
CANADA / JUDGMENT

R. v. Morgan

2020 BCSC 1397

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1397 R. v. Morgan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Morgan,

2020 BCSC 1397

Date: 20200623

Docket: 67870

Registry: Chilliwack

Regina

v.

Louis Morgan

Before: The Honourable Mr. Justice Giaschi

Oral Reasons for Sentence

Counsel for the Crown:

C.M. Lawlor

Counsel for the Accused:

J.R. Steele

Place and Date of Hearing:

New Westminster, B.C.

February 24, 2020

Place and Date of Judgment:

New Westminster, B.C.

June 23, 2020

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- [1] THE COURT: On June 10, 2019, Louis Morgan pleaded guilty to the offence of dangerous driving causing death, contrary to s. 249(4) of the Criminal Code, R.S.C. 1985, c. C-46, which is now s. 320.13. The offence occurred around 9 p.m. on April 9, 2016, near Abbotsford and resulted in the death of Shantelle Dawn Morgan, the spouse of Mr. Morgan.

Facts

Circumstances of Offence

- [2] The offence occurred on the stretch of Highway No. 1 between the Whatcom Road and Mount Lehman Road exits. Mr. Morgan was driving his Ford Mustang automobile with Shantelle Morgan as a passenger. Mr. Morgan was proceeding westbound on Highway No. 1. The weather at the time was good and the highway was clear of debris and well maintained. The highway was also busy with traffic. One witness at the preliminary inquiry stated that the traffic was like rush hour.
- [3] The driving of Mr. Morgan was witnessed, over approximately a 10-kilometre stretch of highway, by a number of persons who testified at the preliminary inquiry. The timeframe involved was at least three or four minutes. Mr. Morgan was observed driving erratically and at a high rate of speed. He was observed weaving in and out of traffic, tailgating, cutting in front of other drivers and, significantly, racing a white BMW automobile.
- [4] The posted speed limit over the stretch of highway involved was 100 km/h. The estimates of the speed at which Mr. Morgan was driving varied. Several witnesses estimated the speed at 130 to 140 km/h. One witness estimated the speed at 200 km/h. Mr. Morgan told a police officer after the accident that he estimated his speed at between 120 and 140 km/h.

- [5] Several of the preliminary inquiry witnesses testified that Mr. Morgan was racing a white BMW. One witness described the two vehicles as "rat racing". Another said the vehicles were being driven like they were doing their own Indie 500. Yet another witness observed the BMW speed by and Mr. Morgan then begin to chase it. Mr. Morgan confirmed to a police officer after the accident that he had been racing a BMW that had cut him off.
- [6] Mr. Morgan's driving was a cause of concern and fear for other users of the highway. One witness at the preliminary inquiry testified that Mr. Morgan was tailgating him so closely, he thought Mr. Morgan was trying to run him off the road. This witness slowed down, pulled towards the shoulder of the highway, and then left the highway earlier than intended. This witness called 9-1-1 on his cellphone while driving because he was concerned someone was going to get hurt.
- [7] Another witness observed Mr. Morgan tailgating the first witness and thought Mr. Morgan was trying to force the other car off the road. This witness slowed down to allow the other vehicles to get away, and testified that the driving witnessed was not something one expects to see driving at highway speeds.
- [8] Yet another witness who Mr. Morgan cut off said that she thought she was going to die.
- [9] It is also apparent that Shantelle Morgan was concerned over the driving of Mr. Morgan. Mr. Morgan advised a police officer after the accident that she had been telling him to slow down.
- [10] There is evidence that Mr. Morgan consumed alcohol prior to the accident. A witness at the preliminary inquiry and a police officer smelled alcohol on Mr. Morgan's breath. Mr. Morgan admitted to the police officer that he had consumed alcohol. He also told a BC Emergency Health Services responder that he had consumed alcohol. However, as the defence correctly points out, there is no evidence of how much alcohol was consumed, when it was consumed, or that Mr. Morgan was impaired. It is noteworthy that a medic who rode with Mr. Morgan in an ambulance to the hospital did not detect alcohol.
- [11] The driving spree came to an end near the Mount Lehman Road exit when Mr. Morgan lost control of his vehicle. The car rolled end over end, injuring Mr. Morgan and ultimately fatally injuring Shantelle Morgan.

Circumstances of Offender

- [12] Mr. Morgan is an Aboriginal person, a Matsqui First Nations man. He was 46 years of age at the time of the offence and 50 at the time of the sentencing hearing. He lives on the Matsqui Reservation in Aldergrove with his son, his fiancée, and his fiancée's daughter.

