

CANADA / JUDGMENT

R. v. Husband

2020 BCSC 2207

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2207 R. v. Husband

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Husband,

2020 BCSC 2207

Date: 20200910

Docket: 72572-2

Registry: Prince George

Regina

v.

Barbara Joan Husband

Before: The Honourable Madam Justice J. A. Power

(appearing by teleconference)

On appeal from: Provincial Court of British Columbia, February 13, 2020

(R. v. Husband, Prince George Docket No. 72572-1)

Oral Reasons for Judgment

at Summary Conviction Appeal

Counsel for the Crown (Respondent)

appearing by teleconference:

M. L. Ahrens

Counsel for the Accused (Appellant)

appearing by teleconference:

D.E.M. Jenkins, Q.C.

Place and Date of Trial/Hearing:

Prince George, B.C.

September 3, 2020

Place and Date of Judgment:

Prince George, B.C.

September 10, 2020

INTRODUCTION

- [1] THE COURT: The appellant, Barbara Joan Husband, was found guilty on February 13, 2020, of one count of driving without due care and attention. She was sentenced that same day. The appellant initiated a summary conviction appeal of both conviction and sentence, but is proceeding only with the sentence appeal. The sentence imposed by the Provincial Court judge was a \$500 fine and a five-year driving prohibition pursuant to s. 98 of the Motor Vehicle Act. The appellant takes issue with the five-year driving prohibition imposed and argues that it should be reduced to six months.
- [2] The appellant, who was 83 years of age at the time of the offence and is now 85, argues that the prohibition is demonstrably unfit, disproportionate, and the result of a number of errors by the sentencing judge.
- [3] The Crown argues that considering all of the principles of sentence, the sentence was carefully crafted by the sentencing judge to include the lengthy prohibition. The Crown argues that the sentence was fit and the sentencing judge committed no error in principle.
- [4] For reasons that I will explain, I accept the Crown's submission and dismiss the sentence appeal.

BACKGROUND

The decision on conviction

- [5] The appellant's driving that gives rise to the charge occurred on December 19, 2018, at around 11:00 a.m. Ultimately a three-and-a-half-year-old toddler was injured when she was run over by the appellant's vehicle in a parking lot in front of Ospika Pet store in Prince George, British Columbia.

- [6] After a trial, the Provincial Court judge found a series of driving errors that constituted the offence. She stated in her judgment under the heading, "Findings of fact", commencing at para. 55:
- [55] I find that Ms. Husband drove for over 50 feet diagonally southbound across the oncoming lanes of traffic at a relatively slow, but steady, rate of speed, in front of two oncoming vehicles, without taking any evasive action. The location of the vehicles is accurately depicted in Exhibit 2. She did so to protect her car, and to prevent the kittens from waking up.
- [56] That, in itself, constitutes the offence of driving without due care and attention.
- [57] I reject the argument that travelling in the oncoming lane is sanctioned, permissible, and routinely done, as suggested by counsel. It is, in fact, a contravention of s. 163(b) of the Act, the relevant portion of which states ...
- [7] She went further at para. 58:
- [58] I find that Ms. Husband entered the third available driveway into the parking lot on a diagonal without slowing down, and drove behind the Explorer, where Ms. Paulson had already buckled her one-year-old son into his car seat.
- [59] She saw the Explorer's open door, but did not see any person until she began turning left into the parking spot.
- [60] As she turned left into her desired parking spot, she saw Ms. Paulson standing beside the Explorer securing the boy in his car seat inside the Explorer.
- [61] To see the boy inside the Explorer, Ms. Husband had to be looking to her left out of her driver's side window. She was not looking forward, where her SUV was travelling.
- [8] She said further at para. 64:
- [64] In particular, Ms. Husband did not see Felicity in her brightly coloured winter jacket at any time, before hitting her and running her over.
- [65] Felicity was there to be seen, and had not moved from the time the SUV began its left turn into its eventual parking spot.
- [9] She said further, earlier when she was discussing the evidence at para. 50:
- [50] I must treat the evidence of Ms. Husband with some caution given my already stated concerns about reliability. To summarize, I have found that:
- a) she did not notice that there were two northbound vehicles on Ospika coming toward her, when she began to travel diagonally across the oncoming traffic lanes;
 - b) she did not notice how close the lead vehicle in particular was, given that it had to brake hard to avoid a collision with her SUV;

