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R. v. Laliberte

2019 BCSC 318

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2019 BCSC 318 R. v. Laliberte

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Laliberte,

2019 BCSC 318

Date: 20190301

Docket: 40488-2

Registry: Courtenay

Her Majesty The Queen

v.

Serina-Marie Anne Laliberte

Before: The Honourable Madam Justice Watchuk

Oral Reasons for Sentence

Counsel for the Crown:

R.L. Ellsay

Counsel for the Accused:

E.K. Chesterley

Place and Date of Sentencing Hearing:

Courtenay, B.C.

February 28, 2019

Place and Date of Judgment:

Courtenay, B.C.

March 1, 2019

I. INTRODUCTION

- [1] These are the reasons for sentencing following the convictions of Ms. Laliberte on December 14, 2018 on three offences, two counts pursuant to ss. 255(2.1) and one count pursuant to 255(3.1) of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] The facts are summarised in the introduction to the trial reasons, indexed as 2018 BCSC 2430 (the "Trial Reasons"), as follows:
- [1] On July 26, 2016, shortly before 2:00 p.m., Buenaventura Bernard was struck by a vehicle driven by the accused, Serina-Marie Laliberte, while he was walking with his wife, Margarita Bernard, on the sidewalk in front of 2760 Cliffe Avenue in Courtenay, BC. Ms. Laliberte's vehicle then continued northbound on Cliffe Avenue where it rear-ended the vehicle of Max MacInnes, who subsequently rear-ended the vehicle of Nicole Dauphinais. Both vehicles were stopped at a traffic light on Cliffe Avenue and 26th Street. The vehicle driven by Ms. Laliberte finally came to a stop after colliding with an unoccupied vehicle in the parking lot at 2500 Cliffe Avenue. That vehicle was pushed into another vehicle.
- [2] Mr. Bernard succumbed to his injuries from the collision and died at the scene.
- [3] Mr. MacInnes and Ms. Dauphinais both suffered injuries which constituted bodily harm.
- [3] The trial dealt with the nine, or three groups of three, offences with which Ms. Laliberte was charged. There were convictions on Counts 2, 5, and 8 which were the three offences alleging driving with a blood alcohol concentration ("BAC") of over 80 mg of alcohol in 100 ml of blood (referred to as "over .08") causing an accident resulting in the death of Mr. Bernard; over .08 causing an accident resulting in bodily harm to Mr. MacInnes; and over .08 causing an accident resulting in bodily harm to Ms. Dauphinais. The three charges alleging impaired driving causing death and bodily harm, and three charges alleging dangerous driving causing death and bodily harm were dismissed. A conviction registered for impaired driving simpliciter was stayed in accordance with the principle from *R. v. Kineapple* (1974), [1975] 1 S.C.R. 729.
- [4] This sentencing, therefore, is based on the three charges arising from having found that Ms. Laliberte was driving with a BAC of over .08 and while so driving caused the accidents which resulted in the death and bodily harm of the three victims.

- [5] In every sentencing the court must address and balance the following factors: circumstances of the offence; circumstances of the offender; aggravating and mitigating factors; the applicable law; and the application of the law to the particular facts. I will proceed to address each of these matters.