Personal, Cultural, and Family History

- [13] I was referred to a Gladue report of Stuart Cadwallader dated September 20, 2019, that was commissioned by defence counsel. I was also referred to a presentence report.
- [14] Mr. Morgan had a tumultuous childhood, characterized by serial sexual abuse by caregivers and others, parental neglect, alcohol and drug abuse by parents and caregivers, family violence, and bullying at school.
- [15] Mr. Morgan himself has struggled with alcohol and drug abuse throughout much of his life. At age 10, he started smoking marihuana. As a young adult he turned to alcohol and by the time he was 25, he was drinking 26 ounces of hard liquor per day. On multiple occasions, he attempted to address his substance abuse issues by attending treatment and counselling. He has had periods of sobriety, but always eventually relapsed.
- [16] The reports are not entirely consistent as to the level of education of Mr. Morgan. The presentence report states he completed Grade 12, whereas the Gladue report states he dropped out of high school in Grade 11. In any event, the reports are consistent in describing learning challenges faced by Mr. Morgan, including an undiagnosed learning disability and a school life of "dodging sexual predators", teasing, and bullying.
- [17] Notwithstanding Mr. Morgan's difficult childhood and early adult life, he has been a relatively productive member of society. He was employed for seven years with BC Fisheries as a bylaw enforcement officer and for ten years seasonally as a park ranger for Greater Vancouver Regional District. When not working seasonally, he is employed full-time at a local cedar mill, a job which remains available to him although he is currently on leave.
- [18] Mr. Morgan appears to currently have a stable family relationship with his fiancée of four years, his son who suffers from fetal alcohol spectrum disorder, and his fiancée's daughter. I understand that he is an important source of emotional support for his son and an important role model for his fiancée's daughter.
- [19] Mr. Cadwallader's Gladue report outlines in significant detail the personal, family, and Aboriginal cultural history of Mr. Morgan. In addition to the factors already mentioned, Mr. Cadwallader notes the following in relation to Mr. Morgan:
- He is the fourth of five children born to Alice McKay, a member of the Matsqui First Nation, and Roy Morgan, a member of the Tsawwassen First Nation;
 - Mr. Morgan was raised within his Aboriginal community for much of his life and continues to live in the community;
 - His parents separated when he was age five. Their seven-year marriage was marked with physical violence and substance abuse;
 - His father, Roy Morgan, committed suicide in 2003;

- Generations of Mr. Morgan's family were forcibly required to attend residential schools where they were subjected to sexual and other forms of physical and emotional abuse. His maternal great-grandmother, his paternal grandfather, and his mother were all survivors of a residential school;
- His maternal great-grandfather was an alcoholic;
- His paternal grandfather was a violent alcoholic and a sexual abuser;
- His mother was repeatedly sexually abused from the age of four; and
- His mother was a self-described alcoholic until later in life. For the last 21 years, she has been an elected chief of the Matsqui First Nation.

[20] Mr. Morgan expressed that, due to the broken and dysfunctional nature of his family, he had lost much of the connection to the traditional Indigenous culture and values.

[21] Mr. Cadwallader summarizes his findings as follows:

A number of adverse factors that affect Aboriginal people in general are present in Louis Morgan's life including:

- Multigenerational familial instability, violence, breakdown, and fragmentation;
- Louis formative environment was defined by instability, violence, transience, and fear;
- Absence of any positive adult role models/mentors;
- Low educational achievement and vocational instability;
- Reported serial sexual victimization commencing at age 6; the unresolved trauma from these experiences has manifested in a range of maladaptive issues impacting Louis' sense of self-worth, security, inter-personal relationships, and functional abilities. Following his victimization, Louis' misuse of substances became a more entrenched feature of his life as he attempted to deal with the unresolved emotional manifestation, and feelings of grief and loss. This pattern of polysubstance use as a coping mechanism has remained relatively static throughout his adult life;
- Premature loss of family members through substance misuse and suicide (father);
- Intergenerational effects including loss of cultural identity and connection to the larger Indigenous community. This has resulted in a loss of language, culture, ancestral knowledge, and traditional family and community support mechanisms.

[22] Various letters to the court from members of Mr. Morgan's family were entered into evidence collectively as Exhibit #3. The letters reference his difficult life and upbringing and describe him as suffering from severe grief, depression, and emotional pain as a result of the events of April 9, 2016.

- [23] The letter from Mr. Morgan's mother references her own childhood as "a nightmare of neglect, physical, sexual, and emotional abuse" and expresses her regret that she was not a better mother to him.
- [24] Mr. Morgan read his own letter to the court. He wrote to acknowledge his responsibility, to apologize, to acknowledge the pain to others that his actions caused, and to express his remorse. Mr. Morgan is currently undergoing counselling and has expressed a willingness and desire to attend further counselling or treatment to address his alcohol and other issues.

