

CANADA / JUDGMENT

R. v. Heth-Klems

2022 BCSC 694

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Supreme Court of British Columbia

DECIDED

27 April 2022

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2022 BCSC 694 R. v. Heth-Klems

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Heth-Klems,

2022 BCSC 694

Date: 20220427

Docket: 69056

Registry: Chilliwack

Regina

v.

Harrison Vaughn Ludwig Heth-Klems

Before: The Honourable Justice Duncan

Oral Reasons for Sentence

Counsel for the Crown:

R. Macgowan

M.B. Rankin (appearing via teleconference)

Counsel for the Accused:

M.S. Smith

Place and Date of Trial/Hearing:

Abbotsford, B.C.

April 4, 2022

Place and Date of Judgment:

Abbotsford, B.C.

April 27, 2022

Introduction

- [1] On December 13, 2021, I convicted Mr. Heth-Klems of one count of dangerous driving causing death: 2021 BCSC 2536. He is before me today for the imposition of sentence.
- [2] Mr. Macgowan, on behalf of the Crown, seeks a sentence of 18 months imprisonment; a driving prohibition for four years from today's date pursuant to s. 259(2)(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], which was the section in force at the time of the offence; and an order that Mr. Heth-Klems submit a sample of his DNA pursuant to s. 487.04 of the Code. Dangerous driving is a secondary designated offence and the requirement for a DNA sample is discretionary.
- [3] Mr. Smith, counsel for Mr. Heth-Klems, has filed a Notice of Constitutional Question challenging the unavailability of a Conditional Sentence Order ("CSO") for dangerous driving causing death by operation of s. 742.1(e)(i) of the Code. He submits that a CSO in the range of 18 to 24 months is a fit sentence in this case, along with a driving prohibition.
- [4] Counsel agreed that I should approach my task of determining a fit sentence as if a CSO were an available sentence and if I decide a CSO should result, the constitutionality of the prohibition would be argued on a subsequent date.

Circumstances of The Offence

- [5] On the evening of July 13, 2018, Mr. Heth-Klems took his friend's Kawasaki Ninja motorcycle without consent. Mr. Heth-Klems was not licensed to operate a motorcycle and he was prohibited from driving at the time. He took his girlfriend, Megan Kinnee, out for dinner then proceeded to operate the motorcycle, with Ms. Kinnee as his passenger, along Highway 1 east towards a park.
- [6] Traffic on the highway was slow and Mr. Heth-Klems took an exit from the highway to the adjacent South Parallel Road. A camera at a business on South Parallel Road captured the motorcycle travelling at 120 km/h in an 80 km/h speed zone. Very shortly thereafter, it collided with the left rear end of a Lincoln Navigator which was travelling slowly along South Parallel Road.

- [7] I found the collision occurred because Mr. Heth-Klems took his eyes off the road ahead of him to gaze over at an accident on Highway 1. This inattention was more than momentary. When coupled with his speed and the fact that he had been gaining on a vehicle which was there to be seen and impossible to miss, his driving was a marked departure from the standard of care expected of a reasonable person. The collision caused the death of Ms. Kinnee.

