
CANADA / JUDGMENT

R. v. Combes

2009 BCSC 539

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 539 R. v. Combes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Combes,

2009 BCSC 539

Date: 20090407

Docket: 54099-2

Registry: Chilliwack

Regina

v.

Jason Arthur Combes

Before: The Honourable Mr. Justice Joyce

Oral Reasons for Sentence

April 7, 2009

Counsel for the Crown:

J. Lester

Counsel for the Accused:

G.K. Gill

Place of Trial:

Chilliwack, B.C.

[1] THE COURT: On December 17, 2008, following trial, I convicted Mr. Jason Combes of criminal negligence causing death in the operation of a motor vehicle, contrary to s. 220(b) of the Criminal Code and failing to stop and give assistance after having been involved in an accident with another motor vehicle, contrary to s. 252(1)(b) of the Criminal Code.

[2] I now have to impose a sentence that is fit for these offences and this offender.

Circumstances of the Offences

[3] The circumstances surrounding the offences are set out fully in the Reasons for Judgment that are indexed as R. v. Combes, 2008 BCSC 1818. I will summarize some of the more salient features.

[4] At approximately 4:00 a.m. on October 20, 2007, Constable McKinlay of the Chilliwack RCMP was driving his marked police car in the Sardis area of Chilliwack, British Columbia, when he received information over his police radio concerning a complaint involving a vehicle at or near the intersection of Watson Road and Carter Street.

[5] As Constable McKinlay stopped at the intersection of Watson Road and Tyson Road, he spotted a car go through the stop sign at Carter Street and Watson Road and turn left, heading west on Watson Road. This car turned out to be a stolen vehicle that was being driven by Mr. Combes.

[6] Constable McKinlay turned on his emergency lights and proceeded west on Watson Road towards Carter Street but soon lost sight of the car when it turned left off Watson Road at Canterbury Street. Constable McKinlay turned off his emergency equipment but followed the car by following the tracks that it left on the wet pavement.

[7] Constable McKinlay next encountered the car when he stopped his police cruiser at the intersection of Canterbury and Lancaster Streets. Mr. Combes turned left onto Lancaster, which is a cul-de-sac, then turned around and raced past Constable McKinlay's car, passing it on the passenger side.

[8] Mr. Combes turned south onto Canterbury, east onto Cumberland and north on Tyson Road. He drove through the four-way stop sign at Tyson Road and Watson Road at high speed, continued north on Tyson Road at a very high rate of speed and drove through the four-way stop at the intersection of Tyson Road and South Sumas Road, smashing into the driver's side of a car being driven westbound on South Sumas Road. The driver of that car, Mr. Dwayne Vardy, suffered massive injuries as a result of the collision and died at the scene within minutes of impact.

[9] Constable McKinlay was able to follow Mr. Combes but never caught up with him. He saw the collision as he came to a stop at the intersection of Watson Road and Tyson Road.

[10] Based on the evidence at trial, including expert evidence, I made the following findings of fact regarding Mr. Combes' actions leading up to the collision:

- (a) Mr. Combes drove on wet residential streets at speeds well in excess of the speed limit in an attempt to evade Constable McKinlay who was following him;
 - (b) For at least 20 seconds prior to colliding with Mr. Vardy's car, Mr. Combes sped along Tyson Road towards South Sumas Road, a residential area with a posted speed limit of 50 kilometres per hour, at an average speed of 127 kilometres per hour and at speeds as high as 133 kilometres per hour;
 - (c) Mr. Combes drove on Tyson Road at approximately 127 kilometres per hour for at least 705 metres before the intersection with South Sumas Road, which means that he also sped through the intersection at Watson Road without stopping;
 - (d) Mr. Combes sped through the stop sign at South Sumas Road at a very high rate of speed -- at least 110 kilometres per hour; and
 - (e) Mr. Combes did not swerve nor did he make any significant effort to brake until approximately 1.4 seconds prior to impact by which time there was no way he could have avoided the collision.
- [11] Mr. Combes and his female passenger were not seriously hurt in the collision and were able to get out of the car. Mr. Combes told his passenger to run and he also ran from the scene of the accident without checking on the condition of the person or persons in the car he had just struck. Mr. Combes was afraid of being caught by the police whom he knew were close behind him and he ran to escape criminal liability.
- [12] The police were able to identify Mr. Combes as the driver of the car by DNA analysis. At trial, Mr. Combes formally admitted that he was the driver of the car that struck Mr. Vardy but denied that he was criminally negligent in the manner in which he drove it before it collided with Mr. Vardy's car.