Prior Convictions

- [25] Mr. Morgan has prior convictions for offences under the Criminal Code and under the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA]. He has two older Criminal Code convictions: one in March 2002 for driving with more than 80 milligrams of alcohol in blood contrary to s. 253(b) of the Criminal Code and one in July 2009 for assault contrary to s. 266.
- [26] His prior MVA convictions are extensive, but are mostly for the period from 1989 to 2001. He committed no offences during the period from approximately September 2001 to July 2006. His convictions or prohibitions since July 2006 are:
- July 30, 2006 - 24-hour prohibition (MVA, s. 215(2));
 - October 14, 2006 - speeding (MVA, s. 146.7);
 - November 17, 2006 - 24-hour prohibition (MVA, s. 215(2));
 - December 6, 2006 - 24-hour prohibition (MVA, s. 215(2));
 - December 18, 2006 - driving without due care (MVA, s. 144.1);
 - November 17, 2008 - failure or refusal to provide a breath sample (Criminal Code, s. 254.5);
 - July 18, 2014 - failure to wear a seat belt (MVA, s. 220.4);
 - May 5, 2015 - excessive speed (MVA, s. 148.1);
 - September 28, 2015 - failure to wear a seat belt (MVA, s. 220.4);
 - February 26, 2016 - no driver's licence or driving contrary to class (MVA, s. 24.1); and
 - February 26, 2016 - disobey traffic control device (MVA, s. 125).
- [27] Mr. Morgan has received multiple driving suspensions over the years. The most recent was a three-year suspension from November 2008 to November 2011.

Impact on Victims and Community

- [28] Several impact statements were provided to the court by members of Shantelle Morgan's family. These statements are expressions of the overwhelming grief and sadness the family members have experienced at the loss of their mother, daughter, sister, and sister-in-law. The statements also recite the toll that Shantelle Morgan's death has taken on the authors, including depression, anxiety, and anger. I cannot do the impact statements justice, but can merely inadequately summarize them.
- [29] MyKenzie Nelson, the daughter of Shantelle Morgan, wrote two heart-wrenching statements in which she attempts to explain what the loss of her mother has meant to her. As a consequence of the loss of her mother, she has experienced difficulties in school and had to move from BC for a period of time, leaving her friends and family behind.
- [30] James Bryson, the father of Shantelle Morgan, writes that he can barely get through a day of work because of the pain deep within his soul. He explains that as a consequence of the loss, there is little left in life for him to enjoy. He has also incurred financial hardship as a consequence of her death. He was required to pay for funeral services, incurred costs relating to obtaining custody of MyKenzie Nelson, lost many hours of work and now incurs, on an ongoing basis, the costs of caring for MyKenzie Nelson.
- [31] Steven Stopa, the brother of Shantelle Morgan, writes that he has experienced "hurt" for a long period of time and that this made him withdraw from others and quick to anger. He also expressed the difficulty of dealing with the aftermath of the event at a time when he was himself trying to move his family.
- [32] Carlene Stopa, the sister-in-law of Shantelle Morgan and a friend of over 20 years, writes that the news of Shantelle's death was like a bullet to the heart. She further explains that Shantelle's death has had negative effects on her own marriage due to the emotional trauma it has had on Steven.

Position of Crown and Defence

- [33] The Crown submits that an appropriate sentence in this matter would be a jail term of two years less a day, plus a significant period of probation with counselling and a very lengthy driving prohibition. The Crown submits that the offence was not a momentary lapse of care, but was a lengthy period of dangerous driving that endangered all users of the highway and ultimately resulted in the death of Shantelle Morgan. The Crown accepts that the remorse demonstrated by Mr. Morgan is mitigating factor, as is the guilty plea. The Crown further accepts that the First Nations status of Mr. Morgan is a factor that must be taken into account.
- [34] The Crown submits that aggravating factors are:
- The length of time Mr. Morgan engaged in dangerous driving;

- His record of convictions, especially the multiple MVA convictions;
- The extreme degree of recklessness demonstrated;
- The consumption of alcohol; and
- The extreme impact of the offence on the deceased and her family, and on the other users of the highway.

[35] The defence accepts that this was a horrific event that bestowed tragedy on multiple levels to two families. The defence submits that a jail sentence of 90 days to be served intermittently, combined with a lengthy probation period and a driving prohibition, would be an appropriate sentence.