II. CIRCUMSTANCES OF THE OFFENCES

- [6] In order to set out the circumstances of the offences I will read in paras. 4-10 of the Trial Reasons:
- [4] A tan Nissan Pathfinder was identified by witnesses at the scene as being the vehicle involved in all collisions. Ms. Laliberte was the driver. Colleen Johnson and Patricia Fulsom were passengers in Ms. Laliberte's Pathfinder ("Vehicle One").
- [5] Ms. Johnson and Ms. Fulsom had met Ms. Laliberte at her new residence in Royston just south of Courtenay. They left the residence in her vehicle with Ms. Laliberte driving. Ms. Fulsom was in the front passenger seat and Ms. Johnson was in the back seat of the vehicle. They drove north a short distance to Courtenay where the old Island Highway becomes Cliffe Avenue.
- [6] Ms. Laliberte stopped her vehicle at a traffic light on Cliffe Avenue at Amfield as they entered Courtenay. She then accelerated rapidly away from the traffic light to a high speed prior to driving up onto the sidewalk. After Mr. Bernard was struck while walking on the sidewalk he was thrown onto the windshield. Ms. Laliberte's vehicle then drove back onto Cliffe Avenue where it struck the vehicle of Mr. MacInnes ("Vehicle Two") which then struck the vehicle of Ms. Dauphinais ("Vehicle Three"). Ms. Laliberte's vehicle then swerved off the road to the right into a parking lot where it struck a parked vehicle ("Vehicle Four"), which then struck another parked vehicle ("Vehicle Five"). Her vehicle came to a rest after those collisions. Ms. Laliberte's driving was observed by the passengers in her vehicle and by other individuals who were in their vehicles and close to the scene.
- [7] Ms. Johnson and Ms. Fulsom testified that prior to accelerating rapidly Ms. Laliberte went stiff and stared straight forward. During her driving from the stop light to the parking lot, Ms. Fulsom tried to pull Ms. Laliberte's leg off the accelerator pedal to no avail. Ms. Laliberte did not respond to physical touch or to Ms. Fulsom or Ms. Johnson yelling at her until after the vehicle stopped.
- [8] Constables Grabb and Gau spoke with Ms. Laliberte at the scene of the last collisions and detected an odour of liquor on her breath. Cst. Gau read her the Approved Screening Device demand. She provided a breath sample which registered as a "Fail". Cst. Gau arrested Ms. Laliberte for Impaired Driving Causing Death. She was transported to the Comox Valley RCMP Detachment by Corporal Matchett. There Ms. Laliberte provided two breath samples that registered as 120 milligrams of alcohol in 100 millilitres of blood, and 100 milligrams of alcohol in 100 millilitres of blood respectively.

- [9] Cst. Gau audio-recorded the interaction with Ms. Laliberte after the collisions. Immediately after providing her name to the officers, Ms. Laliberte stated that she had been drinking and had had one drink. She also said that she was a diabetic.
- [10] At 8:18 p.m. Ms. Laliberte provided a warned statement to Constable Jenkins. She described her circumstances during the day preceding the collisions including having had one fair size drink that day prior to driving. However, Ms. Laliberte had no recollection of the collisions. She remembered nothing from the Walmart intersection until after the last collisions in the parking lot.
- [7] However, this recitation of the facts does not encompass one of the most important circumstances of the offences -- the effects on the victims and their families. The wife, daughter, and son of Mr. Bernard read their Victim Impact Statements in court, and a book with eight other statements of family members and dear friends of Mr. Bernard, known as Goyo, was filed. Ms. Dauphinais' Victim Impact Statement was also filed.
- [8] The Bernard family's worlds were shaken to the core with the taking of their husband and father's life on the afternoon of Mrs. Bernard's birthday lunch. The emotions from their ongoing intense loss cannot be described in words, as his daughter, Caroline Bernard, said. The words of the family tell of a nightmare of profound inconsolable grief. In an instant an inexplicable event deprived Mrs. Bernard of her life companion of 41 years and their plans and dreams for their future together. Caroline was deprived of her beloved father who was about to become a grandfather to her daughter born four months later. Caroline and her brother Paul both learned of their father's death when they were out of town, on a course in Ucleulet and camping with friends in the Kootenays. Paul spoke of returning to Courtenay and finding the courage to continue, bereft without his father. The tragic collision not only killed Mr. Bernard but also devastated his family.
- [9] Ms. Dauphinais has also suffered terrible consequences since the crash involving her vehicle. The ongoing effects include panic attacks and constant pain from injuries to her neck, back and shoulder. She wrote that she had set out on that day joyful and looking forward to the day; since that fateful day she has had to find her way back.

