Citation: R v Devos, 2024 MBCA 23
Date: 20231018
Dockets: AR22-30-09833;
AR22-30-09842

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner

B E T W E E N:

HIS MAJESTY THE KING	)	***C. R. Savage*** *and*
	)	***M. Moorthy***
	)	*for the Crown*
Appellant/Respondent	)	
	)	***R. T. Amy*** *and*
- and -	)	***C. M. A. Glawson***
	)	*for the Accused*
KYLE NOLAN DEVOS	)	
	)	*Appeals heard and*
(Accused) Respondent/Appellant	)	*Decision pronounced:*
	)	***October 18, 2023***

On appeal from: *R v Devos*, 2021 MBQB 189 [the sentence decision];
R v Devos, 2022 MBKB 185 [the conviction decision]

CAMERON JA (for the Court):

Introduction

[1] The accused was convicted of impaired driving causing death (then s 255(3) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*]) and dangerous operation causing death (then s 249(4) of the *Code*) after a trial before a judge in the Court of Queen's Bench. The changes arose in respect of an incident that occurred on April 7, 2018. Those sections have since been repealed and replaced with offences under Part VIII.1 of the *Code*. He was sentenced to six months' imprisonment concurrent on each charge, followed by three

years' supervised probation. He was also prohibited from driving a motor vehicle for two years.

[2] The accused appealed only his conviction for impaired driving causing death. The Crown applied for leave to appeal and, if granted, appealed the sentence of six months' imprisonment in relation to each offence.

[3] After hearing the appeal, we dismissed the conviction appeal; we granted the Crown leave to appeal sentence and allowed its appeal; and varied the sentence to eighteen months' imprisonment to be served concurrently on each charge, with all other aspects of the sentence to remain the same. Finally, we stayed the sentences of imprisonment such that the accused will not be reincarcerated.

[4] At the time of giving our decision, we indicated that reasons would be reserved and released at a later date. These are those reasons.

Facts

[5] The accused was eighteen years of age at the time of the incident. That evening, he had been at a party. He later admitted to police that he had consumed "two maybe three" cans of Bud Light Apple beers just prior to leaving the party. This was just prior to 1:00 a.m., at which time, his friends drove him to his truck that was parked on a field owned by his family.

[6] The accused had a fifteen-year-old passenger in the back seat of his truck who, to the accused's knowledge, was not wearing a seat belt. While driving on the frozen, rutted field the accused decided to do some "spinning"

of his truck for fun. The truck fishtailed and rolled over, resulting in the death of the passenger.

[7] Police arrived at the scene at approximately 1:50 a.m. The investigating officer (the officer) approached the accused, who was now in the back seat of his father's vehicle, and asked him to exit the vehicle. At that time, the officer testified that the accused had a smell of alcohol on his breath. This caused the officer to "[begin] the possibility of an impaired investigation."

[8] After a member of emergency services checked on the accused's well-being, the officer asked the accused to come to his police vehicle. The officer indicated that the accused appeared to be walking slowly and carefully. The officer felt this may be another sign of impairment.

[9] The officer seated the accused in the rear passenger side seat of the police vehicle, proceeded to the driver's seat, entered the vehicle and turned on an interior light. He advised the accused that he was being investigated for impaired driving causing death and advised the accused of his right to counsel. Once the two were in the police vehicle, the officer noticed that the accused had red, glazed eyes and that a strong odour of alcohol quickly filled the cab. The combination of the smell of alcohol emanating from the accused when the officer first made contact with him, in addition to the accused's red, glazed eyes, slow and careful walk and the very strong odour of alcohol upon entering the police vehicle caused the officer to believe that the accused's ability to drive was impaired by alcohol. The officer testified that the determining factor was the strong odour of alcohol that he detected once the accused was in the police vehicle.

[10] Accordingly, the officer arrested the accused for impaired driving causing death and made a breath demand under the former s 254(3) of the *Code*. The accused was taken to a local detachment where he gave two breath samples, each registering a blood alcohol concentration (BAC) of 80 milligrams of alcohol in 100 millilitres of blood (.08).

The *Voir Dire*

[11] Prior to the commencement of the trial, a *voir dire* was held to determine the admissibility of the breath samples. The accused argued that his right to be secure against unreasonable search or seizure pursuant to s 8 of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*] had been infringed. Specifically, he argued that the officer did not have reasonable and probable grounds to make the breath demand. The accused moved to have the resulting evidence excluded pursuant to s 24(2) of the *Charter*.

