
CANADA / JUDGMENT

R. v. Harry

2018 BCSC 2069

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 2069 R. v. Harry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Harry,

2018 BCSC 2069

Date: 20181102

Docket: 103700-2

Registry: Kamloops

Regina

v.

Gary Travis Harry

Before: The Honourable Mr. Justice Marchand

Oral Reasons for Sentence

Counsel for the Crown:

C. Cook

Counsel for the Accused:

M. Stanford

Place and Date of Trial/Hearing:

Kamloops, B.C.

November 1-2, 2018

Place and Date of Judgment:

Kamloops, B.C.

November 2, 2018

[1] THE COURT: With a view to timeliness, I put my reasons for sentence together overnight. At the time of delivering my oral reasons, in the event a transcript of my reasons was ordered, I reserved the right to amend, vary or supplement my reasons. In publishing these reasons, I have done so to protect the privacy of Mr. Harry and others.

Introduction

[2] On May 17, 2018, I convicted Gary Travis Harry of one count of dangerous driving causing bodily harm. These are my reasons for sentence.

Circumstances

[3] The circumstances are described in my reasons for conviction, which are now indexed at 2018 BCSC 820.

[4] Briefly, on July 7, 2015 at about 10:00 a.m., Mr. Harry was driving himself and his passenger, Marlee Duncan, southbound on Highway 99 from Pavilion towards Lillooet in his mother's 2003 Chevrolet Blazer. Mr. Harry perceived a risk that he was going to be rear-ended by another vehicle. He "gunned it" to avoid the risk but, instead of doing so only for a moment, he sustained his acceleration on a relatively steep downhill section of the highway into a well-marked left hand curve. He reached a speed of no less than 163 kilometres per hour, lost control, narrowly missed colliding with two oncoming vehicles, and flipped the Blazer in the ditch on the opposite side of the highway. Ms. Duncan was ejected from the vehicle and suffered very serious injuries. In all of the circumstances, I found Mr. Harry's sustained acceleration to be objectively dangerous and a marked departure from the norm.

Impact on the Victim

[5] Ms. Duncan suffered the following injuries:

1. Extensive scalp lacerations;
2. Fracture of the C2 vertebra with 4 mm displacement;
3. Pars interarticularis fractures at T1 and T4-9;
4. Fractures of the left ribs 2-9;
5. Fractures of ribs 2-1 with a hemopneumothorax;
6. Comminuted left pelvic super-inferior pubic ram;
7. Left sacral alar fracture;

8. Right inferior pubic ramus fracture;
 9. Left comminuted compound tib-fib fracture;
 10. Left scapula and clavicle fracture; and
 11. Extensive gluteal flap degloving.
- [6] Ms. Duncan spent a total of three months in the hospital, including some time in a medically-induced coma. No medical evidence was adduced regarding Ms. Duncan's current medical condition, but she submitted a victim impact statement indicating that she is still suffering the effects from the accident. Unfortunately, Ms. Duncan did not articulate in what way. I conclude from Ms. Duncan's victim impact statement that she remains upset about how the accident has negatively affected her life.

Circumstances of the Offender

- [7] In considering Mr. Harry's circumstances, I have had the benefit of a detailed and thoughtfully prepared Gladue report.
- [8] Mr. Harry is 52 years old. He is the eldest of six children. Together with Ms. Duncan, he is a member of the Ts'kw'aylaxw First Nation ("TFN").
- [9] Mr. Harry's father attended the Kamloops Indian Residential School for 11 years, where he is said to have suffered extensive abuse. Mr. Harry's father was physically abusive to his wife and children, especially Mr. Harry. Mr. Harry also suffered physical abuse from his grandmother and other abuse from a family member and at least one other community member. He witnessed violence, sexual abuse, and substance abuse within his family and community. He is angry that his father has never apologized for physically abusing him and at his mother for not protecting him.
- [10] According to Mr. Harry's counselling psychologist, Mr. Harry reports 15 of 17 symptoms associated with post-traumatic stress disorder, including anxiety and depression. This is hardly surprising, given his childhood experiences.
- [11] Some years ago, Mr. Harry was in a very serious motor vehicle accident, which resulted in spinal surgery and chronic pain. Mr. Harry became addicted to opioid painkillers.
- [12] Mr. Harry has had significant conflict with the law over the years. His criminal record dates to a Youth Court conviction in 1983 for break and enter and theft and contains 26 convictions between 1983 and 2013, many for crimes of violence. Of note, Mr. Harry also has two convictions for dangerous driving, one dated to 1985 and one dated to 2000. I accept that the 2000 conviction for dangerous driving relates to Mr. Harry "running over" one of his former abusers.