III. CIRCUMSTANCES OF THE OFFENDER

- [10] I turn now to the circumstances of Ms. Laliberte. A Pre-Sentence Report ("PSR") has been prepared and filed in this sentencing proceeding.
- [11] Ms. Laliberte is now 49 years old and was 46 at the date of the offences. She has no criminal record and no driving record. She has complied with all of her bail conditions and has no breaches. In 2000, she received certification as a Health Care Aid from Okanagan University College. She is presently employed as a Health Care Aid. Her son and his family live in Salmon Arm, B.C.

- [12] I will not repeat the thorough background set out in the PSR, but I will highlight some of her history and current circumstances. Ms. Laliberte's father is Métis from Saskatchewan and her mother is of Scandanavian ancestry. The PSR therefore addressed the Gladue factors and sentencing considerations for Aboriginal offenders pursuant to s. 718.2(e) of the Criminal Code. The PSR describes the history of the Métis people in Canada, and the village of Green Lake, Saskatchewan where Ms. Laliberte's father lived. Her father drank alcohol to excess and was abusive to her mother. The writer of the PSR describes alcoholism and this type of abuse as being common in Aboriginal communities and states that it may have been a contributing factor in Ms. Laliberte being before the court.
- [13] Ms. Laliberte describes her childhood as being "raised white". She has not applied for her Métis status, and does not recall being subject to any discrimination. She has some curiosity about her heritage and interest in participating in her cultural identity but overall has no association to the Métis community. There are Aboriginal programs in Nanaimo that are available to Ms. Laliberte.
- [14] With regard to the offences, Ms. Laliberte expressed to the writer of the PSR that she is beyond remorseful. Her deep remorse has been expressed since the afternoon of the offences in her interactions with police with whom she was co-operative. She feels shame and stress and has not been able to forgive herself for the offences.
- [15] Ms. Laliberte has diabetes that was untreated at the date of the offences. Since then she has been compliant with her medications and more mindful of taking care of her health, aware now of the consequences of her prior disregard for her doctor's advice.
- [16] The section of the PSR regarding "Substance Misuse" outlines Ms. Laliberte's history of consuming alcohol to excess. Since the offences she has not had a drink. Although the bail condition requiring her to abstain from alcohol has been difficult to comply with, she has persevered and complied. She has been to one Alcoholics Anonymous meeting since the accidents, and since mid-2018 has attended seven counselling sessions. She expresses willingness to pursue recovery avenues and addiction services.
- [17] Since the offences Ms. Laliberte has not driven a vehicle. Her licence has lapsed and she has no intention of renewing it out of fear that another incident and more harm could occur. In order to report on bail and go to work she has relied on friends and a private ride service.
- [18] In court, Ms. Laliberte's lawyer read a letter of apology from Ms. Laliberte to Mrs. Bernard. Ms. Laliberte also stated her heartfelt remorse to the court, repeating through sobs that she is very sorry. Both the Bernard family and Ms. Laliberte expressed their sincere wishes that the events of July 26 could be reversed.

IV. AGGRAVATING AND MITIGATING FACTORS

- [19] The primary aggravating factors are the death and bodily harm that resulted from these collisions. It is aggravating that Ms. Laliberte knew of her drinking problem, and friends had expressed concern, and she did not deal with it. As will be discussed below, the circumstances of the choice to drive her vehicle are also aggravating.
- [20] There are significant mitigating factors that must be considered. Ms. Laliberte has no criminal or driving record -- she has been a law-abiding and contributing citizen for many years. Since the offences she has not consumed alcohol, and since mid-2018 has attended seven counselling sessions.
- [21] Her background was disadvantaged. Ms. Laliberte was deprived of a stable upbringing and a good role model due to her father's alcoholism and his abuse of her mother. The PSR opines that this instability could be related to the negative impacts of colonialism her father faced as a Métis person, and is reflective of the consequences of intergenerational trauma in her own life.
- [22] The immediate and sincere remorse felt and expressed by Ms. Laliberte is a significant mitigating factor. She has taken full responsibility for her actions which caused the collisions and their consequences.