[36] The defence relies heavily upon the cascading effects of colonialism and the residential school system, and submits that this event was a culmination of a lifetime of unresolved trauma. The defence further points to Mr. Morgan's remorse, his efforts to obtain counselling, and his desire to continue with culturally-appropriate counselling and treatment. The defence submits that rehabilitation and restraint ought to be the driving factors, as nothing can change the tragedy that has occurred.

Analysis

Principles of Sentencing

[37] The general principles and purposes of sentencing are set out in ss. 718 through 718.201 of the Criminal Code. The purpose and objectives of sentencing are set out in s. 718 as follows:

Purpose

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.

Fundamental principle

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

[38] Section 718.2 requires that in imposing a sentence, the court shall take into account aggravating or mitigating circumstances (s. 718.2(a)); impose a sentence similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(b)); and, not deprive an offender of liberty if less restrictive sanctions may be appropriate in the circumstances (s. 718.2(d)). Particularly relevant is s. 718.2(e) which provides:

- (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.

Gladue Factors

[39] Section 718.2(e) addresses the so-called Gladue factors. In *R. v. Ipeelee*, 2012 SCC 13, the Supreme Court of Canada stated that this provision imposes a statutory duty on sentencing judges to consider the unique circumstances of Aboriginal offenders in sentencing. In particular, sentencing judges must take judicial notice of the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts. At para. 60, the Supreme Court said:

[60] Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberté*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel.

[40] As indicated in the just-cited quotation, the background factors do not necessarily justify a lower sentence for Aboriginal offenders, but provide the necessary context to determine an appropriate sentence.

[41] The court is to consider the unique background and systemic factors which may have played a part in bringing the particular offender before the courts. There is no requirement that there be a causal link between the background factors and the commission of the offence at issue, but there must be some connection between the factors and the particular offender and offence. At para. 83, the Supreme Court said:

Furthermore, the operation of s. 718.2(e) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[42] The Crown does not dispute that the Gladue factors are to be taken into account and, in fact, submits that they have taken such factors into account in their submission that a sentence of two years less a day be imposed.

Prescribed Limits of Sentence

[43] The maximum sentence that may be imposed for the offence of dangerous driving causing death is 14 years' imprisonment pursuant to s. 249(4) of the Criminal Code. No minimum sentence is prescribed.

Probation, Intermittent Sentence

[44] Probation is addressed in s. 731 of the Criminal Code, which provides that the court may release an offender on probation where no minimum punishment is prescribed or where the term of imprisonment is for less than two years. Pursuant to s. 732.2(2)(b) of the Criminal Code, the maximum period of probation is three years.

[45] Intermittent sentences are available pursuant to s. 732(1) of the Criminal Code, provided the sentence imposed does not exceed 90 days.

Ancillary Orders

[46] Section 259(2), which is now s. 320.24(4), of the Criminal Code provides that, upon conviction of an offence of dangerous driving causing death, this court may make an order prohibiting the offender from operating a motor vehicle in addition to any other sentence imposed. The maximum period of the driving prohibition is dependent on the maximum term of imprisonment that can be imposed. In the case of offences that carry a maximum sentence of more than five years but less than life, which would include the subject offence, the maximum period of the driving prohibition is ten years plus the period the offender is sentenced to imprisonment.

Case Law

The Crown's cases

[47] The Crown has referred me to six authorities in support of a sentence of incarceration for two years less a day:

- R. v. Bosco, 2016 BCCA 55;
- R. v. Zinter, 2018 BCSC 1837;
- R. v. Fedan, 2014 BCSC 2586;
- R. v. Roby, 2015 BCSC 1929;
- R. v. Santini, 2012 BCSC 1985; and
- R. v. Dhillon, 2013 BCPC 259.

[48] Bosco concerned an appeal of a sentence of 51 days' imprisonment, six months' probation, and a two-year driving prohibition for dangerous driving causing bodily harm. The case is of relevance for the general principles espoused concerning dangerous driving and the factors to be taken into account in sentencing. These principles and factors are:

- Dangerous driving is an offence of considerable gravity (para. 37);
- General deterrence and denunciation are the primary sentencing goals in dangerous driving cases. Sentences "must unambiguously express society's condemnation of the conduct and serve to warn likeminded others that it will not be tolerated" (para. 38);
- The factual circumstances of dangerous driving cases vary widely, and therefore the range of appropriate sentences is broad. The relevant factors to consider in determining an appropriate sentence for dangerous driving are "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" (para. 40).