- c) she testified that having seen Ms. Paulson in the parking lot, she left ample room between the Explorer and her own SUV, a distance she suggested was 10 to 15 feet. It is clear from photo 15 of Exhibit 4, that she is parked about two car door-widths away, or six to eight feet, as attested to by Ms. Paulson. I find that the SUV was parked on an angle, and the vehicles were a maximum of eight feet apart, and less at the rear bumpers;
 - d) Ms. Husband is confused about the conversation and order of events immediately following the accident, including believing Ms. Paulson was on the phone arranging childcare as she got out of the SUV.
- [51] It is somewhat bizarre that Ms. Husband would suggest the child was fine when she was screaming. It is also bizarre that she brought her cat out to make the child feel better.

The decision on sentence

- [10] The sentencing proceedings immediately followed the reasons at trial. The sentencing decision is succinct and gives context to the issues before me. The trial judge stated at para. 2:
- [2] In mitigation, Ms. Husband has no criminal record, and she has no entries on her driving extract.
- [3] She has provided letters which show her to be at the age of 83 now, of good moral character, with lots of friends, and active, especially in her church community.
- [4] With respect to aggravating factors, I note that her driving in the minutes preceding hitting this little girl shows a complete lack of attention to the road.
- [5] It is of course not an aggravating factor, but she does not have in mitigation the benefit of a guilty plea.
- [6] A lack of remorse, of course is not an aggravating factor, but she has not once said "I am sorry." She did say "I've lived with this for over a year, I wish it had never happened." She continues to dispute the evidence, and she continues to obliquely criticize the mother, which I find to be offensive, and without foundation. The lack of remorse, in my perspective, goes to her likelihood of changing her driving behaviour.
- [7] Sentencing is an individualized process. I need to consider the circumstances of the offence itself, and of the offender.
- [8] There is no record here as indicated, but her conduct on the day in question shows seriously negligent behaviour.
- [9] I am required to emphasize the principles of denunciation and deterrence, and most importantly protection of the public.

- [10] Ms. Husband appears to lack insight into her driving behaviour that day. At trial she denied running over the child, despite having heard the evidence of other witnesses.
- [11] The Crown seeks a fine, noting that the minimum is \$100, and a minimum five-year prohibition in this case. It submits that Ms. Husband poses a significant risk to users of the road, and needs to be taken off of the road.
- [12] Ms. Husband seeks a higher fine and a lesser prohibition, and perhaps even a limited prohibition that would have her driving only during the day, for example. Counsel cited her clean record, her character references and all of the volunteering that she does in town, which will be made difficult given that she lives outside of town. She does however have savings that she could apply to a fine. I gather she also has savings that she could apply to a taxicab.
- [13] The extent to which her driving on December 19 of 2018 shows a lack of attention is significant. It almost amounts to dangerous driving, in my view.
- [11] The trial judge then went on to impose the \$500 fine and the five-year driving prohibition as sought by the Crown.

Evidence of the sentence appeal

- [12] The appellant has filed an affidavit as part of the record on the appeal which outlines that she lives on a rural property, 17 kilometres from Prince George. She deposes that she has been driving for 69 years without any driving offences.
- [13] Exhibit A to her affidavit is a letter from her general practitioner confirming that there is no obvious medical cause that would impair her ability to drive. She deposes that she lives in a rural community and she relies on her ability to drive to do many good works, including as a lay minister for the Grace Anglican Church, which I understand to be in Prince George proper. It is clear from the material before me that as a lay minister, she brings care and comfort to others and her work is appreciated by her community.
- [14] The appellant's affidavit appends six character references. These references speak highly of Ms. Husband's character and, in some cases, also speak favourably about her driving ability and her driving judgment.