[12] In dismissing the motion, the *voir dire* judge found that the officer's subjective belief that the accused's ability to operate a motor vehicle was impaired by alcohol was objectively supported by the facts (see *R v Shepherd*, 2009 SCC 35 at para 17 [*Shepherd*]). In this regard, the *voir dire* judge rejected the accused's argument that the video recording of him taken from the dashboard camera in the police vehicle (the video) demonstrated that the officer was wrong when he said that the accused walked slowly and deliberately from his father's truck to the police vehicle. Regarding the accused's submission that his red and glazed eyes could have been caused by him tearing up when the officer advised him that his friend had passed away,

the *voir dire* judge noted that there was no evidence regarding when the accused learned of this fact in relation to when the officer made his observation. Giving the benefit to the accused, the *voir dire* judge discounted his red, glazed eyes as a factor demonstrating impairment.

[13] The *voir dire* judge also considered the officer's evidence that a very strong odour of alcohol filled the police vehicle after the accused had entered it. He noted the officer's ten years of experience in dealing with impaired drivers and accepted the officer's opinion that such a strong odour was indicative of significant alcohol consumption.

[14] The *voire dire* judge cited *R v Gunn*, 2012 SKCA 80 at para 9, to the effect that all that the officer required was reasonable and probable grounds to believe that the accused's ability to drive a motor vehicle was even slightly impaired. Subsequently, the *voir dire* judge concluded that the officer's subjective belief was objectively reasonable.

[15] In the result, the *voir dire* judge found that there was no breach of the accused's right to be secure against unreasonable search or seizure. However, he stated that, if he were wrong in that regard, he would have dismissed the accused's application to have the evidence excluded pursuant to s 24(2) of the *Charter*.

The Trial

[16] The commencement of the trial was delayed due to the COVID-19 pandemic. In the interim, the *voir dire* judge retired and the trial judge assumed conduct of the case.

[17] At the trial, among other evidence, the Crown called the officer who gave the same evidence as he had at the *voir dire*. The Crown tendered a statement given by the accused to the police wherein he told the police that "he drank one or two or three" cans of Bud Light Apple beers (four per cent alcohol) (conviction decision at para 4) just prior to driving.

[18] The Crown called a toxicologist to provide expert evidence (the blood alcohol expert) who extrapolated that the accused's BAC would have been between 96 and 113 milligrams of alcohol in 100 milliliters of blood at the time of driving. However, this calculation was based on the assumption that there had been no alcohol consumption in the thirty minutes before the rollover. The blood alcohol expert gave a number of scenarios considering the timing and the BAC readings being at .08. Assuming the accused had drank three cans of Bud Light Apple within thirty minutes of driving and that they were unabsorbed at the time of driving, this would have left 45 milligrams per cent in his system which was unaccounted for. On the other hand, the blood alcohol expert stated that, to have registered a reading of .08 at the time that the breath samples were given, he would have had to consume a minimum of 5.9 cans of Bud Light Apple within thirty minutes of driving but, more realistically, nine to twelve cans.

[19] The Crown also called a forensic collision reconstruction expert who testified that the accused's truck was going between 50 and 60 kilometres per hour at the time of the incident and that it rolled over in the middle of a "fishtail" or "J-hook". He described the manner of driving as "high risk or dangerous".

[20] Based on the evidence of "bolus drinking", the trial judge had a reasonable doubt that the accused's BAC was over .08 at the time of driving and thus, acquitted him of that charge (see conviction decision at para 1).

[21] The trial judge convicted the accused of driving impaired causing death. In his reasons, he stated that:

- He accepted the officer's evidence that there was a strong odour of alcohol coming from the accused, particularly in the police vehicle;

- The blood alcohol expert testified that a BAC between "50 to 100 mg% is associated with impairment" (conviction decision at para 50) and that the performance of skills associated with driving will decline;

- The .08 BAC readings of the accused suggest that he "may well have consumed more than three drinks in total" (conviction decision at para 52); and

- There was overwhelming evidence that the accused demonstrated poor judgment.

