
CANADA / JUDGMENT

R. v. Sater

2014 BCSC 1036

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Supreme Court of British Columbia

DECIDED

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2014 BCSC 1036 R. v. Sater

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sater,

2014 BCSC 1036

Date: 20140501

Docket: X76436-2

Registry: New Westminster

Regina

v.

Cory Sater

Before: The Honourable Mr. Justice Williams

Oral Reasons for Sentence

Counsel for the Crown:

C. McPherson;

E. Lehrer

Counsel for the Accused:

A.P. Serka, Q.C.

R.T. Gill

Place and Date of Hearing:

New Westminster, B.C.

April 28, 2014

Place and Date of Judgment:

New Westminster, B.C.

May 1, 2014

- [1] THE COURT: These are oral reasons for sentence in the matter of R. v. Sater. Because I expect it is likely that a transcript of these reasons will be produced, I will reserve the right to make minor editorial changes. I will not in any way change the substance of the order I am about to pronounce.
- [2] Cory Sater is before the Court today to be sentenced with respect to a number of criminal offences. On January 3, 2014, reasons for judgment were delivered, finding Mr. Sater guilty. That verdict followed a trial in this Court.
- [3] Prior to the date of the verdict being rendered, Mr. Sater entered a guilty plea to a single charge of failing to stop at the scene of an accident. That was Count 1 on the Indictment.
- [4] In the result, Mr. Sater stands convicted of a total of seven offences: two counts of impaired driving causing death, one count of impaired driving causing bodily harm, two counts of dangerous driving causing death, one count of dangerous driving causing bodily harm, and the count of failing to stop. The Court is today obliged to pass sentence in respect of those seven convictions.
- [5] Extensive submissions were made by counsel on Monday, April 28. Decision was reserved to today's date for the pronouncement of sentence.

Offence

- [6] The details of these events are fully spelled out in reasons for judgment indexed as 2014 BCSC 330.
- [7] I do not intend to re-state those here today. Instead, I will provide a brief summary of the events.
- [8] On the evening of February 18, 2011, Mr. Sater drove to a pub in Burnaby where he spent some hours with two acquaintances. In the course of his time there, he consumed six double rye and Coke, and two Jägerbomb drinks. Shortly before midnight, after the serving staff had told him that he would not be served further because he had enough to drink, he got into his vehicle with his friend, Mr. Smith. They left the parking lot of the pub and went to Mr. Sater's home where he obtained some money. The two of them then left with the purpose of going to another drinking establishment. Mr. Sater was driving the vehicle; Mr. Smith was the passenger.

- [9] Shortly after midnight, Mr. Sater was travelling southbound on Lougheed Highway, at an area in the vicinity of the turnoff to Pitt River Road. In my reasons for judgment, I concluded that Mr. Sater passed through the intersection on either a stale amber or a red light, despite there having been displayed an advance warning signal.
- [10] There was an unusual situation occurring at the roadside ahead of him. That involved an automobile which had spun out of control. The occupants had been assisted by passersby. Those persons were gathered by the side of the road, slightly encroaching on the travel portion of the road surface, when Mr. Sater's vehicle came into the picture.
- [11] I found that Mr. Sater was oblivious to their presence and that he drove his vehicle such that it came into collision with the disabled motor vehicle and three persons in the immediate vicinity. Two of those were killed instantly. The third was badly injured. His most critical injury was the loss of his leg.
- [12] Following that collision, despite the fact that his passenger Mr. Smith was imploring Mr. Sater to stop and saying that persons had been killed in the collision, Mr. Sater continued to drive south on Lougheed Highway. He drove to a residential area where he left his motor vehicle. He then left and went to his brother's residence; he subsequently boarded a cab and left; it is unclear where he went. His next appearance was when he arrived with a lawyer at the RCMP detachment for the purpose of turning himself in. That was some time much later that day.

