuring her niece are unacceptable. Additionally, the probation order will focus on her rehabilitation.

[49] The terms of the probation order are that she:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Notify the Probation Officer, in advance, of any change of name or address, and, promptly, of any change in employment or occupation;
4. Report to a Probation Officer within two working days and thereafter, when and in the manner directed by the Probation Officer;
5. Reside as directed by your Probation Officer, abide by the rules of the residence and not change that residence without the prior written permission of your Probation Officer;

6. For the first six months of this order, abide by a curfew by being inside your residence or on your property between 9:00 p.m. and 6:00 a.m. daily except with the prior written permission of your Probation Officer. You must answer the door or the telephone for curfew checks. Failure to do so during reasonable hours will be a presumptive breach of this condition;
7. Not possess or consume alcohol and/or illegal drugs that have not been prescribed for you by a medical doctor;
8. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;
9. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues: alcohol abuse and any other issues identified by your Probation Officer, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;
10. Perform 240 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate. This community service is to be completed at a rate of at least 10 hours per month. The focus of the community service shall be to do work for the Liard First Nation. Any hours spent in programming may be applied to your community service at the discretion of your Probation Officer.

[50] I prohibit Ms. Charlie from operating a motor vehicle on any street, road or public place for a period of two years.

[51] I have considered, but am not satisfied that it in the best interests of justice to make a DNA order, therefore, I decline to do so.

CHISHOLM C.J.T.C.