Legal principles

- [15] I turn now to the legal framework under which I make this decision. The parties are agreed on the standard of review that I must apply to the sentencing decision in this case. Both parties cite *R. v. Miller*, 2013 BCSC 1453, a decision of this court at paras. 4 and 5:

- [4] The Supreme Court of Canada has explained the standard of review that applies on appeals from sentence in a number of cases. In *R. v. C.A.M.*, [1996] 1 S.C.R. 500, Lamer C.J.C. adopted the standard expressed by the court in *R. v. Shropshire*, [1995] 4 S.C.R. 227. He expressed the matter this way at para. 90:
- [90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit ...
- [5] Although expressed in the context of criminal appeals, the same standard applies to appeals from sentence imposed under provincial legislation. The Ontario Court of Appeal helpfully summarized the two broad grounds which justify appellate intervention in *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 in which Laskin J.A. referred to *Shropshire* and *R. v. Muise* (1994), 94 C.C.C. (3d) 119 (N.S.C.A.) and wrote at paras. 20 and 21:
- [20] These two decisions demonstrate that an appellate court may interfere with a trial judge's sentencing discretion in only two kinds of cases. First, an appellate court may interfere if the sentencing judge commits an "error in principle". Error in principle is a familiar basis for reviewing the exercise of judicial discretion. It connotes, at least, failing to take into account a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to relevant factors, overemphasizing relevant factors and, more generally, it includes an error of law. See *Re Fox and Ontario Legal Aid Plan* (1977), 14 O.R. (2d) 668 (Ont. H.C.); *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1 (S.C.C.); *Reza v. Canada* (1994), 116 D.L.R. (4th) 61 (S.C.C.). If the sentencing judge commits an error in principle, the sentence imposed is no longer entitled to deference and an appellate court may impose the sentence it thinks fit.
- [21] Second, although the trial judge does not commit an error in principle, an appellate court may still interfere if the sentence is outside an "acceptable range". The Supreme Court has used a variety of phrases to convey this point: an appellate court cannot interfere unless the sentence is "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", "demonstrably unfit" or a "substantial and marked departure". Whatever the phrase, the bottom line is the same: appellate courts should defer to sentences imposed by trial judges unless the sentence is outside an acceptable range.
- [16] The grounds of appeal as set out in the written argument are formulated as follows:
- a) that the learned trial judge erred in law by imposing a demonstrably unfit five-year driving prohibition;
 - b) that the learned trial judge erred in principle by failing to give adequate weight to the appellant's mitigating factors;
 - c) that the learned trial judge erred in principle by not recognizing counsel's submissions that the appellant was remorseful; and

- d) that the learned trial judge erred in principle by not following 718.1 of the Criminal Code in passing a sentence that was not proportionate to the gravity of the offence.

[17] I will address each of those arguments in turn.

Was the sentence demonstrably unfit?

- [18] In support of the argument that the five-year driving prohibition was demonstrably unfit, the appellant relies on three authorities: *R. v. Chisholm*, 2009 BCPC 23; *R. v. Chand*, 2009 BCPC 242; and *R. v. Randhawa*, 2011 BCPC 372.
- [19] The appellant characterizes these decisions as involving a momentary lapse of judgment resulting in a death by fit and prudent drivers. Specifically, in the case of *Chisholm*, Mr. Chisholm took his eyes off the road to briefly adjust the controls; with respect to *Chand*, Mr. Chand failed to look to the side and did not see a locomotive at a crossing; and with respect to *Randhawa*, Ms. Randhawa turned left at a rush-hour light, and failed to see a motor scooter.
- [20] The facts in those cases are, in my opinion, significantly different than in the case at bar. Here the trial judge was sentencing for what the Crown argued was a cascading series of events that ultimately resulted in the toddler being run over. It is only good fortune that the toddler did not suffer more injuries. The trial judge specifically stated that the extent to which the driving shows a lack of attention is significant. She stated further, as I have outlined, it almost amounts to dangerous driving.
- [21] I conclude that it is clear from her comments that the trial judge was sentencing for the driving as opposed to the consequences of the driving which, in any event, resulted in injury and not death. I conclude that the *Chisholm*, *Chand*, and *Randhawa* cases are distinguishable since they involved a momentary lapse as opposed to a series of driving decisions, any one of which could have constituted the offence. It follows from this that, for example, the difference in fines imposed and in the six-month driving prohibition in *Randhawa* are distinguishable.
- [22] I also find *R. v. Miller* distinguishable. There the offender had a lengthy driving record and received three months in jail. In the case at bar, the trial judge imposed a modest fine and concentrated the sentence on the driving prohibition. In so doing, she said at para. 20:
- [20] More importantly however, is the need to protect the public from Ms. Husband's committing further and similar conduct.
- [23] Having considered the authorities and the facts underpinning the offence and the sentence, I cannot find that the sentence was demonstrably unfit. If anything, the sentence demonstrates the individualized nature of the sentencing process which the sentencing judge noted in her decision.
- [24] This ground of appeal must fail.