The Offender

- [13] Mr. Sater is 40 years of age. He is a long-time resident of the Tri-Cities area. He has a Grade 12 education; he did not achieve a diploma but at some time subsequent to his high school years was awarded his GED.
- [14] He was raised, along with his brother, by his father in a single-parent family. Mr. Sater's father was a roofer; Mr. Sater followed the same vocational path. My understanding is that he has for the most part been employed in that business throughout his adult life.
- [15] Mr. Sater began a common law relationship at the age of 25. There were two children born of that union. That marriage has failed. His spouse evidently experienced and continues to experience serious drug problems and thus is not any part of the family. In the result, Mr. Sater has continued to be responsible for the raising of his two children. Those children are a son age 12, and a daughter age 15.
- [16] Mr. Sater has a minor criminal record. There are two assault convictions on that record, one dated 2004 and one dated 2010. It is significant that, as a consequence of the second conviction, he was placed on probation, which entailed a number of conditions including, most relevantly, that he was to abstain from the consumption of alcohol. That order was in effect at the time of these offences.

Positions of the Parties

[17] The Crown submits that the appropriate sentence in this case is a global jail sentence in the range of eight to nine years. Specifically, the Crown advocates for the following sentences:

1. Impaired driving causing death: six years
2. Impaired driving causing bodily harm: four years
3. Dangerous driving causing death: six years; and
4. Dangerous driving causing bodily harm: four years.

[18] The Crown accepts that those sentences should be served concurrently. That is based upon the proposition that all of the charges arise from one event or one transaction.

[19] As for the failing to stop at the scene charge, the Crown urges a sentence of four years' incarceration, to be served consecutively. The Crown accepts that the totality principle would necessarily have application. In the Crown's submission, the fit and proper global sentence, would be, as noted, in the range of eight to nine years.

[20] The Crown also submits that this Court should order a lifetime driving prohibition and that a DNA warrant should be issued.

[21] For the offender, it is urged that an appropriate sentence for the impaired and dangerous driving charges should be in the order of three years' incarceration for each count. Counsel supports the submission that the sentences for those offences should be served concurrently.

[22] With respect to the charge of failing to stop, it is the submission of Mr. Sater that an appropriate sentence is six months' incarceration. Again, there is no dispute that the sentence for that count should be served consecutively to the others.

[23] As for a driving prohibition, Mr. Sater submits that an appropriate duration is three years.

[24] With respect to the DNA warrant, Mr. Sater opposes the issuance of that warrant but makes no substantive submissions respecting that issue.

Materials

[25] In the course of submissions, a number of materials were filed and received in evidence.

[26] The Crown tendered a total of seven victim impact statements. Five of those were presented and read by or on behalf of the authors of those statements. The other two were filed and read into the record by the prosecutor. The persons providing victim impact statements were the mother, husband, and a sister-in-law of Ms. Reaveley, her close friends, Mr. and Ms. deBenedictis, who were present at the scene of the accident, as well as the mother of Ms. Cruz and Mr. Calimbahin. He was the partner of Ms. Cruz; he was present at the scene and suffered serious personal injury.

- [27] In addition, the Crown filed an extract of Mr. Sater's driving record, a record of his criminal convictions, and a copy of the probation order which was imposed by the Provincial Court of British Columbia on September 10, 2010.
- [28] Mr. Sater filed a series of letters in support, a total of 12. The authors included his father, his brother, his two children, a cousin, some friends, his landlord and two persons who know him from his work. One of the letters was provided by a Community Services Counsellor who has seen Mr. Sater for a number of counselling sessions since the events of the accident.
- [29] In addition, I asked Mr. Sater whether he had anything that he wished to say. In response, he came forward and addressed this Court. Although not an articulate individual, and apparently feeling considerable emotion, Mr. Sater said he feels terribly sorry for the harm that was caused by his actions and that he understands a great many people have been enormously hurt and damaged by his conduct.

