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Docket: CR 16-01-35712
(Winnipeg Centre)
Indexed as: R. v. Recksiedler
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

HER MAJESTY THE QUEEN

- and -

SHANE TYLER RECKSIEDLER,

Accused.

) **APPEARANCES:**

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) Manoja Moorthy and

) Kristee Logan

) for the Crown

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) Scott Paler and Thomas Rees

) for the Accused

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) Judgment delivered:

) June 22, 2017

MARTIN J.

I. INTRODUCTION

[1] In April I convicted Mr. Recksiedler of dangerous operation of a motor vehicle causing the death of 23-year-old Amy Gilbert who was struck down by him shortly after 5:00 p.m. on Saturday, April 5, 2014, as she walked across Broadway Avenue at the intersection of Donald Street in Winnipeg. (***R. v. Recksiedler***, 2017 MBQB 72, [2017] M.J. No. 121 (QL)) The issue before me now is to impose a fit and appropriate sentence for him for this offence.

[2] The Crown seeks a sentence of three years in jail, along with a five-year driving prohibition. The defence says a suspended sentence, or a very short period of jail, such as 90 days intermittent is appropriate. Each stressed various facts and features in support of their position. I pause to clarify a point that may have been unintentionally inferred from the Crown's submission; as will be seen, sentencing does not consist of choosing one or the other recommendation.

II. FACTS

[3] The relevant facts respecting the conviction were summarized at para. 26 of the decision:

As to the facts of his driving, clearly there is no evidence of any erratic or aggressive driving leading up to the accident. Mr. Recksiedler was travelling at or slightly above the posted speed limit of 50 km/h. Typical Saturday afternoon vehicle and pedestrian traffic for Broadway and Donald were present with witnesses describing numerous vehicles and pedestrians in the area. The traffic control device signaling Mr. Recksiedler to stop had been red for about nine seconds before he entered the intersection. Other vehicles turning left onto Donald from Broadway proceeding south had just cleared the intersection when he entered it. Further, he passed vehicles in the centre and curb lane that were stopped for the red light and for the southbound traffic to clear. In the intersection he shifted right somewhat, striking Ms. Gilbert as she was in or near the centre lane. The day was clear, the roads dry and Ms. Gilbert was visible.

[4] At paras. 30 and 31, I outlined the elements of the offence and the specific facts supporting them. I will not repeat the factors demonstrating that his manner of driving was objectively dangerous as they are almost identical to the outline of facts I just mentioned, except for his obvious fatigue; he had no real sleep for the previous 24 hours or so before the collision occurred as he had been partying and visiting friends. This was also key to the mental element of

the charge. And, it is critical to the issue of moral blameworthiness, as a factor in sentencing here. My analysis of the fault element was:

[31] I now must consider the second issue, the fault element. I have no doubt that under the circumstances as presented that fateful Saturday afternoon, a reasonable person would have foreseen the risk and taken steps to avoid it. I am also satisfied that Mr. Recksiedler's actions were a marked departure from the standard of care expected of a reasonable person in the circumstances. In this respect, his manner of driving is informative but more so, crucially, is the combined impact of the facts that:

- before he drove he knew he was very fatigued. He had said as much to his friends;
- he had consumed some alcohol just before driving. To be clear though, I do not find that he was impaired by alcohol at the time; and
- critically, that shortly before the accident he was specifically warned by his friend not to drive but to find a place to sleep. She was concerned with his drinking and fatigue.

Ultimately, I am satisfied that the dangerous driving count has been proven. As must be clear, his fatigue is a decisive factor - in fact one that tipped this event from a provincial traffic offence of careless driving causing death to dangerous driving causing death. ...

III. SENTENCING PRINCIPLES

[5] Section 718 of the *Criminal Code* sets out the statutory considerations in sentencing for any criminal offence. No one factor trumps the rest although the proportionality principle is overarching.

[6] The fundamental purpose of any sentence is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful and safe society. That is hopefully achieved by imposing just sanctions that have various objectives including, of note here, denouncing the unlawful conduct and the harm done, deterring the offender and other persons from committing like offences, rehabilitation of offenders, providing reparations for the harm done and

promoting a sense of responsibility in offenders and acknowledgment of the harm done.