Circumstances of The Offender

- [8] Mr. Heth-Klems was 22 when the offence occurred. He is now 26. He has a 6-year-old son from a previous relationship and he is very involved in his son's upbringing.
- [9] Mr. Heth-Klems is a welder by trade. He works for himself and employs two other people.
- [10] Mr. Heth-Klems did not have an easy childhood. His parents divorced when he was three. He was sexually abused when he was five by his father's girlfriend's children. He was in and out of foster care in his elementary school years. His father had little contact with him and when he was 12 his mother moved to Central America. Mr. Heth-Klems' uncle Louie took him in. He moved out on his own at age 17.
- [11] Mr. Heth-Klems does not appear to have any issues with substance abuse. He has family and community support, as evidenced by over a dozen character references provided to me in the course of sentencing. By all accounts he is a loyal friend, devoted father and a support to the family members who were there for him when his parents effectively abandoned him.
- [12] Mr. Heth-Klems suffered serious injuries in the collision that killed Ms. Kinnee. He sustained a head injury, fractures to his pelvis and back, nerve damage, partial leg paralysis, a collapsed lung and three broken ribs. He is unable to have any more children as a result of his injuries. He went back to work in January 2019, but in retrospect thinks he should have taken more time to recover. Mr. Heth-Klems is taking counselling and physiotherapy for his emotional and physical wellbeing.
- [13] Mr. Heth-Klems does not have a criminal record, but he has a driving record of some significance. As a young person, in May and June 2013, he incurred three infractions including speeding and driving contrary to a restriction.
- [14] As an adult, Mr. Heth-Klems committed three violations on December 30, 2015: failure to display the "L" or "N" sign; failure to yield; and driving without insurance. He was prohibited from driving by the Superintendent of Motor Vehicles on December 20, 2015 for one month. On September 12, 2016, he was prohibited from driving for three months.
- [15] On October 9 2017, he was issued a violation ticket for excessive speed.
- [16] On December 7, 2017 he was issued a violation ticket for speeding.

- [17] On February 15, 2018, he was issued a violation ticket for speeding and failing to display the "N" sign.
- [18] On March 7, 2018, he was issued a violation ticket for speeding.
- [19] On June 15, 2018, he was prohibited from driving for three months. This prohibition was in effect on July 13, 2018 when the offence before me occurred.
- [20] Mr. Heth-Klems was prohibited from driving by the Superintendent of Motor Vehicles for six months on March 13, 2019. On June 3, 2019, he was charged with driving while prohibited. Mr. Heth-Klems received a violation ticket for speeding on May 18, 2020. On January 14, 2021, he received a one-year court-ordered driving prohibition pursuant to s. 98 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318, as well as an automatic prohibition under s. 99 of the Act.

Victim Impact

- [21] Three of Ms. Kinnee's family members read their victim impact statements to the court: her mother Bree Kinnee; her stepfather Tim Chartier; and her great aunt Diane Kinnee. Ms. Kinnee's father, Wayne Marchant, was unable to attend court due to poor health but a victim services worker, Lynn Rajala, read his statement.
- [22] It is a gross understatement to say that Ms. Kinnee is deeply missed by her family. Her mother Bree and Mr. Chartier both spoke about the dreaded knock on the door just after midnight when police came to tell them that their daughter had died. Bree Kinnee remembers looking up the stairs to see her three sons staring down at her, weeping and huddled together at the news of their sister's tragic death.
- [23] Ms. Kinnee's great aunt Diane played a significant role in her life and the two were very close. Diane Kinnee took her great niece back and forth from the mainland to Vancouver Island to facilitate contact with both her parents. They had plans to travel, to attend the Coachella music festival and to see Beyonce in concert. Diane said that her niece loved Mr. Heth-Klems very much and Diane feels guided to stay connected with him and to forgive him.
- [24] Mr. Marchant wrote eloquently and lovingly about his daughter and how he struggles with health issues triggered by her loss.

The Positions of Counsel

The Crown

- [25] Mr. Macgowan submits that a CSO would not satisfy the purpose and principles of sentencing in the circumstances of this case. While recognizing that Mr. Heth-Klems is youthful, has no criminal record and enjoys the support of family and friends, Mr. Macgowan maintains the aggravating factors outweigh those mitigating factors.