Circumstances of the Offender

- [13] Most of the following details concerning Mr. Combes are taken from the pre-sentence report provided to the court.
- [14] Mr. Combes was born May 31, 1982 and is therefore nearly 27 years old. He is the elder of two children. Mr. Combes' parents separated when he was a young child and Mr. Combes grew up thinking his mother's subsequent partner was his biological father. Mr. Combes' mother and stepfather separated in 2001. Mr. Combes has three half-siblings, two of whom live with Mr. Combes' mother.
- [15] Mr. Combes described his family as dysfunctional. His mother had a serious alcohol abuse problem and his stepfather also had a significant problem with substance abuse. Mr. Combes stated that, with the exception of his maternal grandmother who died about three years ago, his family has never been a positive influence for him. He said that through them he was exposed to substance abuse and violence since his childhood.

- [16] When Mr. Combes was a teenager, Social Services became involved and he was placed in a number of foster homes and with relatives, a number of whom exposed him to alcohol and drug abuse. Due to his violent behaviour, it was apparently difficult for the Ministry to find residential placements for Mr. Combes.
- [17] Mr. Combes' biological father was non-native, but his mother is of the Stó:lo First Nation. Mr. Combes told the author of the report that First Nations' culture and spiritual activities have been an important part of his life.
- [18] Mr. Combes has lived in the Chilliwack area for the most part, and he lived on the Skwah Reserve when he was a child. More recently, Mr. Combes has had difficulty maintaining a settled residence.
- [19] Mr. Combes has had two relationships of some duration, one lasting about three years and the other about 12 months. Both his partners had substance abuse problems. Mr. Combes has no children.
- [20] Mr. Combes never did well in school. He exhibited aggression beginning as early as grade four. He was placed in various alternate educational programs. When last in school, he was doing grade six work. Mr. Combes reported that he had problems learning. Apparently, he was diagnosed with having Attention Deficit Hyperactivity Disorder when he was a teenager. Mr. Combes has only recently made some attempts towards obtaining his GED.
- [21] Mr. Combes has a limited employment history. He has mainly been supported by income assistance benefits.
- [22] Mr. Combes has not taken advantage of counselling and other programs that have been made available to him in the past through Youth Probation Services and the Stó:lo Native Organization, including anger management, education, life skills and residential placements as well as individual support such as from Native Justice Workers and Drug Abuse Resistance Education (DARE) workers.
- [23] In 1998, Mr. Combes began a residential treatment program offered by the Stó:lo Nation but after about two months he was asked to leave because of his poor behaviour.
- [24] Mr. Combes has a long-standing history of alcohol abuse and began to use methamphetamines about five years ago. He has been subjected to a number of substance abuse programs and counselling but was consistently resistant to those efforts to address his substance abuse problems. Mr. Combes had still not taken the substance abuse program available through B.C. Corrections as of the date of the pre-sentence report. He did start the Violence Prevention Program in December 2007 but was expelled shortly thereafter due to his poor attitude, refusal to participate and disruptive behaviour.
- [25] According to a letter that Mr. Combes wrote, which was read into the record this morning, he has apparently made further efforts very recently to engage in and take programs offered through B.C. Corrections.