- [13] I consider Mr. Harry's criminal record to be entirely consistent with his childhood experiences. Violence and substance abuse were normalized within his family and community and it is apparent that Mr. Harry has struggled with controlling his emotions. In my view, Mr. Harry's marked overreaction to the threat he perceived on July 7, 2015 and his disregard for the risks associated with his conduct are also consistent with his personal history.
- [14] Though I have to classify Mr. Harry's record as serious, it is mostly dated. His last substantive offence was committed in 2010. His last related offence was committed in 2000 and is explained, in part, by the fact that it involved "running over" a former abuser. Other than the two dangerous driving offences, I consider Mr. Harry's driving record to be poor but not unusual. I note that Mr. Harry has not been in any trouble with the law since the events at issue.
- [15] Mr. Harry has two adult children and a 10-year-old with his current partner. Mr. Harry has been working full-time doing archeological work for his First Nation since June 2018. He is currently abstaining from substances and has weaned himself off of the methadone he had been prescribed to address his opiate addiction.
- [16] Mr. Harry began learning about his culture, heritage and traditions while incarcerated at Matsqui and now has a good level of cultural and traditional knowledge. He is providing for his family and is a good mentor.
- [17] Mr. Harry remained at the scene of the accident and offered assistance to Ms. Duncan. He was deeply shaken by the injuries he caused Ms. Duncan and the thought that he almost took her away from her children and other family members. I believe him when he says that he would gladly trade places with her, that he encouraged her to seek compensation against him for her injuries, that he has apologized to her, that he continues to have nightmares about the accident, and that he is deeply remorseful for what happened. I also believe him when he describes being shamed in his community and that he feels ashamed about injuring Ms. Duncan. TFN is a small community. Mr. Harry's feelings of shame are reinforced whenever he sees a member of Ms. Duncan's family.

Crown and Defence Positions on Sentence

- [18] Against this backdrop, the Crown seeks a custodial disposition of 12 to 18 months, followed by 18 months of probation, together with a five-year driving prohibition and a secondary DNA order.
- [19] Mr. Harry asks that I suspend the passing of sentence and place him on a lengthy period of probation. In the alternative, he submits that he serve an intermittent jail sentence of up to 90 days, followed by probation. He submits that a five-year driving prohibition would have a disproportionate impact on him, as he lives in a rural location. He has taken no position in relation to the DNA order.

Sentencing Principles

[20] Sections 718 to 718.2 of the Criminal Code, R.S.C., 1985, c. C-46 [Code] set out the purpose and principles of sentencing. These sections provide, in part, as follows:

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 to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or 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;
- (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 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.

[21] Section 718.2(e) was introduced in 1996. Cases such as *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13, make clear that it is a remedial provision that was and is intended to deal with the crisis of over-representation of indigenous offenders in the Canadian criminal justice system. Sadly, the statistics are worse today than they were in 1996.

- [22] The crisis described by the Supreme Court of Canada has been driven by the alienation, poverty, substance abuse, lower educational attainment, lower rates of employment, and bias experienced by indigenous Canadians as a result of Canada's colonial history and destructive assimilationist policies such as the operation of Indian Residential Schools.
- [23] While these are broader societal issues, the Court, in Gladue and Ipeelee, has recognized that sentencing indigenous offenders has a role to play in addressing their over-representation in the criminal justice system. Indigenous offenders are different from other offenders because, in the words of the Supreme Court of Canada, they "are victims of systemic and direct discrimination". To help address the crisis, Gladue and Ipeelee changed the way indigenous offenders are sentenced, though not necessarily the result. In sentencing an indigenous offender, a sentencing judge must consider two factors:
1. The unique systemic or background factors which may have played a part in bringing the particular offender before the courts; and
 2. The types of sentencing procedures and sanctions which may be appropriate in the circumstances.
- [24] Other important principles from Gladue and Ipeelee include the following:
- The court must take a holistic approach to imposing a fit sentence. A fit sentence is one that is proportional and appropriately balances the seriousness of the offence with the moral blameworthiness of the offender;
 - The unique systemic or background factors that may have played a part in bringing the particular offender before the court speaks to the moral blameworthiness of the offender;
 - A causal connection between the systemic and background factors need not be established but a link may be important or helpful in finding a fit sentence; and
 - Restorative sentences may be more appropriate for indigenous offenders, but taking a restorative approach will not necessarily lead to a reduced sentence. Colloquially, s. 718.2(e) is not a "get out of jail free" card.