- [26] In particular, the Crown submits that Mr. Heth-Klems was not licensed to drive a motorcycle and was prohibited from driving at all at the time of the offence, flouting the regulatory regime which governs the privilege to operate a motor vehicle. Mr. Macgowan maintains that this increases the moral culpability of Mr. Heth-Klems.
- [27] In addition, Mr. Macgowan submits that Mr. Heth-Klems' driving prior to the collision, while not as aggravated as in other cases, is a factor that elevates his moral blameworthiness. He passed traffic on the right shoulder and was driving 40 km/h more than the speed limit immediately prior to the collision.
- [28] Mr. Macgowan relies on *R. v. Bosco*, 2016 BCCA 55, for its discussion of the applicable sentencing principles. The accused drove along a two-lane road in Langley. It had snowed earlier in the day, the road was icy and slippery and it was dark. The accused was familiar with the road. He began to tailgate. The driver ahead of the accused braked, the accused braked and then lost control. He swerved into the oncoming lane and collided head on with an oncoming vehicle, seriously injuring the driver. The accused had a driving record that was similar to Mr. Heth-Klems', although he was older and the offences occurred over a longer period of time.
- [29] The trial judge imposed an intermittent sentence of 51 days imprisonment and a two-year driving prohibition. The accused appealed. Writing for the Court, Dickson J.A. said:
- [37] Dangerous driving causing bodily harm is widely recognized as an offence of considerable gravity. Pursuant to s. 249(3) of the Criminal Code, the maximum sentence is ten years' imprisonment. When an offender drives dangerously the public is needlessly placed at great risk of harm, sometimes with life-altering consequences. While the consequences are unintended, the risk-taking that produced them is undertaken by choice: *Rawn* at para. 41; *R. v. Gill*, 2010 BCCA 388 at para. 25.
- [38] General deterrence and denunciation are the primary sentencing goals in dangerous driving cases. Members of the public share its highways and are entitled to do so in the expectation of reasonable safety based, in part, on responsible use of motor vehicles by all concerned. As Madam Justice Epstein emphasized in *Rawn* at paras. 49-50, driving is a privilege that can wreak great havoc when it is exercised recklessly. Accordingly, sentences for dangerous driving must unambiguously express society's condemnation of the conduct and serve to warn like-minded others that it will not be tolerated.
- [39] Driving offences are unusual in that otherwise law-abiding citizens like Mr. Bosco may be inclined to commit them without fully appreciating their criminality. Driving is a commonplace activity, and, to varying extents, human frailties like impatience, inattentiveness and impulsivity are ubiquitous. When drivers irresponsibly indulge such frailties from behind the wheel they imperil others in their orbit, sometimes with catastrophic consequences. All drivers are expected to know this and govern themselves accordingly. When they do not and harm ensues, the result is no mere accident. It is a true crime: *R. v. Giles*, 2012 BCSC 775 at para. 25; *Johnson* at para. 30.

- [30] The Court allowed the appeal, but only to the extent of reducing the intermittent sentence by two days to give the accused credit for time erroneously served after he had been released on bail pending appeal.
- [31] Mr. Macgowan cited decisions dealing with the purpose and principles of sentencing in serious driving cases: *R. v. Smith*, 2013 BCCA 173; leave to appeal ref'd [2013] S.C.C.A. No. 251 and *R. v. McKnight*, 2021 BCSC 2542 - as well as several decisions involving roughly similar offenders and circumstances to demonstrate the general range of sentence.
- [32] In *R. v. Nikirk*, 2020 BCPC 10, the accused was convicted after a trial of dangerous driving causing death. She was in her early twenties with no criminal record and a minor motor vehicle record, including a speeding ticket which post-dated the offence. She drove aggressively, at high speeds, in suburban Victoria during rush hour while texting. She struck an 11 year-old child in a crosswalk, causing a traumatic brain injury that left the child in a persistent vegetative state.
- [33] Sentencing proceeded on the same basis as it has before me: McKimm P.C.J. assumed a CSO was an available sentence. He found the accused's moral blameworthiness to be high and, despite her youth, limited driving record, remorse and good character, imposed a sentence of two years in custody.
- [34] In rejecting a CSO, McKimm P.C.J. observed that members of the public must understand that distracted driving poses a very serious risk to other members of the public. The conduct required a sanction that would deter others and only a sentence of incarceration would meaningfully carry out the principles of general deterrence and reflect the moral blameworthiness of the offender.
- [35] *R. v. Sandhu*, 2021 BCPC 240, is a decision of Jette PCJ. The accused was 18 years of age and, contrary to the restrictions on his licence, he drove a group of five people in his father's car. He was speeding and struck an object on the road, causing a crash. One of his passengers died and two others were seriously injured. The accused and one passenger fled the scene. The accused entered a guilty plea to dangerous driving causing death and bodily harm and failing to stop at the scene of an accident.
- [36] Jette P.C.J. found the accused's moral blameworthiness to be high and the need for rehabilitation secondary to the need for denunciation. He imposed 18 months jail for dangerous driving causing death, with concurrent sentences for dangerous driving causing bodily harm and consecutive sentences for leaving the scene.
- [37] In *R. v. Dhillon*, 2013 BCPC 259, the accused was convicted after a trial of dangerous driving causing death. The accused was driving his brother's Corvette, accelerated quickly, made a sudden lane change and lost control. He struck an elderly man sitting at a bus stop. The man died of his injuries several days later. The entire event took less than ten seconds.