[22] In convicting the accused, the trial judge relied on *R v Stellato* (1993), 788 CCC (3d) 380 at 384, 1993 CanLII 3375 (ONCA), aff'd 1994 CanLII 94 (SCC) [Stellato]; and *R v Bush*, 2010 ONCA 554 [*Bush*]. Both of those cases state that "any degree of impairment [ranging] from slight to great" (*Bush* at para 47, citing *Stellato* at p 384) is sufficient to establish the offence of driving impaired.

The Conviction Appeal

[23] The accused raises two issues regarding his conviction. First, he submits that the *voir dire* judge erred in admitting into evidence the results of the breath samples he provided. Next, he argues that the trial judge erred in convicting him of driving while impaired causing death.

The Admission of the Breath Samples

[24] The accused asserts that the *voir dire* judge erred when he found that the officer had reasonable and probable grounds to make a breath demand. In this regard, he states that the *voir dire* judge misapprehended the evidence when he rejected the accused's argument that the video demonstrated that he did not walk to the police vehicle in a slow and careful manner as described by the officer. The accused argues that, absent the manner of walking and red glazed eyes (which the *voir dire* judge discounted), the only other evidence of impairment was the strong odour of alcohol in the police vehicle, which is not sufficient to form reasonable and probable grounds to make a breath demand.

[25] We start our analysis with the observation that in *R v Slippery*, 2014 SKCA 23, the Court recapped that the assessment of reasonable and probable grounds involves the court considering "the facts known to an officer which were available at the time [they] formed the requisite belief." It is the totality of the evidence that is to be considered (*ibid* at para 21). The reason for the emphasis on the totality of the evidence is "to avoid concentrating on individual pieces of evidence which are offered to establish the existence of reasonable and probable grounds" (*ibid* at para 22).

[26] As explained in *R v Farrah (D)*, 2011 MBCA 49 at para 7, a decision as to whether a *Charter* breach occurred and the application of the law to the facts are subject to review on the standard of correctness. The evidentiary foundation or findings of fact are reviewable on the standard of palpable and overriding error (*ibid*; see also *Shepherd* at para 20).

[27] In *R v Kionke*, 2020 MBCA 32, Steel JA reinforced that a misapprehension of evidence must go to the "substance of the evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence" (at para 19). Further, "[t]he error must be readily obvious . . . [and] is not to be confused with a different interpretation of the evidence" (*ibid*).

[28] At the *voir dire*, counsel for the accused measured how much time it took the officer to walk from the police vehicle to the accused's father's vehicle. He then compared it to the time that it took the accused to do the return walk from his father's vehicle to the police vehicle. He submits that each took the same amount of time. Based on this observation, the accused argues that he was not walking slowly and that the video contradicts the officer's evidence in this regard.

[29] The accused also relies on the trial judge's finding who disagreed with the *voir dire* judge that the accused's manner of walking to the police vehicle was slow or careful. The opinion of the trial judge was that the accused appeared to be walking in a normal manner on the video.

[30] The findings of the *voir dire* judge with respect to video evidence are to be treated as findings of fact. Therefore, the standard of review is

palpable and overriding error (see *R v Abdi*, 2011 ONCA 446 at para 6; *R v Melnychuk*, 2008 ABCA 189 at para 5).

[31] In this case, the *voir dire* judge stated that he considered the video to be grainy, such that he could not determine the accused's manner of walking. He rejected the accused's analysis of the video on the basis that the officer had the accused under observation longer than what was shown in the video. Given that he could not reach an independent conclusion regarding the video, he chose to accept the evidence of the officer.

[32] Despite the accused's argument, we are of the view that the real issue concerns the *voir dire* judge's finding that the officer's evidence was credible (see *Slippery* at para 42). Again, this is subject to deferential appellate review.

[33] The accused's submission that the trial judge did not view the video in the same manner as the *voir dire* judge does not indicate palpable and overriding error. The video evidence is reasonably subject to interpretation.

[34] In this regard, we would also observe that the trial judge differed from the *voir dire* judge regarding the possible cause for the accused's red and glazed eyes. The trial judge found that it was not evident from the video that the accused was holding back tears when he was told that his passenger was deceased; the *voir dire* judge accepted that his teary eyes could have been caused by his learning of the loss of his passenger.