V. POSITIONS OF THE CROWN AND DEFENCE

- [23] The Criminal Code provides that the charges for a first offender, such as Ms. Laliberte, do not require a mandatory minimum jail term, although by the operation of sections 255(3.3) and 255(1)(i) of the Criminal Code, there is a minimum fine of \$1,000.00, with the British Columbia Motor Vehicle Act, R.S.B.C. 1996, c. 318 imposing a driving prohibition.
- [24] Where the death of a person has resulted from an accident, the Criminal Code prescribes a maximum of life imprisonment in section 255(3.1). Where the over .08 offence led to an accident resulting in bodily harm to a person face the same minimum fine on a first offence, and pursuant to section 255(2.1) of the Criminal Code, a maximum penalty of ten years in jail.
- [25] The position of the Crown is that:
- (a) for Count 2, the offence of over .08 causing death, a period of incarceration with a starting point of 26 months is appropriate;
 - (b) for Counts 5 and 8, a period of incarceration of 18 months to be served concurrently is appropriate;
 - (c) a driving prohibition of 5 years should be imposed, to commence on conclusion on the jail sentence.

[26] The defence submits that the appropriate sentence for Ms. Laliberte is at the low end or below any normal range of appropriate sentence, given her lesser moral culpability, based on the factors personal to her and the facts of the accident, including an absence of "bad" driving over any significant distance, and the limited physical evidence of impairment.

VI. THE LAW

[27] For the sentencing of all offenders, the applicable objectives are set out in s. 718 of the Criminal Code:

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.

[28] The primary sentencing objectives in cases involving drinking-and-driving causing death or bodily harm are denunciation and deterrence. As Justice Ryan, writing for the court, stated in *R. v. Johnson*, 112 C.C.C. (3d) 225 (B.C.C.A.) at para. 30:

[30] Drinking driving causing death or bodily harm offences are senseless crimes because they are so easily avoided and at the same time they are so easily committed by ordinary citizens. They are unlike any other crimes in the sense that nothing much can be offered to justify driving drunk. Crimes of theft may be motivated by poverty, crimes of assault may be motivated by fear, but what excuse can be offered for driving drunk, except that alcohol allowed the offender to lose all sense of judgment? It is for this reason that communities rightfully express outrage when victims are killed or injured as a result of such conduct. It is for this reason that both deterrence and denunciation are legitimate objectives to pursue for this type of offence.

[29] Proportionality is the guiding principle in imposing a sentence. Section 718.1 states "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".

[30] In the case of *R. v. Berner*, 2010 BCPC 305, aff'd 2013 BCCA 188, Judge Gulbransen said of moral blameworthiness:

[18] Central to every judge's reasoning process in crafting a sentence is the requirement that the judge assess the level of the offender's moral blameworthiness or moral culpability. The Supreme Court of Canada in *R. v. C.(A.M.)*, [1998] 1 S.C.R. 500 said that the assessment of moral blameworthiness lies at the heart of the objective of attaining the goal of "retribution" in the sentencing process.

[19] In the context of the law relating to criminal sentencing proceedings, "retribution" does not mean "revenge." Chief Justice Lamer stated as follows (at paragraph 80):

Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates the principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.

[20] A sentencing judge must consider all relevant issues, including any mitigating and aggravating factors. The concept of retribution incorporates an element of balance into the process. That is, a judge cannot allow any feeling of sympathy or compassion for the offender to compromise his or her duty to objectively assess the offender's moral blameworthiness; nor can he or she allow any sense of anger or outrage at the offender's conduct to compromise his or her duty to exercise restraint in imposing a sentence.