- [38] The accused was in his mid-twenties at the time of the offence. He was gainfully employed until his mental health deteriorated after the accident, rendering him unable to work. He was traumatized by what had happened and deeply remorseful. His driving record was limited. Jardine P.C.J. determined that the offender bore a high degree of moral culpability and, despite mitigating factors and potential immigration consequences, imposed a sentence of one year in jail, two years on probation and a five-year driving prohibition.
- [39] The Crown also relies on *R. v. Proulx*, 2000 SCC 5. It was one of a group of cases heard by the Supreme Court of Canada shortly after CSOs were introduced. The accused entered pleas of guilty to dangerous driving causing death and dangerous driving causing bodily harm. He consumed beer at a party and drove his friends home in a vehicle that he knew was mechanically unsound. He drove aggressively and erratically before colliding with another vehicle, injuring the driver and killing one of his own passengers. The sentencing judge imposed a sentence of 18 months incarceration, which was reversed on appeal but restored by the Supreme Court of Canada.
- [40] At para. 127 of *Proulx*, Lamer C.J. summarized the Court's findings on the availability of conditional sentences, determining at that time a CSO was available for any type of offence except those with a minimum term of imprisonment. This has of course changed with Parliament's amendments to s. 742.1.
- [41] Lamer C.J. summarized the sentencing judge's approach, noting that she found that serving the sentence in the community would not endanger the community but a CSO would not satisfy the purpose and principles of sentencing. Lamer C.J. went on to say:
- 129 While Keyser J. seems to have proceeded according to a rigid two-step process, in deviation from the approach I have set out, I am not convinced that an 18-month sentence of incarceration was demonstrably unfit for these offences and this offender. I point out that the offences here were very serious, and that they had resulted in a death and in severe bodily harm. Moreover, dangerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by otherwise law-abiding persons, with good employment records and families. Arguably, such persons are the ones most likely to be deterred by the threat of severe penalties: see *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145 (Ont. C.A.), at p. 150; *R. v. Biancofiore* (1997), 119 C.C.C. (3d) 344 (Ont. C.A.), at paras. 18-24; *R. v. Blakeley* (1998), 40 O.R. (3d) 541 (C.A.), at pp. 542-43.
- [42] Lamer C.J. went on to say that his comments should not be taken as a directive that conditional sentences can never be imposed for offences such as dangerous driving or impaired driving, but trial judges are "closer to their community and know better what would be acceptable to their community. Absent evidence that the sentence imposed by the trial judge was demonstrably unfit, the Court of Appeal should not have interfered to substitute its own opinion for that of the sentencing judge" (at para. 131).