[35] We would only add that a review of the video leads to the conclusion that neither the *voir dire* judge nor the trial judge is necessarily mistaken. In our view, the accused appears to be walking slowly and carefully as he

commences his walk to the police vehicle, but picks up momentum as he proceeds.

[36] We are therefore not convinced that the *voir dire* judge misapprehended the evidence, erred in his finding of credibility regarding the officer's evidence or that he made any palpable and overriding error regarding his resulting finding of fact.

[37] Accepting the factual findings of the *voir dire* judge, we are not persuaded that the *voir dire* judge erred in finding that the evidence that he accepted objectively supported the officer's subjective belief that the accused's ability to operate a motor vehicle was impaired by alcohol.

[38] Having found no breach of s 8 of the *Charter*, it is unnecessary to determine whether the *voir dire* judge erred in his s 24(2) analysis, save to state that, read in context, we are not convinced that the *voir dire* judge committed a reviewable error.

Impaired Driving Causing Death

[39] Next, the accused submits that the trial judge erred in convicting him of impaired driving causing death on the basis that the verdict was unreasonable.

[40] In considering whether a verdict is unreasonable, an appellate court must determine if it is one that a properly instructed jury could have rendered. An appellate court may also find a verdict unreasonable where a trial judge has drawn an inference or made a finding of fact essential to the verdict that is either plainly contradicted by the evidence or shown to be otherwise

incompatible with other evidence that has not been contradicted or rejected by the trial judge (see *R v RP*, 2012 SCC 22 at para 9).

[41] Relying on *R v Andrews*, 1996 ABCA 23, the accused argues that the trial judge erred in failing to distinguish between "slight impairment" and "slight impairment of one's ability to operate a motor vehicle" (at para 19). He also argues that the trial judge conflated an impaired ability to drive with decreased judgment (*ibid* at paras 19, 21-22, 31). In support of this argument, the accused states:

- it was illogical for the trial judge to have accepted that the accused consumed alcohol just prior to driving (and therefore, the alcohol would have been unabsorbed at the time of driving), but then to convict of impaired driving;

- the trial judge wrongly accepted the blood alcohol expert's estimates of the accused's rate of alcohol absorption as she did not have his correct weight and that, even assuming the estimate of his weight that she did use, her testimony demonstrated that he could have had 45 milligrams per cent in his system, rather than the 50 milligrams per cent that the blood alcohol expert indicated is associated with impairment of the performance of the skills required for driving;

- the trial judge erred in relying on the impaired judgment of the accused as supportive of the conclusion that his ability to drive was impaired by alcohol consumption; and

- there was no evidence that any poor driving exhibited by the accused was due to impairment.

[42] In brief, the accused raises a number of issues regarding the trial judge's finding that his ability to drive a motor vehicle was impaired and that it caused the rollover, which we will consider next.

Impairment and Expert Evidence

[43] Regarding the issue of impairment, a reading of the trial judge's reasons as a whole demonstrates that he did not confuse the issue of impairment *simpliciter* with the legal test that one's ability to operate a motor vehicle must be impaired by alcohol. He clearly referenced the expert evidence and case law that directly spoke to the issue of impaired ability to operate a motor vehicle.

[44] It was also not illogical for the trial judge to have had a reasonable doubt on the charge of driving over .08 based on the accused's statement that he had consumed the alcohol just prior to driving, yet still find him guilty of impaired driving. The trial judge clearly inferred that some alcohol had been absorbed into the accused's system at the time of driving. He did not unequivocally accept the accused's statements regarding his alcohol consumption.

[45] The trial judge was not required to find that the accused had a BAC under 50 milligrams per cent at the time of the rollover, simply because that was the most favourable scenario for the accused. According to the blood alcohol expert, her calculation of this theoretical scenario assumed that the three cans of Bud Light Apple that the accused said that he drank just before

driving was entirely unabsorbed at the time of the rollover. While giving the benefit to the accused by providing the most favourable scenario, the blood alcohol expert said that "realistically speaking" it was not possible for the alcohol to be entirely unabsorbed. The blood alcohol expert testified that, "typically alcohol absorbs really quickly so within like 10, 15 minutes time when they start drinking the majority of alcohol would have been absorbed already".

[46] Furthermore, as pointed out by the Crown, even if the accused's BAC had been at 45 milligrams per cent, it was the blood alcohol expert's testimony that persons below 50 milligrams per cent might be impaired in their ability to multi-task, which driving is considered to be.