Discussion

- [30] The crafting of an appropriate sentence involves taking a number of factors and considerations into account:
1. The specifics of the offence.
 2. The specifics of the offender.
 3. With respect to both, any aggravating and mitigating factors must be considered.
 4. The objectives and principles of sentence as they are spelled out in the Criminal Code of Canada. Those are the following: Section 718 says this:
718. The fundamental purpose of sentencing is 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;
 - (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 and to the community.
- [31] Also relevant is s. 718.1, which is a foundational principle: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".

- [32] In addition, other sentencing principles are these: A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh; and an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.
- [33] It is also necessary to take into account decisions of other courts in other cases. Particular guidance is taken from pronouncements of the Supreme Court of Canada and provincial courts of appeal, most notably the British Columbia Court of Appeal. Decisions of trial courts can be useful although they are somewhat limited in their value because of the many variations between and among fact patterns. Almost never will two cases be entirely alike.
- [34] Finally, it is necessary to take into account the Criminal Code sections with respect to the particular offences. In the matter at bar, the maximum penalty provisions are as follows:
- Impaired driving causing death: life imprisonment.
 - Impaired driving causing bodily harm: ten years' imprisonment.
 - Dangerous driving causing death: 14 years' imprisonment.
 - Dangerous driving causing bodily harm: ten years' imprisonment.
 - Failure to stop at the scene of an accident: life imprisonment.
- [35] With that backdrop I will now discuss the matter at bar.
- [36] I commence by saying this: it is commonly (and correctly) observed that the crafting of a fit and proper sentence in a criminal case is a difficult task. It requires drawing together and accommodating a number of considerations and factors. Those do not all work in a coordinated fashion. There are tensions and conflicts among them.
- [37] Generally, there is no clear absolute right answer. Those who have been victimized by the conduct and who have been injured by the offence urge for greater sentences; the offender calls for mercy. Each has reasons to support their view.
- [38] To say that the facts of this case are horrible, that this was an incredible, shameful waste of humanity, or that unspeakable hurt and sorrow have resulted seems inadequate. Words do not do justice.
- [39] Each of the deceased were by all accounts good and decent people. They were greatly valued and loved by many others. Each was a partner, a daughter, and a friend to others. Ms. Reaveley was a mother of four young children. Each was survived by many who mourn that loss each day.
- [40] Mr. Calimbahin will carry the scars of his injury forever.

- [41] The depth of the pain and destruction was apparent in the words of the victim impact statements that were read and received on Monday. Each was eloquent; each, in its own way, heart rending.
- [42] There is a cruel irony about this case. Ms. Reaveley and her group had stopped essentially to act as good Samaritans to help persons who had encountered a problem. All of the victims of this offence were quite innocent.
- [43] In cases like this, those who have been left with the awful pain of such loss could understandably claim that anything less than the maximum sentence is inadequate. However, I say with great respect, such a view does not accord with the proper concept of the criminal sentencing process. That process is not a means of compensating such losses; it is not a mechanism of exacting vengeance. No matter what sentence this Court imposes, the lives of Ms. Reaveley and Ms. Cruz will not be restored. Mr. Calimbahin's loss, his bodily injury, and the loss of his partner will not be changed.
- [44] In a case as tragic and horrific as this, where such enormous pain and loss and hurt has resulted, a pronouncement of this Court's sentence does not really make anything better. The loss is as great as ever. The sentence will provide no balm to ease the pain and hurt that many are suffering.
- [45] This case is a sad example of the harm and pain and destruction that life sometimes deals us. When we walk out of this courtroom today, the principal artefact left with all will be sorrow and sadness and waste.
- [46] Hopefully, in time, the wounds can heal somewhat.
- [47] I would observe too, though it may seem curious and discordant to say, that the impact of the damage extends to the family of Mr. Sater. They too are among the victims.
- [48] There simply are no winners.
- [49] I turn now to the issue at hand.
- [50] The sentence this Court imposes must, as I have noted, recognize many factors. Foremost among them is the harm done by the offender's conduct and the offender's moral culpability. It must properly serve the objectives of denunciation of the conduct and deterrence, both for Mr. Sater and for others.
- [51] Case authorities make clear that those are important considerations.
- [52] The sentence should advance the principle of retribution. In *R. v. C.A.M.*, [1996] 1 S.C.R. 500, Chief Justice Lamer articulated the concept thusly:
- [79] Retribution, as an objective of sentencing, represents the principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. [It is part of] the existing principles that a sentence imposed be "just and appropriate" under the