- [43] Finally, the Crown relies on *R. v. Livingston*, 2013 BCSC 1837. The accused entered a guilty plea to impaired driving causing death. The accused had been drinking with friends. He drove in excess of the speed limit on a damp road, executed a sharp lane change, overcorrected and hit a utility pole, killing his girlfriend. The accused was also badly injured in the accident and lost his right leg. He was in his early twenties when the offence occurred and had a somewhat difficult childhood. He had no criminal record and no motor vehicle record.
- [44] Schultes J. analyzed the distinction between driving cases involving impairment and those which did not. He concluded that while there are doctrinal differences in the approach to sentencing, with impaired driving causing death carrying an inherently higher degree of moral blameworthiness, he imposed a sentence one-year imprisonment, observing it was more consistent with dangerous driving authorities than with impaired driving authorities. In imposing a sentence at the lower end of the range, Schultes J. found that the accused would have a difficult time in custody as a result of his injuries and that he had been specifically deterred. Denunciation and general deterrence were the pressing objectives of sentence.

The Defence

- [45] Mr. Smith submits that a CSO with house arrest, apart from absences for work or attending to the necessities of life such as grocery shopping or medical appointments, along with conditions prohibiting the accused from consuming intoxicating substances, requiring him to take counselling and prohibiting him from operating a motor vehicle, would be a fit sentence in this case.
- [46] Mr. Smith took me through Mr. Heth-Klems' background, which I have discussed earlier in these reasons. He emphasizes the character reference letters which highlight the emotional burden that Mr. Heth-Klems has carried as a result of Ms. Kinnee's death. Mr. Smith explained that the offence of driving while prohibited that post-dated the offence occurred at a time when Mr. Heth-Klems was in too much pain to walk to a job site. He chose to drive and was apprehended.
- [47] Mr. Smith notes that in *R. v. J.L.M.*, 2017 BCCA 258, the Court of Appeal said that a CSO "is also a punitive sanction capable of achieving the objectives of deterrence and denunciation" and that even when denunciation and deterrence are central objectives of a sentence and aggravating circumstances exist, a CSO may still be a fit sentence (at para. 88). The factual context in *J.L.M.* was communicating or obtaining sexual services for consideration from a person under the age of 18 years.
- [48] Counsel also referred me to the decision in *Proulx*, where the Court said:

22 The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the

victim and community, and the promotion of a sense of responsibility in the offender. However, it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence. It is this punitive aspect that distinguishes the conditional sentence from probation, and it is to this issue that I now turn.

[Emphasis in the original.]

- [49] Later in Proulx, Lamer C.J. cautioned against placing too much weight on deterrence when choosing between a CSO and incarceration, observing that a CSO with sufficiently punitive conditions coupled with public awareness of the severity of the sentence could provide significant deterrence. In the final analysis, however, Lamer C.J. acknowledged that there may be circumstances in which the need for deterrence will warrant incarceration: at para. 107. A CSO is generally better suited to achieving the restorative objectives of rehabilitation, reparations and promotion of a sense of responsibility in the offender: at para. 109.
- [50] The principle of restraint is also important, particularly in relation to first time offenders: *R. v. Ansari*, 2008 BCSC 1709 at para. 20.
- [51] Mr. Smith cited a number of authorities predating the 2007 legislation restricting the availability of a CSO for dangerous driving causing death.
- [52] In *R. v. Areco*, 1999 CanLII 3799 (Ont. C.A.), 126 OAC 338, the Ontario Court of Appeal substituted a CSO for the one-year term of imprisonment imposed by the trial judge. The accused had been traveling about 25 kilometers in excess of the speed limit when he crossed into the oncoming lane of traffic and collided with a taxi. He was 22 years of age at the time of the accident in 1994. By the time the appeal was heard he was married with one child and another on the way. He had no record and the Court of Appeal determined his conduct had not been egregious such that the substitution of a CSO would demean the seriousness of the offence.
- [53] In *R. v. Buchanan*, [2002] O.J. No. 2593, 2002 CarswellOnt 2614, the accused fell asleep at the wheel of his vehicle and killed two pedestrians. He knew he was tired but decided to drive. He was 25, gainfully employed with no criminal record. He was on onerous bail terms as a result of a previous dangerous driving charge, including house arrest and a prohibition on driving. The trial judge imposed a CSO for 21 months on each of the dangerous driving causing death counts and a concurrent term for leaving the scene of an accident.
- [54] Other decisions cited by Mr. Smith illustrate that prior to legislative change in 2007 which limited the availability of CSOs, such sentences had been imposed or upheld in similar cases to the one before me: *R. v. Chapman*, 2000 BCCA 152; *R. v. Clyne*, 2009 BCSC 312; *R. v. Penner*, 2009 ABQB 535; *R. v. Williams*, 2003 ABQB 285; *aff'd* 2003 ABCA 218.

