

Citation: *R. v. Matta*, 2010 YKTC 128

Date: 20091029
Docket: 08-06026
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Faulkner

REGINA

v.

VIVIAN MATTA

Appearances:
Judith Hartling
Edward Horembala

Counsel for the Territorial Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] FAULKNER T.C.J. (Oral): Dr. Vivian Matta was convicted after trial of the offence of careless driving contrary to s. 186 of the *Motor Vehicles Act*, R.S.Y. 2002 c. 153.

[2] The facts are set out in my Reasons for Judgment and need not be extensively repeated. Suffice it to say that Dr. Matta drove past three cars that were stopped at a marked crosswalk without slowing down or averting to the possibility that there was a pedestrian in the crosswalk. Dr. Matta struck the pedestrian without ever seeing her. The pedestrian, Becky Lynn Shank, who was only 26 years old, was gravely injured and died shortly afterward. Becky was in Whitehorse to be the maid of honour at her best friend's wedding, which was to take place four days after she died.

[3] The extensive and heart-rending victim impact statements that were filed reveal just how devastating Becky's death has been to her own family, her common-law partner, her best friend, her friend's family, and many others.

[4] Vivian Matta is a medical doctor who practises in Whitehorse. She is 40 years of age, married with two children. Prior to this incident her driving record was unblemished.

[5] The matter is now for sentence. The *Motor Vehicles Act* provides that the Court may impose a fine of between \$200 and \$1,000, or imprisonment for up to 90 days, or both. The offender's driver's licence may also be suspended for up to 90 days. Finally, a period of probation may be imposed.

[6] Answering the question of what is a fit sentence is particularly difficult in cases of this kind. We have an offender of prior good character. She stands convicted of a traffic offence, not a criminal offence. She did not intend to do harm; her fault was inattention and lack of due care, yet the consequences of her inattention were truly awful. As the Court stated in *R. v. Laycock*, [1996] O.J. No. 3846:

It is a frequent dilemma in sentencing cases where the result is serious, but where the act of the offender would not, but for the results, demand significant sanction.

[7] In assessing the appropriate penalty in cases of careless driving, it is well settled that the Court may have regard to the consequences. (See, for example, *R. v. Martinez*, [1996] O.J. No. 544) In those cases that I was referred to, originating from Canadian courts outside the Yukon, it appears that a custodial sentence is generally, though not invariably, imposed in cases where careless driving have resulted in death.

In this jurisdiction, there are two recent cases that bear examination.

[8] The first of these cases is *R. v. Biondelli*, 2006 YKSC 16. In that case, Mr. Biondelli received a custodial sentence after pleading guilty to careless driving and towing a trailer without adequate brakes. At first instance, he received a fine of \$1,000 and a period of probation. On appeal, Mr. Justice Veale imposed a three-month conditional sentence. The custodial sentence was one month on the careless driving charge and two months additional for the trailer brakes charge.

[9] Mr. Biondelli had decided to drive from Haines Junction to Whitehorse. He was towing a trailer with an SUV on it. The roads were icy. He did not hook up the trailer brakes. The weight of the trailer and its load far exceeded the rated capacity of the towing vehicle. Moreover, the towing vehicle itself had inadequate brakes. Near Whitehorse, the trailer jackknifed into the opposing lane of traffic and collided with another vehicle. The driver of the second vehicle was killed.

[10] Mr. Horembala argued that *Biondelli* was a worse case than Dr. *Matta's* since Mr. Biondelli made a conscious decision to set out grossly overloaded and with inadequate brakes. Indeed, Mr. Justice Veale clearly noted that *Biondelli* was a far different case than one of momentary inattention. In the circumstances, he found the sentence appealed from unfit and imposed a custodial sentence. Mr. Horembala urged that the *Biondelli* case effectively stands for the proposition that momentary inattention would not merit a custodial sentence. He submitted that, in effect, Mr. Justice Veale would not have imposed a custodial sentence had the case not involved an element of conscious decision-making. However, a careful reading of *Biondelli* shows otherwise. Mr. Justice

Veale said the following at paragraph 39:

In my view, a \$1,000 fine and a suspended sentence with probation is not a fit sentence. It is a sentence more appropriate for the model citizen who is a first offender, who had a momentary lapse of [inattention], and where bodily harm or death do not occur.

Thus it is clear that even where the fault is confined to momentary inattention, there can be a custodial sentence if, as here, bodily harm or death results.

[11] The remaining case is *R. v. Monkman*, 2005 YKTC 19. In that case, there was inattention and there was a death. The sentence was a \$1,000 fine. Constable Monkman, who was a police officer escorting a prisoner, was speeding. He drove off the road on a curve and the prisoner was killed. Constable Monkman had either fallen asleep or diverted his attention as the vehicle rounded the curve. Mr. Horembala argued that there was little to distinguish *Monkman* from the present case. The Crown, offered the opportunity to distinguish it on the facts, could not readily do so. Nonetheless, I find *Monkman* of limited value as a sentencing precedent. As has been pointed out, the Court appeared to be particularly impressed by Constable Monkman's prior track record as a citizen and a policeman, but more important to me is that the reasons for sentence revealed that the Crown did not seek a custodial sentence in that case, and thus, the Court considered the issue very briefly, if at all. There was no discussion of the possibility of a conditional sentence.