circumstances. [It is tied to the notion of] "moral blameworthiness" which justifies the state in imposing the stigma and punishment associated with a criminal sentence. See Martineau, at p. 646. I submit that it is this same element of "moral blameworthiness" which animates the determination of the appropriate quantum of punishment for a convicted offender as a "just sanction". As I noted in Martineau in discussing the sentencing scheme for manslaughter under the Code, it is a recognized principle of our justice system that "punishment be meted out with regard to the level of moral blameworthiness of the offender" (p. 647). See the similar observations of W. E. B. Code in "Proportionate Blameworthiness and the Rule Against Constructive Sentencing" (1992), 11 C.R. (4th) 40, at pp. 41-42.

- [80] retribution bears little relation to vengeance vengeance has no role to play in a civilized system of sentencing. Vengeance [he says] as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. 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 retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.
- [81] Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. [it is] a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.
- [53] Earlier, I made mention of the principle of rehabilitation. I should not be taken to say that the objective of the rehabilitation of an offender is not important; it is. However, in cases of this type, it does not play a dominant role. The reasoning for that is explained by Justice Ryan in *R. v. J.A.W.*, a decision of the British Columbia Court of Appeal. She said this at paras. 18 and 19:
- [18] There are cases where the rehabilitation of the offender will take precedence as the appropriate objective in sentencing. This is not one of the cases.
- [19] This is not one of those cases because the gravity of the offence, and the moral blameworthiness of the offender are so great that the sentence must communicate society's condemnation of this conduct. As I said in the case of *R. v. Johnson* (1996), 112 C.C.C. (3d) 225:

- [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 the 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. And it is for this reason that deterrence and denunciation [in that case] ought to have been considered by the trial judge.
- [54] Earlier, I made mention of the principle of proportionality. That is a fundamental principle of the sentencing model; it says this: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".
- [55] In this case, I have no hesitation in concluding that this offence, when the matter is examined from an overall perspective, was at a substantially elevated degree of seriousness.
- [56] My conclusion is informed by the penalties Parliament has seen fit to provide for these driving offences. The maximum sentences are either life imprisonment (for one) or lengthy terms of incarceration. The magnitude of those speak to the seriousness issue.
- [57] As for the offence of failing to stop where the event has resulted in a death, Parliament has seen fit to impose a maximum penalty of life imprisonment. Where bodily harm has been caused, the penalty is up to ten years in prison.
- [58] Again, the same observations apply.
- [59] These offences are gravely serious.
- [60] It is to be noted as well that certain of these penalties have been increased in recent years reflecting Parliament's view of the societal seriousness of the issue. There has been much judicial commentary about the great social damage that drinking and driving offences cause.
- [61] Also with respect to the issue of the gravity of the offence, my conclusion is informed by the fact that the offending conduct resulted in two deaths and one very serious injury. The conduct has resulted in enormous direct and collateral harm and hurt.
- [62] The second consideration is the degree of responsibility of the offender. This includes consideration of such factors as the intentional risk taking of the offender, the harm caused by the conduct, and the normative character of the offender's conduct.