- [26] Mr. Combes has a lengthy criminal record beginning in 1998 when he was a young offender. The record indicates 38 prior convictions, including some 13 convictions for theft or possession of stolen property; 17 convictions for breach of undertaking, breach of recognizance, failure to comply with disposition or breach of probation; three convictions for mischief; two convictions for obstruction of a peace officer; one conviction for possession of a controlled substance; one conviction for assault with a weapon; and one conviction for escaping lawful custody.
- [27] The longest custodial sentence Mr. Combes has received is an equivalent sentence of about six months. Clearly, the present offences are the most serious that Mr. Combes has committed.
- [28] Mr. Combes has demonstrated an inability or unwillingness to comply with supervision orders. He admits that he never took probation seriously. His remand history demonstrates continuing behavioural problems.
- [29] In addition to his criminal record, Mr. Combes has a driving record of note, particularly considering he has never had a valid driver's licence. On June 10, 2007, Mr. Combes was found guilty of six violations of the Motor Vehicle Act, R.S.B.C. 1996, c. 318, arising out of an incident on May 10, 2007 including driving without due care, disobeying a traffic control device and operating a motor vehicle without a driver's licence and insurance. The Superintendent of Motor Vehicles suspended Mr. Combes from driving for five months effective September 28, 2007.
- [30] In addition, the offence of possession of stolen property in 2007, in respect of which Mr. Combes was convicted in February 2009 and is awaiting sentence, occurred when he was driving a stolen car, left the road, and crashed into a pole.

The Victim's Family

- [31] I wish to say something about the impact of this event upon Mr. Vardy's family. A number of victim impact statements from members of Mr. Vardy's family were filed at the sentencing hearing. It is apparent that Mr. Combes' actions in causing the senseless death of a respected and beloved family man have had a devastating effect on Mr. Vardy's family.
- [32] Particularly poignant is the statement from Mr. Vardy's widow who was married to Mr. Vardy for 34-and-a-half years. She and Mr. Vardy raised three children together and were enjoying being grandparents to six grandchildren. Mrs. Vardy describes in powerful words the pain, anger, loneliness and fear that have replaced the comfortable, happy life she had with Mr. Vardy, enjoying their senior years together and planning for their retirement together. Mrs. Vardy has lost the love of her life and her best friend and confidante.
- [33] Mr. Vardy's daughters speak in their statements of a loving father who provided well for them emotionally as well as in material ways. Their love for their father and the pain that losing him prematurely causes them is evident from their words.

- [34] Mr. Vardy's mother speaks in her statement of the pride she felt in her son and his accomplishments as a wonderful husband, father, and grandfather, and of the heartbreaking grief that his death has caused her.
- [35] Mr. Vardy's father-in-law speaks of the sadness and anger that he feels and of the concern about the void that is left in the Vardy family as a result of Mr. Vardy's death.
- [36] I know it will be difficult, and the pain of this tragic event will never pass completely, but I hope that Mrs. Vardy and the other family members will be able to find the strength to move on with their lives.

Position of the Parties on Sentence

- [37] Crown counsel seeks a global sentence of seven years for these two offences prior to giving credit for the time that Mr. Combes has spent in custody.
- [38] Crown counsel seeks two additional orders: (a) a driving prohibition of between ten and 15 years, and (b) an order that Mr. Combes provide bodily samples for forensic DNA analysis in connection with the National DNA Databank.
- [39] Mrs. Gill on behalf of Mr. Combes submits that an appropriate sentence would be one in the high provincial range, along with a period of probation.

Sentencing Principles

Criminal Code Provisions

- [40] The offence of criminal negligence causing death under s. 220(b) of the Criminal Code has no minimum penalty and a maximum penalty of life imprisonment.
- [41] The maximum sentence for a person convicted of an offence of failing to remain at the scene of an accident under s. 252(1)(b) where death results, and that person knows that bodily harm has been caused to another person involved in the accident and is reckless as to whether the death of the other person results from that bodily harm, is life imprisonment.

General Principles

- [42] The general principles of sentencing are codified in the Criminal Code in ss. 718 to 718.2.
- [43] Section 718 of the Criminal Code provides as follows:
718. The fundamental purpose of sentencing is 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;
 - (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 to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders with particular attention to the circumstances of aboriginal offenders.