Analysis

- [55] Sentencing is a highly individualized process. Sentencing in a case like this, where a young life was so senselessly and needlessly lost, is a difficult exercise. As Williams J. observed in *R. v. Sater*, 2014 BCSC 1036:
- [43] In cases like this, those who have been left with the awful pain of such loss could understandably claim that anything less than the maximum sentence is inadequate. However, I say with great respect, such a view does not accord with the proper concept of the criminal sentencing process. That process is not a means of compensating such losses; it is not a mechanism of exacting vengeance
- [44] In a case as tragic and horrific as this, where such enormous pain and loss and hurt has resulted, a pronouncement of this Court's sentence does not really make anything better. The loss is as great as ever. The sentence will provide no balm to ease the pain and hurt that many are suffering.
- [45] This case is a sad example of the harm and pain and destruction that life sometimes deals us. When we walk out of this courtroom today, the principal artefact left with all will be sorrow and sadness and waste.

Is a CSO a fit sentence?

- [56] Section 742.1 of the Code provides if a court imposes a sentence of imprisonment of less than two years, the court may order that the offender serve the sentence in the community, subject to conditions listed in (a) through (f).
- [57] The Crown does not dispute that a sentence of less than two years is appropriate, or that the service of the sentence in the community by Mr. Heth-Klems would not endanger the safety of the community. Where Crown and defence part ways on the appropriateness of a CSO is in the application of the second half of s. 742.1(a): would a CSO be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2?
- [58] Section 718 of the Code provides that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. As set out in s. 718, the objectives of sentencing include the denunciation of unlawful conduct, deterrence of the offender and others from committing other offences, separation of the offender from society where necessary, rehabilitation of the offender, reparation for harm done, and promotion of a sense of responsibility in the offender, including acknowledgment of the harm done.
- [59] Section 718.1 of the Code articulates the overall animating principle of sentencing: the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

- [60] Section 718.2 of the Code sets out a number of specific principles that a court must consider when imposing sentence. These include:
- (a) a sentence should be increased or reduced to take account of any mitigating or aggravating circumstances;
 - (b) a sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances;
 - (c) where consecutive sentences are imposed, the total sentence should not be unduly long or harsh;
 - (d) an offender should not be deprived of liberty if a less restrictive sanction is appropriate; and
 - (e) all available sanctions other than imprisonment should be considered if they are reasonable and consistent with the harm done with particular attention to the circumstances of Aboriginal offenders.
- [61] I reiterate what Dickson J.A. said in *Bosco* at para. 38: general deterrence and denunciation are the primary sentencing goals in dangerous driving cases. The public has a right to expect that those who travel on the roads do so responsibly. When drivers irresponsibly indulge in human frailties like impatience, inattentiveness or impulsivity, they put others at danger and, in some cases, cause catastrophic consequences. Dickson J.A. went on to say:
- [40] The factual circumstances of dangerous driving cases tend to vary widely. That being so, the range of appropriate sentences is quite broad. Factors such as the offender's age, the circumstances of the accident, the duration of the dangerous driving, the existence or absence of a criminal record, the degree of deviation from driving norms, the particulars of the highway and its use and driving conditions are all relevant factors for consideration. Although other cases provide helpful guidance, determining a fit sentence in a dangerous driving case is a particularly fact-sensitive exercise: *R. v. Sadler*, 2009 BCCA 386 at para. 34.
- [62] Mr. Heth-Klems is a young man with no criminal record. He has the support of friends and family, although his mother and father abandoned him when he was very young. He is a devoted and involved father to his six-year-old son. Mr. Heth-Klems is gainfully employed, employs two people and has no substance abuse issues.
- [63] Against those mitigating factors I must consider the aggravating factors. Mr. Heth-Klems was not licensed to operate a motorcycle at the time of the accident. He was prohibited from driving any motor vehicle at the time of the accident due to a number of driving infractions. His choice to drive contrary to that prohibition and in the manner he did resulted in Ms. Kinnee's death and has visited an enormous loss on her family.