Range of Sentence

- [25] Sentencing is a highly-individualized process. The type of available sentence may be constrained by statutory provisions and the range of appropriate sentence is generally established through a consideration of sentences imposed for similarly situated offenders who have committed similar offences in similar circumstances.
- [26] In this case, s. 249(3) of the Code provides for a maximum sentence of 10 years' imprisonment. There is no mandatory minimum sentence, but a conditional sentence order is statutorily not available.

- [27] The parties have referred me to the following authorities on the range of sentence for dangerous driving or impaired driving causing bodily harm or death: R. v. Binning, 2012 BCPC 200; R. v. Cardinal, 2015 BCSC 2536; R. v. Roby, 2015 BCSC 1929; R. v. Gill, 2010 BCCA 388; R. v. Simpson, 2017 NWTSC 72; R. v. Irons, 2016 ONSC 1490; R. v. Startup, 2011 ABPC 389; R. v. Bosco, 2016 BCCA 55; R. v. Schinkel, 2015 YKCA 2; R. v. Leung, 2016 BCSC 214; R. v. Giles, 2012 BCSC 775; R. v. Abbott, an unreported decision of Mr. Justice Dley, made May 2, 2011, Docket Number 87167-2; and R. v. Friesen, 2011 BCPC 418. I have reviewed them all.
- [28] What I draw from the authorities is that these types of cases cover a wide variety of circumstances, a wide variety of offenders, and a wide variety of sentences. For offences at the lower end of the seriousness scale, committed by offenders with a reduced level of moral blameworthiness, a suspended sentence with probation may be appropriate. For offences at the higher end of the seriousness scale, committed by offenders with a heightened level of moral blameworthiness, a term of imprisonment of several years' duration may be called for.

Aggravating Factors

- [29] In this case, many of the aggravating factors seen in the cases cited to me are not present. For example, Mr. Harry did not leave the scene, showed immediate concern for Ms. Duncan, and was cooperative with the police. The distance driven by Mr. Harry at an excessive rate of speed was limited.
- [30] Further, I was not satisfied beyond a reasonable doubt that Mr. Harry was aware of the special risks associated with the probability that Ms. Duncan was not wearing a seat belt prior to his dangerous driving. I was also not satisfied beyond a reasonable doubt that Mr. Harry was intoxicated by alcohol or drugs or that his admitted fatigue and dope sickness were factors in this dangerous driving.
- [31] I do not consider Mr. Harry's advertence to the risk of injury or death associated with his driving to be an aggravating factor. It is the essence of his offence.
- [32] I do not accept the Crown's submission that Mr. Harry lacks insight into his behaviour. He chose to defend himself rather than enter a guilty plea. In doing so, he submitted his driving represented a momentary lapse in judgment. I did not accept that defence, but I do not consider it aggravating for him to have raised it. In my view, he had to explain his driving and, in doing so, was not focused on blaming others.
- [33] Finally, Mr. Harry's criminal and driving records are only marginally aggravating. His criminal record is dated and largely not related. Other than his two prior dangerous driving convictions, his driving record is unremarkable. His dangerous driving convictions are concerning, though they are dated and one involved Mr. Harry "running over" one of his abusers. Nevertheless, Mr. Harry's custodial dispositions on his dangerous driving convictions (one involving two months' imprisonment and the other a three-month CSO) should have sent Mr. Harry a strong message that driving is a privilege that should not be

abused and that he had a responsibility to drive within the rules of the road.