[49] In Zinter, the offender was convicted of dangerous driving causing death, leaving the scene of an accident, and refusing to provide a breath sample. In respect of the dangerous driving conviction, he was sentenced to four years' imprisonment and a five-year driving prohibition to begin at the end of his period of imprisonment. The circumstances of the offence were that the offender was driving at slightly above the marked speed limit in a heavy rain storm while under the influence of alcohol and while using his cellphone. He crossed the highway and collided with another vehicle, killing the driver of that other vehicle.

[50] Justice Baird found that the level of the offender's disregard for other motorists was "marked and utterly appalling" and "constituted a dramatic departure from normative driving behaviour" (para. 5). Justice Baird also found the offender to be "totally unrepentant and unremorseful" (para. 6).

[51] Given the multiple convictions in Zinter, the lack of a guilty plea, and the fact the offender was found to be unrepentant and unremorseful, I do not consider the sentence there imposed to be a particularly helpful guide. However, the decision is relevant in that Baird J. notes that the primary sentencing goals for dangerous driving causing death are deterrence and denunciation, not rehabilitation, and should advance the principles of retribution. He

further notes that there is an upward trend in sentences for dangerous driving causing death at para. 10:

There is no set range of sentencing for dangerous driving because of the broad range of circumstances under which the offence can be found to occur: *R. v. Delellis*, 2017 BCSC 2253 at para. 55. Generally, as defence counsel has candidly conceded, sentences for dangerous driving causing death are trending up: *R. v. Sater*, 2014 BCSC 1036 at para. 77. The primary sentencing goals for this offence are deterrence and denunciation, not rehabilitation: *Delellis* at para. 55; *R. v. Bosco*, 2016 BCCA 55 at para. 38; *R. v. Fedan*, 2014 BCSC 2586 at para. 18; *R. v. Roby*, 2015 BCSC 1929 at para. 35. The sentence should also advance the principle of retribution: *Roby* at para. 34.

- [52] In *Fedan*, the 53-year-old offender drank hard liquor before getting into his truck. He did not put on his seat belt and did not ensure that his obviously intoxicated passengers put on their seat belts. He drove erratically for up to one half-hour before a collision. He was observed tailgating, changing lanes and speeds, failing to signal, and almost hit a pedestrian in a crosswalk. At times, he was driving twice the posted speed limit. He was sentenced to three years' imprisonment and a three-year driving prohibition.
- [53] The case is noteworthy because the consumption of alcohol by the offender was accepted as an aggravating factor, even though there was no conviction for impaired driving (para. 9). Justice Kloegman also noted, based on the cases provided to her, that the range of appropriate sentences for dangerous driving offences is 18 months to six years, and that a key factor is the offender's moral blameworthiness as reflected by the degree of intentional risk taking, the extent of the consequential harm caused, and the degree of deviation of the conduct from acceptable standards of behaviour (para. 18).
- [54] In *Roby*, the 24-year-old offender was convicted of one count of dangerous driving causing death, one count of dangerous driving causing bodily harm, and one count of failure to stop at the scene of an accident. The circumstances of the offence were that the offender and friends consumed beer and hard liquor at a campsite and then got into a truck. The offender drove the truck at speeds of up to 160 km/h. He eventually lost control and crashed the truck, resulting in the death of one passenger and serious injuries to another. The offender also fled the scene, which was the basis for the third charge.
- [55] In respect of the conviction for dangerous driving causing death, Justice Abrioux, as he then was, sentenced the offender to three years and six months. In reaching this decision, he emphasized that principles of denunciation, deterrence, and retribution are particularly relevant in these types of cases (paras. 33-34), and that rehabilitation of the offender is of less significance (para. 35).
- [56] *Santini* concerned an offender of 27 years of age (32 years at the time of sentencing) who was driving his vehicle at a high rate of speed and lost control at a raised intersection, resulting in the vehicle rolling. There were four passengers in the car, one of whom was fatally injured, and two others suffered significant injuries. Consumption of alcohol was involved and the offender had major issues with drug and alcohol abuse. The offender was

sentenced to two years less a day incarceration, 18 months probation, and a five-year driving prohibition. In determining sentence, Justice Harvey held that although the Crown had not proven impairment, the consumption of alcohol in the circumstances was an aggravating factor (paras. 70-71). He also held that the circumstances of the offence itself, travelling at a high rate of speed (para. 69), and the impulsivity, substance abuse, and recklessness were significant aggravating factors (para. 75).