- [64] The driving in this case was not protracted. While Mr. Heth-Klems was impatient on Highway 1 with the slow traffic and chose to drive on the shoulder, the dangerousness of his conduct did not manifest itself until he was on South Parallel Road. A combination of speed and prolonged inattention to the vehicle ahead of him caused the collision and the death of Ms. Kinnee.
- [65] Bearing in mind the aggravating and mitigating circumstances as well as the driving at issue, I am not satisfied that the principles of general and specific deterrence would be satisfied by a CSO in this case. I place particular emphasis on Mr. Heth-Klems' choice to drive, contrary to a prohibition which had been imposed only a month earlier. His decision to take a motorcycle, a conveyance which he had never been licensed to operate, was selfish. His decision to drive the motorcycle in excess of the speed limit and take his eyes off the road as he did cost Ms. Kinnee her life.
- [66] The need to deter other like-minded individuals who are prohibited from driving but are tempted to take a risk is pressing. The need to deter Mr. Heth-Klems himself is also important. He drove while prohibited after his lengthy hospital stay for injuries incurred in the matter before the court. I accept that he is remorseful for causing the death of Ms. Kinnee, but I cannot find that he truly grasps the concept that driving is a regulated activity, not a right. His conduct in this regard causes me to doubt that he would abide by the terms of a CSO, if one were to be imposed.
- [67] The Crown seeks a jail sentence of 18 months. In my view a sentence of that length overemphasizes the aggravating factors and fails to take into account the mitigating factors of Mr. Heth-Klems' age, pro-social lifestyle and employment. I am satisfied that a 12-month sentence of imprisonment, which Mr. Smith submits as an alternative to a CSO, fulfills the need for deterrence and denunciation while recognizing the mitigating factors.
- [68] Mr. Heth-Klems, please stand. For the offence of dangerous driving causing death, I sentence you to 12 months imprisonment. In addition, pursuant to s. 259(2)(b) of the Code, I prohibit you from driving for a period of three years from today's date. I impose a Victim Fine Surcharge of \$200 with two months to pay.
- [69] Finally, this offence is a secondary offence for purposes of the DNA databank established by s. 487.04 of the Code. Making an order under s. 487.051 is discretionary. In exercising this discretion, sentencing judges are to consider the offender's criminal record, the nature of the offence, the circumstances surrounding its commission and the impact that such an order may have on the person's privacy and security.
- [70] I am not satisfied it is in the interests of justice to require you to provide a sample of your DNA to be kept in the national DNA data bank. You have no criminal record, the likelihood of re-offending in a manner where DNA evidence would play a role is low and your privacy and security interests outweigh the factors that militate in favour of an order that a sample be taken.

Conclusion

[71] Thank you for your assistance in this difficult matter counsel. We are adjourned.

"Duncan J."

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Prepared on 26 October 2026 · Esheria