- [63] Under this head, it is relevant that this offender, although an unlicensed driver, made a deliberate decision to get into a motor vehicle and go out for the evening, to drink. He drove to a bar. He drank for a number of hours. He consumed eight drinks as I have noted, including six double highballs. When he was cut off by bar staff because they considered he should not drink anymore, he elected to get into his vehicle and drive home to get more money in order to go out and drink more.
- [64] With respect to the actual events of the collision and of the driving, I find that he failed to comply with the traffic control devices in place. For no apparent reason, he failed to see a significant clearly visible hazard on the roadway. He drove into the vehicle and the persons that were there. Following that, when the magnitude of the event could not have been anything other than apparent, he left the scene. The evidence establishes clearly that he knew what had happened, he knew at least in a very general way, what harm had been done. Nevertheless, he chose to drive away. He went some distance and parked his vehicle. He got out and went somewhere. Sometime later, he went in the company of his lawyer to the police station.
- [65] In my view, the degree of responsibility of Mr. Sater in this event, that is, his moral culpability, is extremely high. The risks he took were great, the harm he did was enormous, his behaviour was strikingly at odds with what could be called normative or reasonable conduct.
- [66] Other factors that inform my conclusion are the fact that he has a driving record which includes two prior situations of having had 24-hour roadside suspensions, (one in 2005 and one in 2006), issued on the basis that it appeared to the investigating police officer that he had been and he was driving. While that is not conclusive proof of, say for example, previous impaired driving, it is a factor that has weight in the matter. It is indicative of some history of drinking and driving.
- [67] Another factor is that when these events occurred, he did not hold a valid driver's licence. Although there was no prohibition or suspension order in force at the time, his right to drive had been withheld because he owed money to the issuing agency. To drive in those circumstances, to drink and drive in those circumstances, suggests a serious disregard or disdain for conventionally accepted norms of conduct.
- [68] My conclusion is also informed by the fact that he was at the time of the event, under a court order, a probation order, that specifically required that he not consume alcohol. To my mind, that is a relevant factor in terms of assessing his moral culpability. It is an aggravating factor.

- [69] Part of the calculus of analysis in matters such as this involves assessing aggravating and mitigating factors. Typically, that discussion will include consideration of the issue of remorse. The general principle is that where an offender is genuinely remorseful, that can be taken into account by the court as a mitigating factor in the determination of sentence. A lack of remorse is not an aggravating factor; it is essentially neutral.
- [70] In the present case, the Crown urges this Court to conclude that Mr. Sater is entirely without remorse. The Crown points out that there has been no indication of any remorse. The Crown says that his guilty plea in respect of Count 1 came at the conclusion of the trial and was essentially a recognition of the fact that he would inevitably be convicted on the evidence. The Crown notes there were no other guilty pleas in the matter.
- [71] Those factual observations made by Crown counsel are valid.
- [72] That said, it is important that this Court should not inflict a greater sentence upon this offender for these reasons, and there should be no appearance of that having been done. It is his right to take a matter to trial and that is what he did.
- [73] Remorse is a complicated concept.
- [74] Insofar as whether he feels badly for the consequences of his actions, I am satisfied that he does. What he had to say on Monday was an expression of that. Indeed, it would be hard to imagine anyone not feeling badly for the harm these actions caused.
- [75] A cynic might say that what Mr. Sater expressed before the Court on Monday was simply self-serving and of no real sincerity. Frankly, I do not know. It appeared to me that there was a genuine element of sincerity to what he said.
- [76] I turn now to the matter of what actual quantum of sentence should be imposed. That is informed substantially by the sentence ranges prescribed by the Criminal Code and the jurisprudence. Counsel have referred me to a number of cases in the course of their submissions on the issue. I have examined each of those cases and will append a list of them to my reasons for sentence.
- [77] My thoughts and conclusions respecting quantum of sentence are as follows.
1. Generally, sentences for impaired and dangerous driving causing death and bodily harm are, compared to many years past, trending up. That is reflective of Parliament's intention and the broadly accepted view that a significant sentencing response is called for in order to attempt to curb such conduct. Courts have given effect to that view. Among the cases to which I have been referred there is, as I have noted, judicial commentary to that effect.
 2. Thinking of ranges of sentence is often an unhelpful concept. Based upon the authorities that I have reviewed, I accept that sentences for impaired or dangerous driving causing death may, in certain circumstances, be as low as two years. There is also good authority for such sentences to extend to six to eight years, and in certain circumstances, beyond that.