[31] Sentencing courts have attributed an inherently high degree of moral blameworthiness stemming from the essential nature of impairment as one of its elements: *R. v. Livingston*, 2013 BCSC 1837 at para. 44.

[32] The range of sentence for similar offences must be considered. However, ranges are guidelines and not hard and fast rules; the determination of a just and appropriate sentence is a highly individualized exercise: *R. v. Nasogaluk*, 2010 SCC 6 at paras. 43-44; *R. v. Lacasse*, 2015 SCC 64 at para. 58.

[33] The Supreme Court of Canada, in *R. v. Suter*, 2018 SCC 34, recently addressed the range of sentence for the three offences of impaired driving causing death, over .08 causing death, and refusing to provide a breath sample. At paras. 2 and 90, it states:

[2] Mr. Suter was initially charged with three offences arising out of this incident, including impaired driving causing death and impaired driving causing bodily harm. The impaired driving charges were later withdrawn by the Crown when Mr. Suter pleaded guilty to one count of refusing to provide a breath sample knowing that he caused an accident resulting in a death, an offence set out in s. 255(3.2) of the Criminal Code, R.S.C. 1985, c. C-46. Refusing to provide the police with a breath sample is always serious, but especially so when a death occurs. The maximum penalty for this offence -- like for impaired driving causing death and driving "over 80" causing death -- is life imprisonment. And lest there be any doubt, for sentencing purposes, these three offences will typically be treated alike.

[90] As indicated, the sentencing range for the s. 255(3.2) offence is the same as for impaired driving causing death and driving "over 80" causing death -- low penitentiary sentences of 2 or 3 years to more substantial penitentiary sentences of 8 to 10 years, depending on the circumstances. In unique cases, mitigating factors, collateral consequences, or other attenuating circumstances relating to the offence or offender may warrant the imposition of a sentence that falls below this broad range. By the same token, the aggravating features in a particular case may warrant the imposition of a sentence that exceeds this broad range. As long as the objectives and principles of sentencing codified in ss. 718 to 718.2 of the Criminal Code are met and respected, the sentence will be fit.

[34] The sentencing range in *Suter* supersedes the previous law in British Columbia as set out in the case of *R. v. Smith*, 2013 BCCA 173, leave to appeal denied [2013] S.C.C.A. No. 251.

[35] The case of *R. v. Woodley* (1993), 44 M.V.R. (2d) 51 (B.C.C.A.), as cited in *R. v. Matheson*, 2011 BCSC 208, continues to be of assistance for its statement of the considerations in applying the sentencing range to cases of this nature:

[16] The Crown relies on *R. v. Woodley* (1993), 44 M.V.R. (2d) 51 (B.C.C.A.) per Seaton J.A. at paragraphs 22 to 28 as setting out the considerations appropriate to serious driving offences:

22 I now must consider whether the sentence in this case is unfit having in mind, as I think I must, the decisions of this Court.

23 The appellant argued that only cases that include very serious moral blameworthiness warrant penitentiary sentences. I do not think the cases support that position.

24 Long penitentiary sentences are reserved for cases in which isolation is the goal. *Regina v. Lunn*, *supra*, is an example of such a case.

25 Sentences of four years and more are given where there are aggravating circumstances such as prior convictions or particularly blameworthy conduct.

26 Shorter penitentiary sentences are given in cases that do not exhibit either the need for isolation or great moral blameworthiness.

27 Sentences of less than two years have been imposed on young people, in cases where the moral blameworthiness is of short duration or otherwise minimal, where there are mitigating circumstances, or where neither the offence nor the offender can be thought to warrant other than a minimal sentence.