[7] Further, a judge must consider a number of sentencing principles. Here, those principles include:

- s. 718.1: referred to as the fundamental principle, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, in other words an offender's moral blameworthiness;
- s. 718.2(a): that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;
- s. 718.2(b): that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; and
- ss. 718.2(d) and (e): the restraint principle - that jail and the length of a jail sentence should be used sparingly. Effectively, it should be a last resort when other sanctions are not available or are inappropriate in the circumstances.

In addition to this statutory list are a number of principles developed through the common law. Ultimately, the sentence must be fair and just. While the notion of punishment may be a factor, the concept of vengeance cannot be. The sentence I impose must be tailored to this situation and Mr. Reckseidler.

[8] Finally, the *Code* also sets out applicable penalties. There is no minimum penalty, but neither is a conditional or community sentence order available as it was before 2014. The maximum penalty is 14 years' imprisonment (s. 249(4)). There is no mandatory period of driving prohibition in this situation, although I have the discretion to prohibit Mr. Recksiedler from driving for any period not exceeding 10 years (s. 259(2)(b) of the *Code*).

IV. MR. RECKSIEDLER'S BACKGROUND

[9] Mr. Recksiedler is a 29-year-old man from the Steinbach area of Manitoba. His biological father left the family when Mr. Recksiedler was four. He has had no contact with him since. His biological mother remarried and Mr. Recksiedler was adopted by his mother's husband, with whom he has had a relatively tumultuous relationship that is steadily improving. He struggled in school with attention deficit disorder and a learning disability. While the material supporting this was skimpy, he has provided sufficient evidence of these conditions to qualify as a disabled person for Revenue Canada tax credit purposes. Returning to his school experience, he was also subject to bullying as he is of mixed race. Nonetheless, he completed his grade 12 but has no other formal education or vocational skills. He is being treated with medication for depression and anxiety. His work history is spotty, but for the past eight months he has been gainfully employed at a swine production facility. Mr. Recksiedler has generally positive relationships with his siblings, girlfriend, relatives, friends and co-workers. Alcohol has been a negative feature in his life since his teens; it underlies several

criminal convictions including assaulting a peace officer and driving over .08 in 2006 and 2008, respectively. He has never been sentenced to jail.

[10] Numerous letters of reference were filed from his family, employer, and members of his church. In sum, they speak of a man who has struggled with various issues in life but who is not only trying to deal with them, but apparently overcoming them. Most notably, for the last three years he appears to have stopped drinking and taking drugs and has reached out to members of his church for support, including partaking in a mentorship program that helps people facing difficult circumstances. He has been in the program for 26 months, 16 of which have been as part of a resident program that he is still in.

[11] According to his pre-sentence report, Mr. Recksiedler is gauged as a medium risk to criminally reoffend. This is based on identified risk factors of his past criminal history, his alcohol and drug problems and some poor companions. Balancing this is the probation officer's conclusion that he has positive family supports "which appear to be an encouraging attribute" and that his commitment through his church "provides positive insight to his willingness to change and to promote a healthier lifestyle."

V. ANALYSIS

[12] A fairly consistent message from various Courts of Appeal about sentencing for dangerous driving causing death situations is that the specific facts of a given case, particularly as they reflect an offender's moral blameworthiness, are critical to determining a fit and appropriate sentence. The

Manitoba Court of Appeal in ***R. v. Wallace***, 2012 MBCA 54, 280 Man.R. (2d) 209 at para. 43, echoed its previous comments in ***R. v. Eckert***, 2006 MBCA 6, 201 Man.R. (2d) 175, that:

43. Steel J.A. continued in *Eckert* (at paras. 15-16):

... [I]n sentencing individuals for dangerous driving offences, the facts become crucial. They can vary in a continuum from a short period of inattention, perhaps a violation of a traffic control signal, through to those that involve significant impairment while knowingly driving unsafe vehicles and prolonged periods of driving at high rates of speed.

In passing sentence, the judge must assess the moral blameworthiness involved in each case. It is not sufficient to look only at the tragic consequences when determining the seriousness of a crime. The function of a court is not to exact revenge, but, in this case, a sentence should express society's denunciation of the conduct involved. Therefore, the nature of the blameworthy conduct that led to the consequences must be considered.

The court further noted that denunciation and deterrence are uppermost concerns, particularly where aggravating circumstances exist and the moral blameworthiness is high. Yet, as reaffirmed by the court, rehabilitation also remains an important principle.