Mitigating Factors

[34] In terms of mitigating factors, Mr. Harry is remorseful for his actions and has taken meaningful steps to address his deep-seated anger issues and substance abuse. He has been in counselling and has found it within himself to abstain from the use of drugs and alcohol. Though much work remains to be done, I give Mr. Harry credit for making meaningful progress in turning his life around. I consider Mr. Harry to be a bright and capable person who, with additional help, is in a good position to provide for his family and community. I will consider Mr. Harry's so-called Gladue factors in my assessment of his moral blameworthiness.

Principles of Sentencing Deserving of Greatest Emphasis

[35] The case law establishes that denunciation and deterrence are primary sentencing principles in a case such as this. A fit sentence must reinforce the message that driving is a privilege which comes with inherent risks and that the privilege of driving should be exercised carefully so as to avoid the tragic consequences associated with a case such as this. At the same time, Mr. Harry's personal circumstances cry out for a sentence that emphasizes restoration and rehabilitation. Public safety would be well served if Mr. Harry can find a way to deal with his past traumas, remain abstinent from drugs and alcohol, and control his emotions and behaviour.

Sentence

[36] In determining a fit sentence, I must take into account that Mr. Harry has committed a serious crime. As a result of his conduct, Ms. Duncan has suffered very serious injuries that required her to spend a significant amount of time in hospital. It is likely that she will continue to suffer adverse physical and emotional consequences for a very long time, if not for the rest of her life. On the other hand, in determining a fit sentence, I must recognize that Mr. Harry has a highly-reduced level of moral blameworthiness. Canada's colonial history and assimilationist policies have had a direct and profound adverse effect on Mr. Harry's community, family, and Mr. Harry himself.

[37] Mr. Harry had a childhood that no person should experience. He was raised in a dysfunctional environment where violence and substance abuse were normalized, where he was not protected, and where he suffered various forms of abuse. In my view, 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. Like many indigenous offenders with a similar background, these experiences have brought Mr. Harry into conflict with the law, including with respect to the offence before me.

- [38] In considering the seriousness of the offence and Mr. Harry's moral blameworthiness, I take into account that his driving on July 7, 2015 did not involve any subjective intent to drive dangerously and that his dangerous driving was of a relatively brief duration.
- [39] Any sentence that I impose cannot undo the significant harm Mr. Harry has caused to Ms. Duncan. I understand why she remains upset with Mr. Harry. She has every right to feel that way. Without being in any position to tell Ms. Duncan how to feel and without intending to do so, I cannot help but say that I hope Ms. Duncan can find some peace with what she has been through.
- [40] As I said in *R. v. Swaby*, 2017 BCSC 2020, aff'd 2018 BCCA 416, "The hardest sentencing decisions are those [that] involve serious offences committed by offenders with a reduced level of moral blameworthiness." Like *Swaby*, this is one of those cases.
- [41] After having carefully considered all of the circumstances, in the exceptional circumstances of this case, in my view, separating Mr. Harry from society with a jail sentence is not required to meet the objectives of denunciation and deterrence. In my view, these objectives will be adequately met by the terms of the probation order I will be making, the substantial civil liability Mr. Harry faces in relation to Ms. Duncan's injuries, the driving prohibition I will be imposing, and the shaming Mr. Harry is experiencing in his community.
- [42] A tragedy has occurred that cannot be undone. More good will now come from Mr. Harry maintaining his wellness and contributing to his community than spending weekends incarcerated at the Lillooet detachment of the Royal Canadian Mounted Police. In my view, the sentence I will be imposing will address public safety concerns through supporting Mr. Harry's efforts to rehabilitate himself, provide some reparations to the community, and promote a sense of responsibility in Mr. Harry.
- [43] The Gladue report does not identify any specific restorative justice programs offered by the TFN or the larger St'át'imc Nation but notes, "There may be options for volunteer service within his community as a way for Mr. Harry to acknowledge and repair harms caused by his actions." The Gladue report also recommends specific trauma treatment programs for indigenous participants. My sentence will incorporate some of the suggestions and recommendations within the Gladue report.
- [44] Mr. Harry, I am going to ask you to stand. Mr. Harry, I am suspending the passing of sentence and placing you on probation. If you do not comply with the terms of the probation order, the Crown may elect to bring you back before me to revisit my sentence, which could include jail time.
- [45] Mr. Harry, you must comply with the terms of a probation order for a term of three years. The conditions of the order are:
- You must keep the peace and be of good behaviour;
 - You must appear before the court when required to do so by the court;