Did the sentencing judge properly consider the mitigating factors?

- [25] I turn to the argument that the trial judge failed to give adequate weight to the appellant's mitigating circumstances.
- [26] The reasons for sentence specifically recognize the appellant's lack of a criminal record and driving record. The trial judge specifically referenced the appellant's good moral character and her active role in the community. I do not find that the sentencing judge considered an element of the offence as aggravating, but rather was referencing the nature of the driving which she was sentencing for. That is the task that she was undertaking, crafting a fit sentence for driving behaviour which she later described as close to dangerous driving. I do not find it an error to refer to that driving as aggravated, and find that term referenced the series of driving decisions made by the appellant before she struck the toddler.
- [27] The trial judge specifically imposed the driving prohibition as a key component of her sentence and one that was designed to protect the public. I cannot find any error in the judge's considering the mitigating factors. Even if I am wrong and the trial judge wrongly considered an element of the offence as aggravating, I cannot find that it unduly affected the sentence, and in that regard I reference *R. v. Lacasse* at para. 83.

The issue of remorse

- [28] Finally I turn to the issue of remorse. The appellant submits that the trial judge did not give adequate weight to her counsel's submissions of her remorse. At trial, the appellant's counsel stated the following at p. 10, line 34:

My client felt, notwithstanding Crown's comments, terrible about what had happened, absolutely terrible about what had happened, but has maintained throughout that she never, ever, ever, saw the girl.

- [29] It is open to the appellant to put the Crown to the proof of the offence as she did by having a trial and to maintain her position at sentencing. That cannot be considered aggravating. It is her right to do so. However, the appellant cannot later claim the degree of insight which she seeks to benefit from when she still denies or cannot comprehend the offence.

- [30] In that regard, the sentencing judge said at para. 10:

Ms. Husband appears to lack insight into her driving behaviour that day. At trial she denied running over the child, despite having heard the evidence of other witnesses.

- [31] I conclude that the issue of expression of remorse within the sentencing decision is, at most, a neutral factor. I cannot find an error in the reasoning process of the trial judge.
- [32] Having considered the totality of the record before me, I can find no error in the imposition of a five-year driving prohibition on the facts of this case. In upholding the five-year driving prohibition, I recognize that this may result in a lifetime driving ban for Ms. Husband. I recognize that that is a significant impact for her and for her community. I do not find the

ban itself or that impact to be disproportionate, given the underlying facts here. That effect is caused by Ms. Husband's age of 85. The reality is that many citizens of Ms. Husband's age voluntarily give up their driver's licence, even if they have not been involved in such a driving incident as in this case.

[33] As noted by the Provincial Court judge, driving is a privilege not a right.

[34] In all of the circumstances, this sentence appeal is dismissed.

[35] That concludes my decision, and I should indicate that since I gave this decision orally, I do reserve the right to edit for grammar or clarity, but the substance of the decision is as I have just given.

"J. A. Power, J."

The Honourable Madam Justice J. A. Power

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