[13] The general and broad range of sentence for a dangerous driving causing death offence encompasses both the Crown and defence positions. There are ample precedents to demonstrate sentences from suspended sentences to significant penitentiary terms, depending of course on the facts and the offender. I appreciate counsel has provided me with a number of precedents but, except for general guidance on various points, they are in the main distinguishable. So, for example:

- in **Wallace**, the driver was racing through a 50 km/h residential area, forcing another car to take evasive action to avoid an accident. He ignored a stop sign while travelling at 136 km/h and crashed into another vehicle, killing its driver. Mr. Wallace had been drinking but refused to take a breathalyzer test. The Court of Appeal upheld a two-year community supervision order sentence;
- in **R. v. Bagri**, 2017 BCCA 117, [2017] B.C.J. No. 473 (QL), the British Columbia Court of Appeal upheld a three-year jail sentence for a professional truck driver who jackknifed two unloaded flat deck trailers across a highway killing a family of four. The sentencing judge noted that Mr. Bagri failed “to stop at a brake check, [drove] a large heavy truck in the oncoming lane of a busy wet highway, through a sharp curve on a steep downhill grade, in excess of the posted advisory speed past some five cautionary or warning signs” before the collision. While he had no criminal record, he had 10 driving offences including four for speeding and three for using an electronic device while driving, two of which happened while on charge for the deaths. In rejecting the appeal, the court noted its narrow and deferential standard in reviewing a sentence and Mr. Bagri’s acknowledgment that his sentence was within the range of an appropriate sentence.

I pause to note that in both of these cases the moral blameworthiness of the drivers was very high. That is distinct from the following situations where it was much lower:

- ***R. v. Carleton***, 2012 MBPC 54, 282 Man.R. (2d) 247, where an 18-year-old man drove through a pedestrian crosswalk killing a young woman. The warning lights had been flashing and he passed two lanes of stopped cars. He had not been drinking, speeding, or driving erratically except for some “cat and mouse” driving with another car. It was simple inattention. He received a sentence of 30-days’ imprisonment plus probation.
- ***R. v. Manty***, [2005] M.J. No.137, (Man. Q.B.), where a man in his early 20’s received a suspended sentence for driving through a stop sign and killing three people. The judge noted he was not speeding, not driving erratically and alcohol was not a factor. She found it was a case of “pure inattention and inadvertence: gross negligence of a magnitude that brings it within the definition of dangerous driving.” The sentence was upheld on appeal.
- ***R. v. Muthoka***, 2011 MBCA 40, 268 Man.R. (2d) 26 and ***R. v. Shoyoye***, 2015 MBQB 72, 317 Man.R. (2d) 57, where both drivers, in lapses of driving skill and then panic, stepped on the gas pedal rather than the brake pedal causing collisions where two people and one person died respectively. Ms. Muthoka received a suspended sentence, while Mr. Shoyoye received 90-days’ intermittent incarceration and probation.

All in all, none of these six cases demonstrate a similar degree of moral blameworthiness as I would ascribe to Mr. Recksiedler for his conduct.

[14] I now turn to the aggravating and mitigating circumstances. The key aggravating circumstances are that:

- Mr. Recksiedler did not notice the red light despite it being activated for nine seconds; and, more importantly and no doubt related,
- he was severely fatigued;
- he drank some mixed beer and Pepsi shortly before driving; and
- he was cautioned against driving.

And of course the consequence was devastating, as reflected in the charge. In terms of mitigating circumstances, I note:

- he cooperated with police including providing the names of people he was with during the prior 24 hours, all of whom testified for the Crown and were essential in my finding he was fatigued;
- he has taken a number of positive steps to deal with the types of issues that contributed to his driving, risk-taking and poor judgment that day;
- he suffers from intellectual or psychological issues;
- he has not been involved in any driving events since;
- his Highway Traffic Act record is not of real consequence; and finally
- rehabilitation is a real and live factor.

While I was concerned about contrition, I do accept that his remorse for having killed Ms. Gilbert is genuine. This is difficult to see in a man like Mr. Reckseidler,

but his actions since the event and his words in court, in the context of his background and history, are a sufficient demonstration.

[15] Moving on, while Mr. Recksiedler's criminal record is not an aggravating factor, it is one that entitles him to a degree of leniency. I recognize he would have been about 18 or 19 years old when those offences took place, but most notably the prior driving over .08 conviction is troubling.