Case Authorities

- [44] Because the range of sentences for criminal negligence causing death is broad, the circumstances of the particular offence for which the sentence is being imposed, including any mitigating and aggravating factors, and the circumstances that relate to the particular offender, must be carefully considered when reference is made to case authority.
- [45] Counsel have referred to a number of cases dealing with criminal negligence causing death, dangerous driving causing death, and criminal negligence causing bodily harm in connection with the operation of a motor vehicle in which the sentences range from a conditional sentence to seven years' imprisonment.
- [46] The Crown referred to the following cases which, for convenience, I will simply list in chronological order: *R. v. Plante*, 2005 BCSC 1148, 22 M.V.R. (5th) 142, *R. v. Woloshyn*, 2006 BCCA 228, 225 B.C.A.C. 161, *R. v. Prasad*, 2006 BCCA 470, 231 B.C.A.C. 150, *R. v. Calder Berg*, 2007 BCCA 343, 221 C.C.C. (3d) 449, *R. v. Scott*, 2008 BCCA 307, 257 B.C.A.C. 295, *R. v. Lardner*, 2008 BCSC 253, 64 M.V.R. (5th) 11, *R. v. Gilliland*, 2008 BCCA 118, 253 B.C.A.C. 180, and *R. v. Bertrand*, 2008 BCSC 1310.

- [47] In addition, defence counsel referred to the following cases: *R. v. Desjardins* (1998), 116 B.C.A.C. 159, *R. v. Bhalru*; *R. v. Khosa*, 2003 BCCA 645, 190 B.C.A.C. 42, and *R. v. Carry*, 2008 BCCA 37, 250 B.C.A.C. 228.
- [48] I have considered these cases. I will not review them in detail, but will refer briefly to them. In my opinion, they support a range of sentence in this case in respect of the offence of criminal negligence causing death of four to six years. In my view, they also support for a consecutive sentence of six to 18 months for failing to remain at the scene of the collision.
- [49] In *Woloshyn*, *supra*, the respondent spent an evening drinking before driving her vehicle in the wrong direction on a highway. She collided with another vehicle, killing the driver of that vehicle. Ms. Woloshyn was 26 years old and had a record that included an impaired driving conviction in 1997. She expressed remorse and pleaded guilty at the earliest possible opportunity. The sentencing judge found that Ms. Woloshyn had good prospects for rehabilitation and imposed a sentence of two years' imprisonment to be followed by two years of probation.
- [50] On a Crown appeal, the sentence was increased to four years. The Court of Appeal held that the sentencing judge erred in making rehabilitation the focus of the sentence and in overlooking the objectives of denunciation and deterrence. At para. 26, Ryan J.A. said this with regard to the appropriate range of sentence:
- [26] There is no issue that six years is at the upper end of the range that should be imposed in a case such as this. The high end of the range should be avoided so that we may pay deference to the finding of the sentencing judge that Ms. Woloshyn suffers genuine remorse and has a good chance for rehabilitation. I would therefore set aside the sentence of two years and impose a sentence of four years imprisonment.
- [51] In *Prasad*, *supra*, an appeal from a global sentence of five years for dangerous driving causing death was dismissed. At para. 7, Hall, J.A. noted that:
- [7] A particularly egregious circumstance in this case, as I see it, is that for approximately four years prior to the incident in question that resulted in the tragic death of the victim, the appellant had been prohibited or suspended from driving, but nonetheless continued to drive in his occupation as a delivery person for a courier company.
- [52] In *Calder Berg*, *supra*, the accused rear-ended a vehicle stopped in traffic, then sped off in a reckless manner down a highway. When she attempted to make a U-turn, she collided with a truck driving in the opposite direction which in turn collided with another vehicle, killing its passenger. The accused was sentenced to five-and-a-half years for criminal negligence causing death.
- [53] On appeal, no issue was taken with the effective length of the sentence. The sentence was reduced to four years and eight months after taking into account an additional ten months' credit for time spent in custody. At para. 7 of that decision, Madam Justice Prowse noted that the circumstances giving rise to the charge of criminal negligence causing death were

particularly egregious and concluded that the sentencing judge was "fully justified in finding that a fit sentence for criminal negligence causing death in these circumstances was five-and-one-half years' imprisonment" (at para. 25).