- You must notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation;
 - You must report in person to a probation officer at 455 Columbia Street, in Kamloops, B.C. by 3:00 p.m. on Friday, November 9, 2018, and, after that, you must report as directed by the probation officer;
 - When first reporting to the probation officer, you must inform him or her of your residential address and phone number. You must not change your residence or phone number without written permission from your probation officer;
 - You must attend, participate in and successfully complete any intake, assessment, counselling or program as directed by the probation officer. Without limiting the general nature of this condition, the intakes, assessments, counselling or programs may relate to: a) anger management; b) alcohol or drug abuse; or c) mental health, with special consideration given to the Kwunatsustul Trauma Program offered by Tsow-Tun Le Lum;
 - You must complete 240 hours of community work under the direction of the probation officer. Your community work service must be completed by May 1, 2020. Special consideration is to be given to work for the benefit of the TFN;
 - You must apologize to Ms. Duncan in the manner directed by your probation officer and to the satisfaction of your probation officer. I am not putting any deadline on that because it may depend on Ms. Duncan's receptiveness in receiving a formal apology of this kind.
- [46] MS. COOK: Should it -- sorry. Should it not be to the end of the probation order, then? Because if he doesn't complete it, then it would be a breach.
- [47] THE COURT: I think it is inherent in the order, but I can add "by the end of the order".
- [48] MS. COOK: Sorry, I just do not have the wording in front of me, so I wasn't sure if you meant just whether or not she wanted it or not, but I think -- I think typically -- if -- anyways.
- [49] THE COURT: Well, if she is not receptive, I expect that the probation officer would not force her to receive the apology and would not breach Mr. Harry if he did not provide the apology.
- [50] MS. COOK: Of course.
- [51] THE COURT: Because that would not be in the manner directed by the probation officer. Returning to the terms of the probation order:
- Subject to the consent of Ms. Duncan and the TFN, you must participate in a restorative justice program at the direction of your probation officer.
- [52] Pursuant to s. 259(2) of the Code, you are prohibited from operating any motor vehicle on any street, road, highway, or other public place in Canada for three years.

- [53] Count 1 on the indictment is a secondary designated offence. After considering the factors set out in s. 487.051(3), I am satisfied that it is in the best interest of the administration of justice to make an order in Form 5.04 authorizing the taking of samples of bodily substances from you for the purpose of registration in the DNA National Databank. I note, in particular, that you did not raise any privacy or security concerns that would weigh against the making of this order. You must attend at the Battle Street detachment of the Kamloops RCMP, before 3:00 p.m. on November 9, 2018, and submit to the taking of the samples. This order is valid until executed.
- [54] I think it would be helpful for Mr. Harry's probation officer to have access to the Gladue report. Would Mr. Harry consent to its release to his probation officer?
- [55] THE ACCUSED: It would probably be helpful [indiscernible/not near microphone]. That's very hard because there's some very hard stuff in there that brings up some pretty -- pretty hard emotions. I'm sorry -- I'll -- sure, I'll -- I'll allow it, you know, it's going to be hard [indiscernible/not near microphone] --
- [56] THE COURT: I understand --
- [57] THE ACCUSED: -- knowing that this person will know what happened to me.
- [58] THE COURT: The reason it is important is that, in my view, you need to find a way to deal with your history. How do you deal with it if the person who is there to help you does not know?
- [59] THE ACCUSED: As -- as being a North American native, I've never ever experienced good relations with any other people, except for you. You're the first person that I've ever felt comfortable with to talk to about this.
- [60] THE COURT: Well, the community corrections officers are trained. Their goal is the same as yours, which is for you to be well, because, if you are well, then you will not be committing offences and you will be leading the life that you should be leading.
- [61] THE ACCUSED: Yeah. I understand, yeah.
- [62] THE COURT: It would be kept --
- [63] THE ACCUSED: Confidential?
- [64] THE COURT: -- private, yes.
- [65] THE ACCUSED: Okay.
- [66] THE COURT: All right. With Mr. Harry's consent, I direct that a copy of the Gladue report filed as exhibit 4 in the sentencing hearing be provided to his probation officer.
- [67] I thank counsel for their able assistance. I wish Ms. Duncan the best in the future and I wish Mr. Harry success along his healing journey.

"L.S. Marchand J."

MARCHAND J.

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