[57] In Dhillon, the offender lost control of his vehicle while rapidly accelerating upon a change in a traffic light from red to green and switching lanes. The vehicle collided with a bus stop bench upon which the deceased was sitting. The offender was sentenced to one year in prison, two years' probation, and a five-year driving suspension. In reaching this sentence, the Court stated that the circumstances of the offence involved a significant degree of moral culpability and that the manner of driving, although brief, was very dangerous (para. 49). The Court also noted that the sentence range at that time was four months to six years, with the higher sentences reserved for cases involving alcohol consumption (para. 42), although alcohol was not a factor in that particular offence.

The Defence's cases

[58] The defence refers me to several cases in support of its submissions that an appropriate sentence is an intermittent sentence of 90 days plus a lengthy probation and a driving prohibition. The cases relied upon by the defence are:

- R. v. Hecimovic, 2017 BCSC 1433;
- R. v. Maan, 2016 BCPC 428;
- R. v. Friesen, 2011 BCPC 418;
- R. v. Kwasnica, 2006 BCSC 2037;
- R. v. Reed, 1998 CanLII 5160 (B.C.C.A.); and
- R. v. Thornton, 2000 BCSC 1430.

[59] Before addressing the particular sentencing cases relied upon by the defence, I state that I do not find the cases to be particularly relevant or helpful. Hecimovic, Maan, Friesen, and Kwasnica involved accidents where there had been a momentary lapse by the offender driver as opposed to a prolonged period of dangerous and aggressive driving. Kwasnica, Reed, and Thornton all involved conditional sentences, a sentence that is no longer available for the offence of dangerous driving causing death.

- [60] In Hecimovic, the offender, a new driver, proceeded straight through an intersection against a red light while travelling in the right-hand turn lane. She then lost control of her vehicle while attempting to avoid the median and collided with another vehicle, killing the two occupants of that vehicle. There was no evidence of alcohol or distracted driving and was no evidence of an erratic pattern of driving in the moments before the accident. The offender was sentenced to 90 days to be served intermittently plus two years' probation.
- [61] Maan also involved an offender that ran a red light. Excessive speed, erratic driving, distracted driving, fatigue, and alcohol were not factors in the accident. The main contributing factor was the position of the sun which obscured the traffic light. The offender was 63 years of age with no criminal record and only one previous driving infraction for speeding. The offender was given a sentence of 60 days to be served intermittently.
- [62] Friesen involved a 22-year-old offender who had, in all likelihood, fallen asleep at the wheel when driving home after working an overnight shift. He ran a stop sign, causing a series of collisions with fatal consequences. He had no criminal record or record of driving infractions. There was no evidence of poor driving, aggressive driving, excessive speed, or alcohol consumption. The offender was given a fine and sentenced to two years' probation.
- [63] In Kwasnica, the offender was given a conditional sentence of one year, a sentence that is no longer available for this offence. The offender had driven through an intersection into a crosswalk at a speed that was higher than posted, but was normal for the traffic in the area. The offender had no criminal record and there was no evidence of drugs, alcohol, excessive speed, or a protracted period of dangerous or aggressive driving. The offender did have a record of driving infractions, but these were thought to not have created a danger to the public.
- [64] Reed was an appeal of a conditional sentence of 18 months given to a 24-year-old offender in respect of a motor vehicle accident that caused three fatalities. The offender was found to have been driving at an excessive rate of speed in the wrong lane and in a vehicle that had been modified such that it was less responsive. The offender had also consumed at least five beers, although there was insufficient evidence of impaired driving. The Court of Appeal confirmed the 18-month sentence but varied the conditions.
- [65] Thornton involved a 24-year-old offender who was driving at an excessive rate of speed when the traffic light turned yellow. Instead of stopping, the offender sped up, colliding with a vehicle in the intersection. The impact speed was estimated to be 142 km/h, whereas the posted speed limit was 80 km/h. The offender had no criminal record but had numerous MVA violations, including 12 for speeding. The offender was given a conditional sentence of 18 months.

Summary of Principles

- [66] The provisions of the Criminal Code, and the cases I was referred to, make clear that for dangerous driving offences, general deterrence and denunciation are important objectives in sentencing. Retribution, but not vengeance, is also an important objective.
- [67] However, I keep in mind that sentencing is a balancing process and that the sentence imposed must be proportional, which is to say it must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [68] The sentences imposed for dangerous driving vary widely, depending on the circumstances of the offence, the moral culpability of the offender, and the aggravating and mitigating factors.
- [69] Although there is some dicta in the case law that suggests the range of sentences for dangerous driving has been increasing and now stands at 18 months to six years, based on the cases I have been referred to, the range is from 90 days served intermittently, as in Hecimovic, to four years, as in Zinter.
- [70] The imposition of a short-duration term of imprisonment is appropriate where the dangerous driving is a momentary lapse or of short duration. Lengthier terms of imprisonment are imposed where there is a serious, wilful, or reckless disregard for the lives and safety of others over a more prolonged period of time. A lengthier term of imprisonment is also imposed where the offender has used drugs or consumed alcohol.
- [71] The specific factors to address in relation to a dangerous driving offence include:
- The age of the offender;
 - The duration of the dangerous driving;
 - Other circumstances of the accident or collision;
 - The degree of recklessness inherent in the driving and the extent to which it deviates from the expected norm;
 - The nature of the roadway, the driving conditions, and the amount of traffic, both vehicular and pedestrian; and
 - The existence or absence of a criminal record.
- [72] I must also consider and take into account the Aboriginal status of Mr. Morgan. This does not mean that I am to automatically reduce the sentence that would otherwise be imposed.