Impaired Judgment

[47] In convicting the accused, the trial judge relied on indicia of poor judgment by the accused including that he (i) deliberately violated the term of his graduated licence that he not drive with any alcohol in his system; (ii) chose to drive while his passenger was not wearing a seatbelt; (iii) chose to spin his truck in the dark on a frozen, rutted field; and (iv) the fact that he rolled his vehicle suggested poor driving judgment.

[48] The accused submits that the decision to drink and drive, including while his passenger was not wearing a seatbelt, was one that the accused made when he was sober. He argues that the cause of his poor judgment was just as likely to be associated with his age.

[49] While poor judgment cannot be considered to be evidence in every case, the jurisprudence demonstrates that it may be a factor in the

consideration of whether one's ability to drive is impaired. In *Bush*, the Ontario Court of Appeal commented that, "[s]light impairment to drive relates to a reduced ability in some measure to perform a complex motor function, whether impacting on perception or field of vision, . . . reaction or response time, judgment and regard for the rules of the road" (at para 47).

[50] In *R v Hinkley*, 2013 ABCA 207, the accused was convicted of impaired driving causing death in circumstances where he drove a tractor over his mother while working on the family farm. The trial judge relied on the accused's BAC, as well as the poor judgment he exhibited by failing to adjust his seat. On appeal, the Court stated: "The trial judge expressly made reference to the accused's lack of judgment in not adjusting the driver's seat to a height where his ability to see what was in front of him was improved. Poor judgment is also an indicator of impairment and we see no error in the trial judge's finding" (at para 9).

[51] Also see two related Ontario lower court decisions in which the courts considered poor judgment as indicative of impairment:

- *R v Gabriel*, 2020 ONSC 6028 at para 59: finding that, after having just consumed four drinks, taking passengers on an ATV not meant for passengers, one of whom was not wearing a helmet, was evidence of impaired judgment; and

- *R v Clucas*, 2015 ONCJ 227 at paras 208-17: finding of impaired driving relying heavily on the accused's decision making, separate from the accused's manner of driving.

[52] Based on the above, we are not convinced that the trial judge erred in considering the poor judgment exhibited by the accused as being indicative of impairment.

Causation

[53] The accused argues that the trial judge failed to assess whether the accused's impairment was a contributing cause of the rollover. In support of this argument, he repeats that his ability to drive was not impaired as evidenced by the fact that he was able to manoeuvre a fishtail. We disagree.

[54] Given that the accused decided to do some "spinning" on a frozen, rutted field after having consumed alcohol, with a passenger who was not wearing a seatbelt and the findings of impairment that the trial judge made, we are not persuaded that the trial judge erred in concluding that the accused's impairment was a contributing cause of the rollover.

The Sentence Appeal

[55] As earlier indicated, we granted the Crown leave to appeal the sentence of six months' imprisonment concurrent on the impaired driving causing death and the dangerous driving causing death convictions. We allowed the appeal and imposed a sentence of eighteen months' imprisonment concurrent on both charges (which we stayed), but otherwise we did not disturb the rest of the sentence imposed.

The Reasons of the Trial Judge

[56] At the sentencing hearing, the Crown suggested that a sentence of four years' imprisonment be imposed, plus a five to ten-year driving

prohibition. The accused suggested a sentence of three years of supervised probation or, in the alternative, an intermittent sentence of imprisonment up to ninety days.

[57] In his reasons for sentence, the trial judge noted that the accused had filed 129 letters attesting to his character. He stated that the letters were from friends, relatives and people in the accused's community. The letters expressed the accused's strong work ethic, volunteer work and described his personality and remorse for his actions.

[58] As well, the trial judge noted the accused's apology and expression of remorse to the deceased's family. The parents of the deceased expressed their profound grief, but also their support for the accused.

[59] The pre-sentence report noted that the accused was at a very low risk to reoffend and recommended a community-based sentence that would include the accused speaking about his experience to other young people/drivers.

[60] In his reasons, the trial judge cited the relevant sentencing provisions of the *Code*, as well as case law regarding sentences imposed for offences of impaired driving and dangerous driving causing death. In none of the cases reviewed by the trial judge did an accused receive a sentence as low as six months' imprisonment for the offence of impaired driving causing death.