[12] In considering a fit sentence in this case, I therefore consider the consequences, the tragic death of Ms. Shank, as a primary factor. I also find that the facts of this case go beyond what might be considered a minimal case of carelessness or momentary

inattention. I say that because some period of time passed as Dr. *Matta* drove from Main Street toward the crosswalk at Steele Street. Admittedly, that period of time was a matter of seconds, but other motorists were able to assess the situation and slow down or stop. Dr. *Matta* appears to have been oblivious to the fact that Second Avenue is a dangerous street to drive on or cross. A considerable degree of vigilance is required. She also appears to have been oblivious to what the vehicles around her were doing, and thus oblivious to the strong possibility that a pedestrian was crossing in front of her. I would have to say that she failed utterly to meet the standard required by the locale and the circumstances.

[13] Nevertheless, I do agree that the degree of fault is less than in *Biondelli*, because this case does not contain the element that *Biondelli* did; of, effectively, prior deliberation. Mr. *Biondelli* received one month conditional sentence for the careless driving and an additional two months for towing a trailer with inadequate brakes. Nevertheless, I view the trailer brakes charge as part and parcel of the incident of careless driving dealt with, and the sentence as being a global one.

[14] I accept as absolutely genuine Dr. *Matta*'s expression of remorse and grief at having caused Ms. *Shank*'s death. I am advised that she has provided an apology to the victim's family. At the same time, it does not appear that Dr. *Matta* has fully accepted responsibility or fault regarding the death, since she pleaded not guilty to the charge and proceeded to trial.

[15] There is one additional matter to be considered. Dr. *Matta* is an immigrant and wishes to become a Canadian citizen. Subsequent to the sentencing hearing, Mr.

Horembala, by letter, submitted that a custodial sentence could adversely impact Dr. *Matta's* application for citizenship. On receiving the letter, the Court reconvened to hear counsel on this point. My reading of the *Citizenship Act* (R.S., 1985, c. C-29), s. 21, is that any period of imprisonment or probation cannot be counted toward the period of residency required before a landed immigrant can apply for citizenship. Mr. Horembala suggested that the consequences might be more drastic than this, based on his reading of the citizenship application form, but was unable to provide the Court with any information from Citizenship and Immigration Canada, or elsewhere, to substantiate this concern. In the absence of anything else, I am left to conclude that any period of imprisonment or probation imposed would not be counted toward her residency requirement, but that it would not otherwise form an impediment to her gaining citizenship. In these circumstances, the impact on Dr. *Matta*, while unfortunate, is not so significant as to warrant a departure from the sentence that would otherwise be fit and would be imposed.

[16] In the result, I impose a jail sentence of one month in addition to a fine of \$1,000. There will be a victim surcharge of \$150. The offender's operator's licence is suspended for a period of three months. I will allow the sentence to be served conditionally. As previously indicated, I will accede to counsel's request to address the Court respecting the appropriate terms.

[17] I want to conclude my remarks by saying that I understand that those who knew and loved Becky Shank may think the sentence I have just imposed is inadequate. The short legal answer is that the sentence must be within the limited range permitted by the *Motor Vehicles Act*. It must not be out of proportion to sentences imposed in other

similar cases. However, that is not really an answer. Becky's loved ones will say that her life was worth more than \$1,000 and a month of house arrest. Of course, they would be right, but no sentence I can pass could ever be adequate in that sense. No sentence the Court can impose can undo what is done; no sentence can end the pain of those who have been touched by this sad event. The best the Court can do is to denounce the careless driving that has occurred in the hope that other drivers will be more vigilant in the future.

[18] Do counsel have submissions on the terms of the conditional sentence order?

[SUBMISSIONS RE TERMS OF CONDITIONAL SENTENCE]

[19] The terms of the conditional sentence order will be:

1. You will keep the peace and be of good behaviour;
2. You will report to the Court as and when required;
3. You will report to a Conditional Sentence Supervisor within two working days and thereafter as, when and in the manner directed;
4. You will advise the Conditional Sentence Supervisor in advance of any change of name or address and promptly notify her of any change of occupation or employment;
5. You will remain within the jurisdiction unless given permission by the Conditional Sentence Supervisor to go outside of the Yukon;
6. You will remain within your place of residence at all times except for the following:
 - (a) in cases of emergency;

- (b) for the purposes of employment as a medical doctor either at the medical clinic, the Young Offenders facility or the Yukon General Hospital, also except for obtaining the necessities of life; also except for complying with the terms of the conditional sentence order which could include, for example, meetings with your Conditional Sentence Supervisor; also except for attending to the needs of your children, and also except as the Conditional Sentence Supervisor will approve;
7. When you are in your place of residence, you will answer the telephone or the door in response to compliance checks, and your failure to do so will be a presumptive breach of the order;
8. You will take such assessment, programming and counselling as directed by the Conditional Sentence Supervisor.

[20] With respect to the Crown's suggestion that Dr. Matta should speak in the schools, I have two comments. Firstly, there has been a great deal of publicity already surrounding this matter. Secondly, and I think more importantly, in light of Dr. Matta's occupation, she has the opportunity, skill and means to be of greater service to her community in pursuing her profession rather than spending time elsewhere.

[21] With respect to the fine and surcharge, there will be 30 days time to pay.

FAULKNER T.C.J.