Sentence

- [73] I now apply the various principles and factors to the circumstances of this case.

Aggravating Factors

The age of the offender

- [74] Mr. Morgan was 46 years of age at the time of the offence. Put simply, he was old enough to know better.

The duration of the dangerous driving

- [75] The duration of the dangerous driving by Mr. Morgan is a significant aggravating factor. Mr. Morgan's dangerous driving was not a momentary lapse or of short duration, unlike in many of the cases I was referred to by the defence. Rather, it occurred over a distance of approximately 10 kilometres and individual witnesses observed the dangerous driving for three to four minutes.

The degree of recklessness inherent in the driving and the extent to which it deviates from the expected norm

- [76] The degree of recklessness inherent in Mr. Morgan's driving is a second significant aggravating factor. His erratic driving consisted of speeding, weaving in and out of traffic, and tailgating. In doing so, he endangered not only his own life and the life of his passenger Shantelle Morgan, but also the lives of every user of the highway that evening. His driving was a very marked departure from the norm. In fact, his driving was simply atrocious.

Other circumstances of the accident or collision

- [77] Related to the degree of recklessness of Mr. Morgan's driving is the evidence that he was racing a white BMW. Mr. Morgan admitted to a police officer that he was chasing a BMW that had cut him off. Racing or chasing another vehicle on a public roadway is something that is never to be tolerated or excused and is deserving of the strongest rebuke. The fact that Mr. Morgan engaged in this chasing behaviour because he perceived he had been cut off makes this even more egregious. He appears to have put the safety and lives of others at risk to satisfy his desire for some kind of revenge or vengeance against the driver of the BMW. His response to being cut off was completely inappropriate, immature, and utterly reckless.

The nature of the road way, the driving conditions, and the amount of traffic, both vehicular and pedestrian

- [78] The dangerous driving of Mr. Morgan occurred on one of the province's busiest highways and, at the material time, the highway was busy with traffic. The fact that the highway was busy increased the risks of an accident and, if an accident occurred, increased the probability that there would be injuries or fatalities. Mr. Morgan completely disregarded these increased risks, a factor that militates in favour of a lengthier sentence.

His criminal and driving record

- [79] Mr. Morgan has both a criminal record and a record of multiple driving infractions under the MVA. In respect of Mr. Morgan's criminal record, I do not find this to be an aggravating factor. His impaired driving conviction dates back to 2002, more than 14 years prior to the commission of the current offence. His assault conviction in 2009 is completely unrelated to driving.
- [80] Mr. Morgan's driving record, however, is a different matter. His record of MVA offences and prohibitions is extensive. Since July 2006, he has had three 24-hour driving suspensions, two speeding or excessive speeding convictions, one conviction for driving without due care, and one conviction for failure to obey a traffic control device. In addition, there are several other minor offences.
- [81] I consider Mr. Morgan's record of MVA violations to be an aggravating factor.

Alcohol consumption

- [82] The Crown submits that the use or involvement of alcohol is also an aggravating factor. I accept that there is some evidence that alcohol had been consumed. However, there is no evidence of impairment and no evidence of how much alcohol was consumed by Mr. Morgan, or when it was consumed. In the circumstances, the Crown has not discharged the onus of proving alcohol use as an aggravating factor beyond a reasonable doubt.

Mitigating Factors

- [83] I accept that there are several mitigating factors at play that I must also take into account:
- Mr. Morgan has pleaded guilty.
 - Mr. Morgan has demonstrated true remorse for his actions.
 - Although there is no evidence that alcohol use caused or contributed to the accident, Mr. Morgan has acknowledged his problems with substance abuse and has taken steps to address those issues, albeit with limited success.
 - Mr. Morgan has a relatively stable employment history and plays an important role in supporting his current family, including his son who suffers from fetal alcohol spectrum disorder.