28 Offences that do not cause death usually result in a shorter sentence.

VII. ANALYSIS

[36] At the commencement of the analysis, I will deal with the able submission of defence counsel with regard to the sentencing ranges expressed by Justice Moldaver in *Suter*. In that case, Moldaver J. specified at para. 90 that the low range is a term of imprisonment of two to

three years for the offences of impaired driving causing death, over .08 causing death, and refusal to blow with "these three offences typically [being] treated alike" (at para. 2). Defence counsel submits that over .08 and impaired causing death should not be treated alike in sentencing. He argues that because the offence of over .08 causing death only requires the temporal causal connection rather than the substantive causal connection necessary to found a conviction for impaired driving causing death (as discussed in the Trial Reasons at paras. 56-96), the corresponding over .08 offence carries lesser moral culpability, which should be reflected in the sentence.

- [37] At the date of these offences the law regarding the causation element applicable to the impaired driving offences versus the over .08 offences differed. Consideration of the temporal connection for the over .08 offence did not require taking into account any effect of the untreated diabetes on Ms. Laliberte's state or seizure at the time of the collisions -- the evidence of the certificate of analysis of 100 mg% was sufficient to found the conviction after consideration and rejection of the recent drink defence. However, at trial, I found the causation element of the impaired driving causing death offence was not proven beyond a reasonable doubt due to the potential contributing effect of the diabetes as discussed in the evidence of the expert, Mr. Jeffery. The conviction for impaired driving simpliciter was based on the evidence of Mr. Jeffery that every person is impaired at 100 mg%. Ms. Laliberte exhibited minimal symptoms with the police noting only the odour of alcohol on her breath.
- [38] With respect, and after consideration, I do not accede to the submission. The differing causation elements are inherent in the offences -- they are different offences with differing legal requirements for proving the element of causation. This difference in law would have been understood by the Supreme Court of Canada when it equated the sentencing ranges for impaired driving causing death and over .08 causing death. I conclude that the use of the word "typically" in the application of the sentencing range refers to possible distinctions based on the facts of each case. I thus am bound by the range set out in Suter of a term of imprisonment of 2 to 3 years absent exceptional circumstances.
- [39] It is the further submission of the defence that because this is an exceptional case, the fit sentence for Ms. Laliberte is below the sentencing range prescribed by Suter.
- [40] Livingstone is a case where there was a finding that the presence of exceptional circumstances resulted in a sentence below the range prescribed for impaired driving causing death. The offender, age 20 and with a learner's licence, pleaded guilty after he caused a collision in which his girlfriend, age 19, was killed. At the time of the collision he had been speeding while driving home from a bar. Mr. Livingstone was in a coma for 3½ weeks and his right leg had to be amputated. Justice Schultes listed the significant mitigating factors at para. 36, which included the offender's young age, the fact that his BAC was at the lower end of the range for prohibited intoxication, the minimal driving error leading to the collision, the timely guilty pleas despite viable defences, strong family and community support, and significant rehabilitation efforts since the collision. In the circumstances, a jail sentence of one year was imposed for impaired driving causing death.