- [54] In *Gilliland*, supra, the circumstances of the offence were egregious. The accused drove a stolen SUV at high speeds on a busy highway in the retail and commercial district of Kelowna. For a time, the police were engaged in a chase of the accused's vehicle, but ceased the chase. The accused continued to drive at about 80 kilometres per hour through a stop sign in a residential area and collided with another car, causing serious harm to the driver and passenger of that car. At the date of the offences, Mr. Gilliland was under two court-ordered driving prohibitions, an indefinite suspension under the Motor Vehicle Act, and terms of a probation order. He had been released from custody 45 days earlier from his last custodial sentence for driving offences involving a stolen vehicle and a police chase, and was on parole from that offence at the time. Mr. Gilliland was 33 years old and had an extensive criminal record of 56 previous offences including 12 motor vehicle related offences, three of dangerous driving, three of fleeing from police, five of driving while disqualified and one of impaired driving. The Court of Appeal upheld a sentence of seven years noting the need to address the protection of the public. Huddart J.A. stated at para. 9:
- [9] In my view, Mr. Gilliland's record indicates that he is a recidivist criminal. He has served time, been released, and has promptly engaged in more criminal behaviour. The last bout of criminal behaviour left two young women severely injured.
- [55] Further, at paras. 14 and 15, Madam Justice Huddart said this:
- [14] I agree with Crown counsel that the sentencing judge appropriately emphasized the gravity of the offences and the high degree of moral blameworthiness. The applicant's actions resulted in serious injuries to two persons and were an escalation in seriousness from his previous recent offences involving high risk and high speed police pursuits while driving stolen vehicles.
- [15] The applicant's demonstrated failure to abide by any form of court order including numerous driving prohibitions and probation orders require imposition of a sentence which would provide some measure of protection of the public. The sentence of four or five years, his counsel suggests, would be appropriate. In my view, it is entirely inappropriate to this offender on the circumstances of the offences for which he was being sentenced.
- [56] In *Scott*, supra, the accused pleaded guilty to one count of dangerous driving causing death and one count of dangerous driving causing bodily harm. The victims were his sons. The accused was speeding on a back road, missed a turn and went off the road into a telephone pole. The accused had five driving related convictions and was driving without a licence or insurance. Alcohol was involved. He received a sentence of three-and-one-half years which was upheld on appeal.

- [57] In *Lardner*, supra, the accused, after an evening of drinking, was riding his motorcycle with a passenger who was not wearing a helmet. He lost control of the motorcycle and the passenger was killed. The accused was convicted of criminal negligence causing death, impaired driving causing death, and driving while over the legal limit. Beames J. imposed sentences of four-and-one-half years in prison for criminal negligence for causing death, plus three years concurrent for impaired driving causing death. Mr. Lardner had a criminal record including a conviction in 1997 for driving while impaired causing bodily harm. At para. 12, Madam Justice Beames said:
- [12] In terms of the objectives of sentencing it is clear, from what I have just read and from other cases provided to me, that general deterrence and denunciation are very important objectives which sentences should seek to meet in cases such as this, involving high speed driving, drinking and driving, and a reckless disregard for the safety and lives of others and for the rules of the road.
- [58] In *Bertrand*, supra, after refusing offers of a ride, the accused drove away from a pub while highly intoxicated. He drove without having his headlights on through a police road check at high speed, and a short time later, his vehicle left the road, crashed through a guardrail and into a private residence. Two persons who were asleep in the residence were killed. The accused pleaded guilty to two counts of criminal negligence causing death. He had no previous criminal record and was not likely to re-offend. MacKenzie J. held that denunciation and deterrence to others were the primary factors to be considered and had to take precedence, notwithstanding the several mitigating factors, and sentenced the accused to five years' imprisonment.
- [59] In *Plante*, supra, an effective sentence of three years was imposed for dangerous driving causing bodily harm, along with a 12-month consecutive sentence for failing to remain at the scene of the accident. In that case, there were a number of aggravating circumstances including a criminal record and the fact that the accused had never been licensed to drive. There were also mitigating factors including the fact that it was a relatively young offender, age 20, there was an early guilty plea, and the offender showed remorse. There were also reasonable prospects for rehabilitation.
- [60] In *Desjardins*, supra, a case relied by the defence, the accused was convicted of criminal negligence causing death and leaving the scene of an accident. He drove back and forth in his lane of traffic, went through a red light, drove past another vehicle on the right and after losing control, collided with a pole, killing his passenger. At the time of the accident, the accused's ability to drive was impaired by alcohol. He received a global sentence of two years less one day.
- [61] The Court of Appeal increased the sentence for criminal negligence to four years incarceration, remarking that the picture that emerged from the circumstances was "of a man to whom a high degree of moral blameworthiness must attach" (para. 7).