3. As a general rule, where the impaired driving or dangerous driving has resulted in bodily harm rather than death, the sentence will be less than where a fatality has occurred.
4. As for the charge of fail to stop, there is a substantial dispute between the Crown and defence in this case. The Crown as I have noted urges a sentence in the order of four years. The defence urges a sentence of six months and points to many decisions where relatively short sentences have been imposed in the order of six to 12 months. My view of the matter, founded upon consideration of both basic principles and the authorities, leads me to conclude that, for fundamentally sound reasons, a significant carceral sentence may be appropriate in such situations.

To my mind, the conceptual justification for that conclusion is clear. When an individual who has been involved in an accident makes the decision to leave the scene, he or she very substantially frustrates the opportunity of authorities to investigate the circumstances. Sometimes all liability is avoided. In a matter such as the one at bar, a critical issue was the state of intoxication of Mr. Sater at the time of the events. His decision to flee effectively precluded the usual investigative mechanisms that would have been open to the authorities, specifically the obtaining of samples of breath, blood, and the opportunity to make observations of him. In addition to such conduct being morally reprehensible, it is a unilateral means of frustrating or defeating the usual investigative measures. In the case of a serious crash such as this, the driver's potential exposure is great.

Put another way, the matter can be examined through the lens of cost and benefit. If the cost of fleeing the scene is substantially less than the risk run by remaining at the scene, the benefit is clear. In my view, that is a dynamic that the sentencing mechanism must consider and deter.

I note that in this case through good fortune alone, the police were able to adduce a body of evidence which reliably demonstrated Mr. Sater's drinking pattern. Even at that, the true state of his blood alcohol at the time of the event was only capable of being estimated and not being known with certainty. Generally, the evidence available to establish that issue is, when unsupported by forensic evidence of blood or breath or observations, woefully inadequate.

For those reasons and considering that the Criminal Code provides for a sentence of up to life imprisonment for this offence, I am convinced that Mr. Sater's submission that an appropriate sentence is in the order of six months is simply not tenable. In my view, a substantial jail sentence will often, depending on the circumstances, be the appropriate outcome. My review of the authorities suggests to me that a jail sentence in the range of three to four years is properly supportable. See, for example, the decision of the British Columbia Court of Appeal in *R. v. Prasad*, 2006 BCCA 470.

5. In the course of submissions, counsel for Mr. Sater urged upon the Court that the matter of culpability in respect of Count 1 ought to be considered in light of the proposition that there was no evidence to conclude that Mr. Sater left the scene for the purpose of avoiding criminal liability. Counsel took the position that it would not be an appropriate matter for the Court to draw inferences to support that conclusion.

In my view, that is not an argument which is entitled to great weight. I note, first of all, that the count to which Mr. Sater entered his plea includes the element that the act was committed "with intent to escape civil or criminal liability". He has admitted to that element by his plea.

Furthermore, I observe that the evidence at trial was that he said as he drove away, "I have to see my children". In the totality of the circumstances, and taking that evidence into account, it is my view reasonable to infer that his action was intended to enable him to leave the scene immediately and for his own purposes, with the likely result that his identity might well not be known, and it would follow that the mischief contemplated by the section was served.

[78] Finally, there was one other matter raised by defence counsel and I want to make mention of that.

[79] The issue raised was the proposition that Mr. Sater has been bound by and complied with a strict bail order since being charged with these offences and so the court should, in determining his sentence, consider allowing some reduction in recognition as is done where an offender has been incarcerated prior to sentence -- so-called dead time.

[80] The authority invoked in support of that submission was a 2006 decision of the Ontario Court of Appeal, *R. v. Downes*, [2006] O.J. No. 555. There, writing for the court, Justice Rosenberg held that time spent under stringent bail conditions especially under house arrest must be taken into account as a relevant mitigating circumstance in sentence. He allowed that the effect could vary and the court may decide that little or no credit should be given for pre-sentence house arrest. That, of course, is a decision of the Ontario Court of Appeal. It does not have binding effect upon this Court, although it is entitled to be considered.

