Citation: *R.* v. *Stick*, 2009 YKTC 86

Date: 20090716
Docket: 08-00200
Registry: Whitehorse
Heard: Haines Junction

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

REGINA

v.

RAYMOND STICK

Appearances:
Noel Sinclair — Counsel for Crown
James Van Wart — Counsel for Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Raymond Stick has entered a guilty plea to having committed the offence of having operated a motor vehicle while his blood alcohol level exceeded 80 milligram percentile.

[2] The circumstances are that on June 12, 2008, at about 9:25 a.m., Haines Junction RCMP responded to a complaint that Mr. Stick was driving a vehicle while he was very intoxicated. He was also noted to have been consuming alcohol just prior to beginning driving. I believe there were, based on some facts I heard previously, two phone calls; one to indicate that he was at a gas station while intoxicated and a second one right after he left. There is some indication that as he was leaving the gas station

there was some erratic driving. The RCMP located the vehicle about four to five minutes later. There were three individuals in the vehicle. Mr. Stick was driving. Symptoms of alcohol consumption were observed. He failed a roadside screening device and ultimately provided breath samples of 350 and 330 milligram percentile. There was open liquor in the vehicle.

[3] Mr. Stick comes before the Court with a criminal record of four prior related offences; two in 1988, for over 0.08 and driving while impaired, for which he received $500 and $1,000 fines respectively, and two in 1998, for refusing to provide a sample, for which he received 14 days, and driving over 0.08, for which he received 45 days, and driving prohibitions of one year on each of those.

[4] Crown counsel is seeking a sentence of 12 months in this case, and a four-year driving prohibition, pointing to the statutorily aggravating factors of consuming alcohol while driving, having passengers in the vehicle and, particularly, having blood alcohol readings over four times the legal limit, at 350 and 330.

[5] Defence counsel points out, in seeking a lesser sentence, and I note that Crown has filed notice of intention in this case and so therefore the minimum punishment is 90 days incarceration, but again, defence counsel has pointed out the mitigating factors: that he is a primary caregiver for his father, he has a good work history, he is sorry for having committed this offence.

[6] On that final point, it has been apparent to the Court, and Crown has pointed out, that Mr. Stick has, almost without exception, shown up to court here under the influence of alcohol. It is fairly consistent with his comments in the pre-sentence report that he

really does not want to engage in alcohol treatment at this point in time because he does not have any real interest in stopping drinking. The pre-sentence report, interestingly enough, notes that he has a moderate level of problems related to drinking. Drinking alcohol is not a crime. Driving a vehicle while drinking it in excess is a crime. So I can accept that Mr. Stick may have remorse for driving in the vehicle while drinking, and yet nonetheless find that that is not inconsistent with him not wanting to quit drinking. Those are two separate things, so I am prepared to give him the benefit of the doubt in that he is sorry he drove while he was under the influence of alcohol to that extent.

[7] He is a Southern Tutchone individual and attended residential school for ten years. The pre-sentence report provides some information that indicates, generally speaking, that his experiences at the school and throughout his school years were such that he got along well with his peers and teachers. Defence counsel has made some submissions that I can still take into account the fact that he is First Nations and apply the principles of *R.* v. *Gladue*, [1999] S.C.J. No. 19, even without specific information as to what the actual effect on him was that may have contributed to an alcohol problem, and that may have contributed to this offence.

[8] I agree that the general principle of over-incarceration of First Nations offenders is a principle the Court needs to be mindful of and that even without specific information I can certainly keep in my mind the fact that much of what took place in the educational school system while residential schools were going on resulted in negative impacts on individuals and on their communities and on their families. But certainly where there is a lack of a direct indication of this person’s experiences that lead to it, the effect of the

Gladue considerations is tempered somewhat. So while in the sentence I impose today I am aware and I take into account the First Nations status of Mr. Stick and I take into account the principle that we need to avoid the over-incarceration of First Nations offenders, it is not a significant aspect in the decision. But it is a consideration I am taking into account, recognizing that, certainly on certain kinds of offences where denunciation and deterrence are the leading principles, that the Court will be more reluctant to impose sentences that are creatively different based on an individual's First Nations' status without much more cogent evidence as to what the impact of that status was. This is in no way a reflection on counsel. It is simply the fact that Mr. Stick's circumstances are such that there does not appear to be much more out there that would be available.