- [41] In reaching this sentence, Schultes J. reaffirmed that deterrence and denunciation were to be given significant weight in the sentence for cases of impaired driving causing death, and that the high moral blameworthiness of the offence must also be reflected: para. 41. He confirmed that impaired driving offences have an "inherently high degree of moral blameworthiness, stemming from the essential nature of impairment as one of its elements": para. 44.
- [42] In this case, I find a high degree of moral blameworthiness on the part of Ms. Laliberte. In particular, I have considered the circumstances of the choice to drive her vehicle that afternoon. Ms. Laliberte's friend's vehicle was available and her friend was ready to drive them to the lake. Ms. Laliberte had consumed between 8 to 10 ounces of vodka before getting behind the wheel of her vehicle at 1:40 p.m. She had not eaten, nor had she taken her diabetes medication. Her decision to drive exhibited reckless disregard for the law and the potential consequences, tragically realised, of driving with a BAC over .08.
- [43] Ms. Laliberte's decision to drive also exhibited a lack of awareness of her alcohol consumption. That lack of awareness continues somewhat to this day. To the police officer at the scene of the last of the series of collisions she said that she had only had one drink. To the writer of the PSR she stated that she had had one large drink that day. Her description of 8 to 10 ounces of vodka as being one drink is not indicative of a degree of insight such that it would lower the level of moral blameworthiness attributable to her.
- [44] In assessing moral blameworthiness I also take into account that Ms. Laliberte's driving prior to the collision was not out of the ordinary. She did not appear intoxicated to her friends and as passengers they did not note any concerning driving prior to stopping at the red light on the outskirts of Courtenay. That said, Ms. Laliberte's intoxicated state put at risk all drivers on the highway in the five kilometres between her home in Royston and the scene of the first collision.
- [45] The BAC reading of Ms. Laliberte, 100 mg%, was at the lower end of those present as facts in other cases cited, notably Johnson, in which the offender's BAC was between 180 and 210 mg%; Smith, in which the offender's BAC was between 123 and 206 mg%; Matheson, in which the offender's BAC was between 130 and 165 mg%; and R. v. Warren, 2012 BCPC 483, in which the offender's BAC was 140 mg%.
- [46] To her credit, Ms. Laliberte has since approximately the summer of 2018 commenced counselling sessions. However, she has not demonstrated sustained significant efforts at rehabilitation over the 2½ years since the offences. As stated in Smith at para. 59:
- [59] Ms. Smith is to be congratulated for her efforts to rehabilitate herself. However, the fact that she was well-aware of her addiction problems for many, many years and took no steps towards rehabilitation is a factor that heavily weighs toward her moral blameworthiness. She knew she should not have been driving. She was highly intoxicated, and yet she drove for over three kilometers placing many people at risk, and eventually killed Mr. Mahenthiran. Ms. Smith is not a young person with little life experience. I am alive to the

guilty plea, her limited cognitive ability, her efforts at sobriety and the fact that she has no criminal record. In my view, however, these mitigating factors are not sufficient to bring her case into the exceptional category.

- [47] In the result, I do not find that this is an exceptional or unique case requiring a sentence below the range. I also do not find this to be one of the more serious circumstances, such as in *Berner*, in which the offender, while having a BAC of between 63 mg% and 117 mg%, had been driving at an excessive speed and did not slow down when she approached two large speed bumps, causing her car to spin out of control causing the death of a four-year-old and serious injuries to the child's aunt.
- [48] The range set out in *Suter* therefore applies. The principles of denunciation and general deterrence require the greatest emphasis in the determination of a fit sentence in this case. It is fundamental to the sentencing process that the message be repeatedly sent that not merely does society denounce in the strongest of terms driving while intoxicated, those sentences must act as a deterrent to any who would make such choices, intentional risk-taking, that can and do lead to senseless indescribable tragedies and inconsolable grief.

VIII. SENTENCE

[49] Ms. Laliberte would you stand please.

[50] Having considered the circumstances of the offences and of yourself, the aggravating and mitigating factors, the Gladue principles applicable to the sentencing of an Aboriginal offender, the law and its application to these facts, and the principles of sentencing:

On Count 2 regarding the death of Mr. Bernard, I sentence you to a term of imprisonment of 25 months.

On Counts 5 and 8 regarding the bodily harm suffered by Ms. Dauphinais and Mr. MacInnes, I sentence you to terms of imprisonment of 18 months concurrent to each other and concurrent to the sentence on Count 2.

The total jail sentence is therefore 25 months.

- [51] In addition, there will be a five-year driving prohibition to commence on the completion of the jail sentence pursuant to s. 259 of the Criminal Code.
- [52] There will be no victim surcharge as the Supreme Court of Canada declared s. 737 of the Criminal Code to be unconstitutional in *R. v. Boudreault*, 2018 SCC 58.
- [53] I wish to thank counsel for their assistance throughout the trial and sentencing. Both counsel have exemplified the highest and best traditions of the Bar.

"The Honourable Madam Justice Watchuk"

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