- [62] In my opinion, the circumstances in Bhalru, supra, in which conditional sentences of two years less a day were imposed are quite dissimilar to those in the present case. Bhalru involved what was characterized as a spontaneous street race in which one of the participants lost control with disastrous consequences. He struck a pedestrian. Both offenders were young men without criminal records and with good prospects of rehabilitation.
- [63] Carry, supra, is another case relied on by the defence. The accused there pleaded guilty to a number of offences including dangerous driving causing bodily injury, fleeing from the police, driving while disqualified, theft under \$5,000 (the car he was driving), five counts of driving while disqualified, and one count of possession of stolen property. He received a global sentence of five years after taking into account two years credit for time spent in custody awaiting sentence. The actual sentence imposed in respect of the criminal negligence conviction was three years.
- [64] The sentences were upheld on appeal. At para. 8, Lowry J.A. commented as follows:
- [8] The applicant has persisted in criminal conduct that represents a serious danger to public safety. He has, in particular, repeatedly driven when he has been disqualified from so doing and he is now convicted of a second serious crime caused by his criminal negligence for which he bears a high degree of moral blameworthiness. The applicant stands convicted nine times of driving while disqualified and accordingly has shown no willingness to abide by the court's orders. As the judge said, the only way to insure he will not continue to endanger the public as he has, is to incarcerate him for an extended period of time. In my view, this, coupled with meeting the sentencing objectives of denunciation and deterrence, justifies the sentence imposed. I see little reason to consider whatever prospect of rehabilitation there may be should serve to offset the grave concern for protecting the public that has to be the dominant factor in sentencing the applicant.

Sentencing Aboriginal Offenders

- [65] I want to say something about the sentencing of aboriginal offenders. As I referred to earlier, s. 718.2(e) of the Criminal Code provides that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders with particular attention to the circumstances of aboriginal offenders."
- [66] In *R. v. Morris*, 2004 BCCA 305, 198 B.C.A.C. 235, Finch C.J.B.C. discussed the effect of this provision at paras. 51 through 55, referring to two decisions of the Supreme Court of Canada: *R. v. Gladue*, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385, and *R. v. Wells*, [2000] 1 S.C.R. 207, 141 C.C.C. (3d) 368. He noted that Gladue and Wells recognized that appropriate sentences for aboriginal offenders will often focus on restorative objectives and incorporate community-based sentencing alternatives. He went on to say that, "These imperatives are not, however, exclusive and must be weighed against the other principles of sentencing set out in the Criminal Code." At para. 55, Finch C.J.B.C. said:

- [55] Although judges are therefore required to approach the sentencing of aboriginal offenders with an analysis that is sensitive to the conditions, needs and understandings of aboriginal offenders and communities, this does not mean that sentences for such offenders will necessarily focus solely on restorative objectives or give less weight to conventional sentencing objectives such as deterrence and denunciation. As Iacobucci J. observed in *Wells*, supra ¶42:

Notwithstanding what may well be different approaches to sentencing as between aboriginal and non-aboriginal conceptions of sentencing, it is reasonable to assume that for some aboriginal offenders, and depending upon the nature of the offence, the goals of denunciation and deterrence are fundamentally relevant to the offender's community. As held in *Gladue*, at para. 79, to the extent that generalizations may be made, the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance.