[9] I have considered the case law, and of course in cases where we have repeat impaired driving offenders, *R.* v. *Donnessey*, [1990] Y.J. No. 138, stands at the forefront for its consideration of principles. Mr. Donnessey had, I believe, ten prior impaired driving-related offences, one within two to three years from the time he was sentenced to two years less a day for having been picked up with breath alcohol readings of 180 and 200. *Donnessey* puts forward the principle often recited in the court about the devastation wreaked upon communities by impaired drivers, not only on those people that may be in the vehicles with them, but on innocent passersbys.

[10] Cases subsequent to *Donnessey* in the Yukon have imposed custodial sentences for impaired driving offences even where there have been long gaps of ten to 14 years. What once used to be higher fines has become incarceration, and of course, since *Donnessey* there have been amendments to the *Code*, the most recent in July of

2008, which have increased minimum sentences and minimum driving prohibitions, which reflects society's abhorrence of the offence of impaired driving and the need to increase denunciatory and deterrent sentences in order to try to reduce the amount of impaired drivers on the road. It is not working to the extent it should yet, and I am cognizant of the fact that Mr. Stick's offence was committed before the most recent amendments.

[11] I am also aware of the fact that Crown has proceeded by indictment instead of summary conviction. There was some discussion with Crown counsel upon this, and to the extent that previous cases that I may have referred to during submissions, where the election was not apparent to me, whether these cases may have been limited by summary elections that would have perhaps shown a range of sentence that would be lower than would have perhaps been the case had those sentences been indictably, to that extent, certainly, I recognize I must be careful when considering the election that is made. On the other hand, I am reluctant to look at the same offender, the same set of circumstances, and decide that the Crown's exercise of discretion to proceed by indictment necessarily makes these things worse than had the Crown chosen to proceed summarily, although I do recognize that there is a difference in the sentencing ranges available and I do recognize that the exercise of Crown discretion is something that the courts give considerable deference to, although will, in certain occasions as recent case law has developed, look into, with respect to the filings of notices of intention to seek greater punishment. That is not an issue in this case.

[12] I have referred to cases like *R.* v. *Leatherbarrow*, 2004 YKTC 95, *R.* v. *Fordyce*, [2003] Y.J. No. 154 and [2004] Y.J. No. 66, *R.* v. *Joseph Neil Taylor*, [2003] Y.J. No.

147, and consider that the circumstances of the offence here are more aggravated in that the readings are higher than many of these cases.

[13] I recognize we are not dealing with an accident, maybe only because the officer was able to respond to a fortuitous complaint by a member of the community before an accident could have possibly taken place. I cannot, of course, assume that that would happen, but it is not a case where we are dealing with someone sitting in a parked vehicle. Mr. Stick was driving the vehicle while under that influence.

[14] I looked at *R.* v. *Gill*, 2001 YKTC 46. Judge Faulkner noted 11 prior convictions for drinking-driving offences and offences for driving while prohibited. The Court refers to *Donnessey* and imposes a sentence of six months on the charge of failing to provide breath samples, with three consecutive months for driving while prohibited. Although Judge Faulkner did not say anything, certainly we were looking at a global sentence, and the principle of totality, generally, is applied to sentences, although not specifically stated in this case.

[15] I believe a significant period of custody needs to be imposed in this case, considering these authorities. I find the 12 months suggested by Crown, while had this offence happened after July of 2008 would certainly be closer to the middle of the acceptable range and not necessarily at the high end, may be, because of this happening just prior, a bit at the high end.

[16] The *Leatherbarrow* case I referred to was 14 months for, I believe, more priors, and one within a two-year period of the one for which he was sentenced, to an older individual. But the sentence was made 14 months and no probation because of the fact

that he simply was not going to comply. This is a similar case with respect to probation, but with respect to sentence, I think, is still different than *Leatherbarrow*.

[17] There will be a sentence of incarceration. The period of incarceration will be for a period of seven months. There will be a driving prohibition of four years. The victim fine surcharge will be waived.

[18] Anything further?

[19] MR. SINCLAIR: Stay of proceedings on Count 1.

[20] THE COURT: I did not specifically say it; there will not be probation, and that is a factor in the sentence that I considered appropriate in the case.

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COZENS T.C.J.