[61] Rather, the trial judge appeared to distinguish the cases he reviewed, stating that none of them "mentioned 129 Character Letters" (sentence decision at para 67). He said that the accused's character exhibited the

"essential traits – the essential measure of a man" (*ibid* at para 71) and held that it would be unfair to ignore his kindness, empathy and integrity in crafting a sentence.

[62] Absent *Gladue* factors (see *R v Gladue*, 1999 CanLII 679 (SCC)), the trial judge said that he found it difficult to conceive of a more sympathetic case. While he denied that he was finding exceptional circumstances, he found that this was a rare case with extremely unusual facts that justified a sentence well outside of the range set by this Court in *R v Ruizfuentes*, 2010 MBCA 90 [*Ruizfuentes*].

The Positions of the Parties

[63] The Crown argues that the trial judge erred in overemphasizing the character of the accused as a mitigating factor. It argues that, in a case such as this, denunciation and deterrence are paramount sentencing considerations. Therefore, the character of the accused takes on a lesser role (see *R v McMillan (BW)*, 2016 MBCA 12 at para 12).

[64] Next, it argues that the sentence imposed was unfit, especially in light of the fact that it was concurrent on both the impaired driving causing death and the dangerous driving causing death offences. It submits that such a sentence resulted in the accused being given a "free ride" for the latter offence (see *R v McLean*, 2022 MBCA 60 at para 78).

[65] In addition, the Crown submits that the trial judge misapplied the range of sentence for impaired driving causing death and that his review of the case law did not take into account the harsher penalties that are now being imposed.

[66] The accused argues that the trial judge did not err when he described the case as unique. He submits that it was not just the quantity of the letters, but also their content, including that the death of the passenger and the accused speaking about it was already providing a deterrent effect on the community.

[67] The accused submits that sentencing an offender is inherently personal and fact-reliant and that the emphasis the trial judge put on the accused's mitigating factors contributed to the proportional sentence he imposed.

[68] Regarding fitness of sentence, the accused refers to the deferential standard of review for sentencing decisions and that to be unfit, a sentence must be "clearly unreasonable" (*R v Shropshire*, 1995 CanLII 47 (SCC) at para 46; see also *R v LM*, 2008 SCC 31 at paras 14-15). He reinforces that sentencing ranges are guidelines and not rules and, in some circumstances, a fit sentence may lay far from any starting point and outside the range (see *R v Friesen*, 2020 SCC 9 at paras 37-38 [*Friesen*]).

[69] He asserts that his case was unique in that he was acquitted of the driving over .08 offence and that the driving occurred on a private farm field, thereby lessening the risk to the public than an offence committed on a busy roadway. He also submits that, because the offence occurred in a small community where he resided, general deterrence will have a larger impact where the passenger was well known.

Standard of Review

[70] In *Friesen*, Wagner CJ and Rowe J, writing for a unanimous court, reiterated that the role of appellate courts in sentence appeals is to ensure

"both that the principles of sentencing are correctly applied and that sentences are not demonstrably unfit" (at para 34). Sometimes an appellate court must also set a new direction "[w]hen a body of precedent no longer responds to society's current understanding and awareness of the gravity of a particular offence and [the] blameworthiness of particular offenders or to the legislative initiatives of Parliament" (*ibid* at para 35).

[71] That said, the standard by which appellate courts review sentencing decisions is deferential. Appellate intervention is justified only where the sentence is demonstrably unfit or the sentencing judge made an error in principle that impacted the sentence. One such error is where there has been an erroneous consideration of an aggravating or mitigating factor. As stated in *Friesen* at para 26:

> . . . The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse* [*R v Lacasse*, 2015 SCC 64], at para. 49). . . .

Analysis and Decision

[72] As we explain below, in this case, the trial judge erred in principle by overemphasizing the personal circumstances of the accused, which significantly impacted the sentence that he imposed. We are of the view that the sentence of six months' imprisonment concurrent on the impaired driving causing death and the dangerous driving causing death offences constituted an unfit sentence.

[73] As emphasized in *R v Lacasse*, 2015 SCC 64 [*Lacasse*], impaired driving offences still cause more deaths than any other offence in Canada despite countless awareness campaigns (see para 7). This has been the case since, at the least, the Supreme Court of Canada decision in *R v Bernshaw*, 1995 CanLII 150 (SCC), wherein Cory J recognized that driving impaired is "clearly the crime which causes the most significant social loss to the country" (at para 16).