- [67] In my view, those remarks have application to the present case. The serious nature of the offences in this case requires emphasis on the principles of denunciation and general deterrence. While the prospects for the rehabilitation of Mr. Combes must not be ignored, they must take second place. I am not persuaded that Mr. Combes' aboriginal background ought to result in anything less than a significant custodial sentence.

Applications of Principles to This Case

- [68] In my view, there are a number of circumstances that place Mr. Combes towards the higher end of the scale of moral blameworthiness for this kind of offence.
- [69] Mr. Combes did not engage in a spontaneous or momentary instance of dangerous driving. He engaged in a sustained pattern of reckless driving over a significant distance. He drove on wet, residential roads at very high speeds -- more than double the posted speed limit. He failed to stop at three intersections, and failed to even slow at the last intersection where the collision occurred. The fact that it was early in the morning and there was little or no other traffic or pedestrians in the area does not excuse Mr. Combes' reckless driving. The very nature of his driving put himself, his passenger, and anyone he might encounter on the street at grave risk. That risk became a reality with tragic consequences.
- [70] There are a number of aggravating circumstances in this case. I am satisfied that while there was not an ongoing police pursuit as such, Mr. Combes drove as he did in an attempt to evade the police whom he knew to be following him. The fact that he did not have and never had a licence to drive a motor vehicle is an aggravating factor. The fact that he was on probation at the time of these offences is an aggravating factor. His substantial prior criminal record and prior violations under the Motor Vehicle Act are aggravating factors.

- [71] Even though Mr. Combes' criminal record does not involve violent offences, it makes me very pessimistic about his ability to change his pattern of criminal activity, despite his current stated intentions in that regard. He simply has no realistic plan in place. Mr. Combes has been given chance after chance by being placed on probation to do something to alter his pattern of offending. Thus far, he has not taken advantage of those opportunities. He has continued to display a lack of willingness to comply with authority, persisting through this most recent remand.
- [72] I agree with Crown counsel that this is a case in which protection of the public, denunciation of the criminal conduct and deterrence of others must be given priority.
- [73] I accept that this case lacks a feature that was present in many of the authorities to which the Crown referred, namely, the presence of alcohol as a contributing factor. However, the very manner of driving in all the circumstances persuades me that the degree of moral culpability in this case is at the higher end. Mr. Combes made the choice to continue to drive at very high speeds even when his passenger was afraid and wanted him to stop so that she could get out.
- [74] The only mitigating factor in this case is the remorse that Mr. Combes has shown. In statements he made to the probation officer, statements through his counsel at the sentencing hearing, his own statements at the sentencing hearing, and the two letters that were read this morning, Mr. Combes has expressed remorse for the incredible pain and sorrow that his actions have caused. I appreciate that it is difficult for Mr. Vardy's family and friends to find any solace in these expressions, but I believe they are genuine.
- [75] Mrs. Gill refers to Mr. Combes' background and the lack of support and grounding that it gave him. I recognize that Mr. Combes is one of many persons of aboriginal heritage who are exposed to substance abuse and violence and seem to move naturally into a life of crime. Mr. Combes has been offered some opportunities to help himself break this cycle and thus far has chosen not to take advantage of them. He has now committed offences of a very serious nature such that, as I have already indicated, his aboriginal background and the systemic problems that he has faced cannot relieve against harsh consequences.
- [76] I have concluded that an appropriate sentence for Mr. Combes for the offence of criminal negligence causing death would be five years, less credit for the time he has spent in custody on these matters prior to sentencing.
- [77] Counsel agree that, in accordance with the binding authorities, Mr. Combes should receive credit on a two-for-one basis for the time he has spent in custody on this matter. He was arrested October 23, 2007 and has been in custody ever since. However, on October 30, 2007, Mr. Combes was convicted of breach of probation and sentenced to three months in jail. I conclude therefore that two months of the time spent in custody should be attributed to that sentence. Mr. Combes was also convicted of possession of stolen property in February of this year, but has yet to be sentenced for that offence. I conclude that the total time Mr. Combes has been in custody on the matters for which he is being sentenced is 15-and-one-

half months. He is therefore entitled to credit for 31 months. The actual sentence I therefore impose on Mr. Combes on the conviction for criminal negligence causing death is 29 months in prison.