[16] Also important in my analysis is the heart-wrenching impact of this event on so many people who knew and loved Ms. Gilbert. By all accounts a bright star was darkened that day. Her mother's moving victim impact statement reveals the raw, blunt devastation of this type of tragedy but also the less noticeable, yet long-lasting and pervasive, obstacles to healing. As everyone will know, nothing I can do will minimize or take away the effects of this tragedy.

[17] What is required by me at this point, as the sentencing judge, is balancing all of the factors noted from s. 718 of the **Code** in the circumstances of this specific case.

[18] I start by adopting the general comments of the British Columbia Court of Appeal in another case, **R. v. Bosco**, 2016 BCCA 55, 382 B.C.A.C. 212, which was referred to in **Bagri**, that:

39 Driving offences are unusual in that otherwise law-abiding citizens like Mr. Bosco may be inclined to commit them without fully appreciating their criminality. Driving is a commonplace activity, and, to varying extents, human frailties like impatience, inattentiveness and impulsivity are ubiquitous. When drivers irresponsibly indulge such frailties from behind the wheel they imperil others in their orbit, sometimes with catastrophic consequences. All drivers are expected to know this and govern themselves accordingly. When they do not and harm ensues, the

result is no mere accident. It is a true crime: *R. v. Giles*, 2012 BCSC 775 at para. 25; *Johnson* at para. 30.

[19] Moving to the specific, overall, I consider Mr. Recksiedler's moral blameworthiness sufficiently significant to require a jail sentence in order to signal the community's concern for the risk-taking he took by driving so fatigued, in spite of a warning, such that he missed a lengthy red light, stopped cars and seeing Ms. Gilbert. This is distinct from other examples of fatigue that drivers may encounter in the normal course of driving that may contribute to an accident, yet not raise the moral blameworthiness to the point of either a conviction for dangerous driving or a jail sentence. As I have stressed, a conviction and sentence are always fact specific. Further, the sentence must be a deterrent to him and others. On the other hand, it must be recognized that many aggravating features that accompany significant jail sentences are absent here. So, for example, there is no excessive speed or aggressive or erratic driving such as in both *Eckert* and *Wallace*. And, the mitigating circumstances are considerable including having made positive strides to straighten out his life and having significant support which lessens his risk of future criminal behaviour. Further, the sentence must be tempered with the recognition that Mr. Recksiedler has never been to jail before. There is nothing easy about it, especially for a person not engrained in a criminal lifestyle. The sentence must clearly make him denounce and deter, but not be so punitive as to unduly test the strength of his rehabilitation, especially considering his depression and

psychological disabilities. His particular vulnerabilities make him more susceptible to a setback than others, and that would not be in anyone's interest.

[20] I already commented about the distinguishing features of the sentencing precedents I was provided. Particularly though, respecting the three-year sentence sought by the Crown, for the reasons given by the sentencing judge in *Bagri*, and notably that he killed four people and his driving record showed a degree of impunity, his culpability is much higher than Mr. Recksiedler's. So too was Mr. Wallace's in terms of his very deliberate and aggressive driving.

[21] As to a driving prohibition, it is part of the sentence and hence part of his penalty and subject to the same sentence factors I have outlined (*Muthoka* at para. 12). I note that while some consider driving to be a privilege, it has, in this day and age, taken significance such that any restriction on a person's ability to drive can dramatically negatively affect their family, education, employment and treatment where necessary, particularly in rural Manitoba where public transportation is poor. So, neither a driving prohibition nor a jail sentence is inconsequential no matter the length. I am satisfied that licencing authorities can adequately address Mr. Recksiedler's competence to drive including a risk assessment. In terms of a just sanction though, despite the hardship, a driving prohibition is required here.

VI. CONCLUSION

[22] In conclusion, for the offence of dangerous operation of a motor vehicle causing death I sentence Mr. Recksiedler to:

- one year in jail; followed by
- a two-year driving prohibition; and
- a two-year supervised probation order with the usual statutory conditions set out in s. 732.1(2) and the following two conditions as recommended by probation services in the pre-sentence report, namely:
 1. attend, participate and complete programming/counseling as supervised and directed by probation services; and
 2. attend, participate and complete an Addictions Foundation of Manitoba assessment as directed by probation services.

Additionally, he will perform 100 hours of community service work as directed by probation services.

[23] Finally, there will be the mandatory victim impact surcharge of \$200.

_____ J.