[81] I note that while the concept has been recognized in this province, its application has not been profound. On occasion it has been recognized and given some effect; in many instances, sentencing courts have concluded that it will not impact the quantum of sentence. In a nutshell, time so spent is something that the sentencing court should consider, but its effect is very much a matter for the discretion of the sentencing judge and its effect is to be taken as a mitigating factor in the offender's favour. There is no clear or formulaic way of determining the matter.

[82] In the present case, having reflected upon the situation, I decline to assign this factor any specific value. I take that position because the bail order binding Mr. Sater was not in my view especially strict or akin to house arrest. The terms were typical; there was also a curfew condition requiring him to be inside his home between 9:00 p.m. and 6:00 a.m., unless

certain arrangements were made. Otherwise, there were no particular restraints upon his liberty that could fairly be described as like house arrest. In the result, I have accepted for the purpose of deciding Mr. Sater's sentence that he was compliant with his bail order for the entire time of its currency and that no substantive violations or misconduct have occurred.

[83] I turn now to the specific sentences to be imposed in this case.

[84] I will deal first with the substantive driving offences and then the charge of fail to stop:

- a) For Count 2, impaired driving causing death, I impose a sentence of six years' imprisonment.
- b) For Count 3, impaired driving causing death, I impose a sentence of six years' imprisonment.
- c) For Count 4, impaired driving causing bodily harm, I impose a sentence of three and one-half years' imprisonment.
- d) For Count 9, dangerous driving causing death, I impose a sentence of six years' imprisonment.
- e) For the second count of dangerous driving causing death, I impose a sentence of six years' imprisonment.
- f) For Count 10, dangerous driving causing bodily harm, I impose a sentence of three and one-half years' imprisonment.

[85] All of those sentences will be served concurrently.

[86] With respect to Count 1, the charge of failing to stop the vehicle and give his name and address and offer assistance, I impose a sentence of three and one-half years, that is, 42 months' imprisonment. That will be served consecutive to the other sentences imposed.

[87] In the result, the total sentence to be served is nine and one-half years.

[88] It is my view that the quantum of sentence which I have pronounced in this matter is such that it properly invokes the court's application of the so-called totality principle. That principle requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender.

[89] In *R. v. C.A.M.*, *supra*, the Supreme Court of Canada referred with approval to a learned treatise in which one of the bases of the concept was explained as avoiding the imposition of a crushing sentence not in keeping with the offender's record and prospects.

- [90] In my view, the sentence here, without some reduction, is not just and appropriate. Allowance must be made for the fact that this man is not before this Court with a lengthy record of the type too frequently seen. While he does have a record, it is relatively minor and not enormously relevant to the criminal conduct at bar.
- [91] The material before the Court indicates that he has been a member of society who has worked and applied himself to raising and providing for his family as a single parent. His rehabilitation and restoration to the community are proper considerations to take into account. There is no reason to believe that he has been anything other than properly compliant with the terms of his bail order. Accordingly, it is my conclusion that the total sentence to be served by Mr. Sater should be reduced to seven and one-half years.
- [92] With respect to the matter of the driving prohibition, pursuant to s. 259(2) of the Criminal Code, I order that there will be a driving prohibition for a period of eight years in addition to the term of imprisonment.
- [93] Finally, there is the matter of the imposition of an obligation upon Mr. Sater to provide samples of his DNA. The offences at issue are secondary designated offences. The court has the discretion as to whether or not to order samples. In making that determination, the court is obliged to consider the offender's criminal record, the nature of the offences, the circumstances of the offence commission, and the effect or impact upon the offender's privacy and security if the order is made. The public interest includes the deterrence of potential repeat offenders, the concerns for public safety, and whether or not the provision of such samples might reasonably be seen as in the interests of future investigative endeavours.
- [94] In my view, although this offender does not have a significant criminal record, the other considerations, including the deterrence of recidivism and the fact that offences such as the matter at bar are not infrequently assisted in their investigation by the use of forensic DNA technology, I conclude the public interest does support the issuance of the warrant. On the other hand, I note that Mr. Sater has not provided any basis to conclude that his privacy and security interests in the matter outweigh the public interest. In the final result, I am satisfied it is appropriate to make the order under s. 487.051, and I so order.
- [95] Finally, there is the matter of a victim fine surcharge. Are there submissions on that?
- [96] MR. MCPHERSON: I have none. I do not think it is mandatory and I have no submissions on that.
- [97] MR. GILL: I do not know where we lie with respect to the amendments, My Lord. If this falls under the new amendments jurisdictionally, if it does - but I do not have any submissions - I think the court is bound, and if it does not, I would ask that they be waived, but I unfortunately don't have an answer (indiscernible). I certainly would - I don't know if under the new amendments there is discretion to increase and if there is, I would say that it should not be increased at all but I certainly cannot argue against any again obligatory -