- [78] Leaving the scene of an accident is also a serious offence. This crash was horrendous. The driver's side of Mr. Vardy's car was crushed in. It would have been obvious to Mr. Combes that the driver of the car he had just struck might need assistance, but he fled without attempting to render assistance. On the conviction for leaving the scene of the accident, I impose a sentence of 12 months. I might have been inclined to impose an even greater sentence but for the principle of totality.
- [79] With regard to the issue of whether the sentence in respect of the conviction for leaving the scene of the accident should be concurrent or consecutive, in *R. v. Gummer* (1983), 38 C.R. (3d) 46, 25 M.V.R. 282 (Ont.C.A.), that issue was expressly addressed. In that case the offender was given concurrent sentences for dangerous driving and failing to stop and render assistance. At p. 49, Martin J.A. stated as follows:

The learned trial Judge considered that it was appropriate to impose concurrent sentences because so many of the ingredients of the offence of failing to remain were "caused by the earlier offence, the consumption of alcohol, the blurring of judgment", for which the respondent had already been sentenced in respect of the offence of dangerous driving. Counsel for the respondent ably argued that the trial Judge did not err in imposing concurrent sentences and that sentences for offences arising out of the same transaction or incident are properly made concurrent. We do not consider the rule that sentences for offences arising out of the same transaction or incident should normally be concurrent necessarily applies where the offences constitute invasions of different legally-protected interests, although the principle of totality must be kept in mind. The offences of dangerous driving and "failing to remain" protect different social interests. The offence of dangerous driving is to protect the public from driving of the proscribed kind. The offence of failing to remain under [what was then] s. 233(2) of the Code imposes a duty on the person having the care of a motor vehicle which has been involved in an accident, whether or not fault is attributable to him in respect of the accident, to remain and discharge the duties imposed upon him in such circumstances.

In our view, the failure of the respondent to stop his automobile when, as the trial judge found, he was aware that he had struck someone was perhaps the more serious of the two offences which the respondent committed. In failing to stop as required, the respondent exhibited a grave failure to comport with the standards of humanity and decency.

- [80] *Gummer*, supra, was recently referred to with approval by our Court of Appeal in *R. v. McCrea*, 2008 BCCA 227, 256 B.C.A.C. 312. Further, in *Prasad*, supra, the court held that the sentencing judge did not err in imposing consecutive sentences for dangerous driving causing death and failing to stop. I am satisfied on these authorities that the sentence for failing to remain at the scene should be consecutive to the sentence for criminal negligence causing death.

- [81] The total global sentence is therefore 41 months in prison. This is effectively a global sentence of six years.
- [82] Considering the nature of Mr. Combes' driving record and the fact that he has never bothered to obtain a driver's licence, I believe that a lengthy driving prohibition under the Criminal Code is appropriate. I therefore prohibit Mr. Combes from operating a motor vehicle for a period of 12 years pursuant to s. 259(2)(a.1) of the Criminal Code.
- [83] Mr. Combes, a copy of the driving prohibition will be given and read to you. You must be told and you must be aware that it is a serious offence to drive while prohibited. If you do so, you could be sentenced to another jail sentence.
- [84] Finally, I am satisfied that it is appropriate to make an order under s. 487.051 of the Code requiring Mr. Combes to provide bodily samples for forensic DNA analysis. Failing to remain at the scene of an accident is a secondary designated offence. The offence is a serious one. In this case as it turned out DNA analysis formed the basis for identifying Mr. Combes as the offender. Mr. Combes has a substantial criminal record. The taking of the samples involves minimal intrusion on his person. In all of the circumstances, I am satisfied that it is in the interests of administration of justice that the order be made. Further, such order was not opposed by his counsel.

"B.M. Joyce J."

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