The Gladue factors

- [84] The defence argues that Mr. Morgan's status as an Aboriginal offender justifies a sentence of 90 days to be served intermittently. The defence says that, because of Mr. Morgan's Aboriginal status, rehabilitation and restraint are in play.

- [85] The Crown does not dispute that I must take into account the unique background and systemic factors which may have played a part in bringing Mr. Morgan before the court. In fact, in its submissions, Crown purports to take such factors into account.
- [86] The report of Mr. Cadwallader and, to a lesser extent, the pretrial sentence report, disclose that Mr. Morgan has a background and upbringing that is all too familiar to Indigenous persons and that is now accepted to be as a result of colonialism. I must take these factors into account, even when there is no causal connection between the Indigenous heritage and the offence. However, I note that there is not to be an automatic reduction of sentence merely because an offender is Aboriginal.
- [87] Mr. Morgan has been economically and socially disadvantaged by reason of his Indigenous heritage. More specifically, he has lacked proper educational instruction, proper role models, and has had limited options for positive development. His ongoing struggles and conflicts are directly related to the intergenerational impacts of colonialism and the residential school system. These considerations diminish his moral culpability or blameworthiness. However, they do not eliminate what is otherwise, in the circumstances of this case, a very high level of moral culpability or blameworthiness.

Proportionality

- [88] As indicated, any sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [89] In my view, a jail sentence of 90 days to be served intermittently combined with a lengthy probation period and a driving prohibition, as submitted by the defence, would be a completely inappropriate sentence in the circumstances of this case. Such a sentence is not proportionate to the gravity of the offence or the degree of responsibility of Mr. Morgan. Further, such a sentence would not fulfil the sentencing objectives of denunciation and deterrence, which are significant objectives in cases of dangerous driving causing death.
- [90] The driving of Mr. Morgan on the evening of April 16, 2016 was utterly deplorable and resulted in the death of Shantelle Morgan. It also put the lives of many others at risk. I accept that Mr. Morgan is genuinely remorseful, that he is taking efforts to turn his life around, and that his moral culpability for the offence is somewhat diminished by reason of his Indigenous background. However, the offence was still gravely serious and his moral culpability, even as diminished, is still significant. The objectives of general deterrence and denunciation and, to a lesser extent, retribution, demand that a substantial term of imprisonment be imposed, as well as a lengthy probation period and a driving suspension.

Imposition of Sentence

- [91] Mr. Morgan, please stand:

- a) On Count 1, the single count of the indictment, the offence of dangerous driving causing death, I sentence you to a period of incarceration of two years less a day, plus a term of probation following your release from jail of three years.
- b) The conditions of your probation shall be:
 - 1. You shall keep the peace and be of good behaviour;
 - 2. You shall appear before the court when required to do so by the court;
 - 3. You shall 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;
 - 4. You shall report in person to a probation officer within 72 hours of your release from custody, unless you have obtained before your release written permission from the probation officer to report within a different timeframe. Thereafter, you shall report to a probation officer in the manner directed by the probation officer;
 - 5. When first reporting to your probation officer, you must provide them with the address where you live and your phone number; and
 - 6. You must attend, participate in, and complete any treatment programs as directed by your probation officer, including any culturally appropriate programs for alcohol or drug addiction or for psychiatric or psychological health.

[92] You may be seated, Mr. Morgan.

Ancillary Orders

[93] I also make the following ancillary order: Pursuant to s. 259(2) which is now s. 320.24(4) of the Criminal Code, you are prohibited from operating a motor vehicle on any street, road, highway, or other public place anywhere in Canada during the entire period to which you are sentenced to imprisonment and for five years thereafter.

[94] Counsel?

[95] MS. LAWLOR: Yes, My Lord, I think the forfeiture order of the items that were seized by the officer, I believe that is by consent.

[96] MR. STEELE: That's fine, yes.

[97] THE COURT: All right, Crown will you draft the form?

[98] MS. LAWLOR: I can draft that order and submit it to the registry for filing.

[99] THE COURT: All right, so then there will be a forfeiture order for the items seized which the Crown is to draft and submit.

[100] MS. LAWLOR: Thank you, My Lord, I believe that is all from the Crown.

[101] THE COURT: Thank you. We are adjourned.

[102] MS. LAWLOR: Oh, is this a DNA, primary DNA?

[103] MR. STEELE: I don't think so.

[104] MS. LAWLOR: I don't believe it is. It's a secondary, so it's discretionary for the Court if you feel it should --

[105] THE COURT: I did not feel it was required.

[106] MS. LAWLOR: Thank you, My Lord.

"Giaschi J."

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