[98] THE COURT: I have no intention of increasing. I do consider that I am bound by the most recent amendments to the Criminal Code and accordingly I will impose the minimum victim fine surcharge in the circumstances. Are there any other matters to be dealt with?

[99] MR. MACPHERSON: No, My Lord.

[100] MR. GILL: No, not from us My Lord, thank you.

[101] THE COURT: Mr. Sater, stand up, please. Sir, I have sentenced you to a term of imprisonment of seven and one-half years. That is a lengthy sentence. It is important for you that when you return to the community that you find ways to deal with your problems and become a proper law abiding and contributing member of society and I wish you good luck in that, sir. Thank you.

"Williams J."

Appendix "A"

Crown's List of Authorities:

1. R. v. Gill, [2010] B.C.J. No. 1691 (BCCA).
2. R. v. M.(C.A.), [1996] 1 S.C.R. 500 (SCC).
3. R. v. J.A.W., [2006] B.C.J. No. 1112 (BCCA).
4. R. v. Boukchev, [2003] O.J. No. 3944 (ONCA).
5. R. v. Junkert, [2010] O.J. No. 3387 (ONCA).
6. R. v. Smith, [1992] B.C.J. No. 363 (BCCA).
7. R. v. Regier, [2010] O.J. No. 1389 (ONSC).
8. R. v. Regier, [2011] O.J. No. 3749 (ONCA).
9. R. v. Kummer, [2011] O.J. No. 234 (ONCA).
10. R. v. Gratton, [2003] A.J. No. 1327 (ABQB).
11. R. v. Wood, [2005] O.J. No. 1611 (ONCA).
12. R. v. Yuzicapi, [2011] S.J. No. 706 (SKCA).
13. R. v. Prasad, [2005] B.C.J. No. 1796 (BCPC).
14. R. v. Prasad, [2006] B.C.J. No. 2782 (BCCA).
15. R. v. Woodley, [1993] B.C.J. No. 906 (BCCA).
16. An Act to amend the Criminal Code (impaired driving and related matters), S.C. 1999, c. 32.

17. House of Commons Debates, 36th Parl, 1st Sess, No 241 (9 June 1999) at 1830 Ms. Eleni Bakopanos).

Defendant's List of Authorities:

1. R. v. Charles, 2009 BCSC 1928.
2. R. v. Charles, 2011 BCCA 68.
3. R. v. Galloway, 2004 SKQB 130.
4. R. v. Hall, [2004] O.J. No. 6176 (Ont. Sup. Ct.).
5. R. v. Hall, 2007 ONCA 8
6. R. v. Johnson (1996), 112 C.C.C. (3d) 225 (BCCA).
7. R. v. McAndrew, 2004 BCCA 368.
8. R. v. Maxwell-Smith, 2012 YKTC 107.
9. R. v. Mercredi, 2011 SKQB 4.
10. R. v. Taylor, 2000 BCCA 654.

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