[74] In keeping with their role to provide guidance, appellate courts have developed sentencing ranges and starting points to ensure parity and proportionality of sentences. These sentencing ranges do so by guiding the exercise of discretion of sentencing judges and to "prevent any substantial and marked disparities in the sentences imposed on offenders for similar crimes committed in similar circumstances" (*Lacasse* at para 2) [emphasis added]. While parity is a guiding principle, proportionality is the fundamental principle of sentencing and is codified as such in the *Code* (see *Friesen* at para 30).

[75] In setting sentencing ranges, courts have incorporated mitigating factors such as good character (see *R v Parranto*, 2021 SCC 46 at para 24 [*Parranto*]).

[76] Of course, sentencing ranges and starting points are "not hard and fast rules" (*Lacasse* at para 60). Rather, they are guidelines and deviation from them "does not automatically justify appellate intervention" (*R v Suter*, 2018 SCC 34 at para 25 [*Suter*]; see also *Lacasse* at para 67).

[77] Sentencing ranges can be altered either deliberately after careful consideration by the courts or practically as a consequence of court decisions

that have such an effect (see *Parranto* at para 26, quoting *R v Wright*, 2006 CanLII 40975 at para 22 (ONCA)).

[78] In 2010, this Court, in *Ruizfuentes*, conducted a review of sentencing decisions from across the country for the offence of impaired driving causing death. Justice Chartier stated that the cases showed a trend toward higher sentences. As well, he noted changes in the legislation eliminating the option of a conditional sentence for bodily harm offences and increasing minimum sentences for impaired driving causing death and other drinking and driving offences. Relevant to this case, he increased the range of sentence for the crime of driving impaired causing death to two to five years for offenders "who have no prior convictions for drinking and driving or serious personal injury offences" (*ibid* at para 22).

[79] Five years later, in *Lacasse*, the Supreme Court upheld a sentence of six and one-half years' imprisonment for a youthful first offender who pled guilty to two counts of impaired driving causing death.

[80] In *Suter*, the accused was convicted of refusing to provide a breath sample after causing an accident, resulting in death pursuant to s 255(3.2) of the *Code*. Justice Moldaver, writing on behalf of the majority, stated (*Suter* at paras 26-27):

> Both the sentencing judge and the Court of Appeal correctly held that the sentencing range for the s. 255(3.2) offence is the same as for impaired driving causing death. In my view, this range also includes the offence of driving "over 80" causing death (under s. 255(3.1) of the *Criminal Code*). All three of these offences carry a maximum penalty of life imprisonment — an indication that Parliament intended that they be treated as equally serious. Moreover, they all have the same overarching objective: to deter drunk driving.

> The sentencing range for these offences has been quite broad — low penitentiary sentences of 2 or 3 years to more substantial penitentiary sentences of 8 to 10 years — because courts have recognized that they cover a broad spectrum of offenders and circumstances: see *R. v. Junkert*, 2010 ONCA 549, 103 O.R. (3d) 284, at para. 40; *R. v. Kummer*, 2011 ONCA 39, 103 O.R. (3d) 641, at para. 21; *Lacasse*, at para. 66. An offender's level of moral blameworthiness will vary significantly depending on the aggravating and mitigating factors in any given case. In unique cases, mitigating factors, collateral consequences, or other attenuating circumstances relating to the offence or offender may warrant a sentence that falls below this broad range. By the same token, the aggravating features in a particular case may warrant the imposition of a sentence that exceeds this broad range. As long as the sentence meets the sentencing principles and objectives codified in ss. 718 to 718.2 of the *Criminal Code*, and is proportionate to the gravity of the offence and the level of moral blameworthiness of the offender, it will be a fit sentence.

[81] Since *Ruizfuentes*, there has been somewhat of a general trend demonstrating an increase in sentences imposed in Manitoba for the offence of impaired driving causing death where an offender has no previous or related record. See, for example:

- *R v Goodman (TS)*, 2023 MBPC 61, leave to appeal to MBCA requested: the accused was sentenced to six years' imprisonment for operating a conveyance while impaired causing death and one year consecutive for failing to stop where accident involving death;

- *R v Quevedo* (5 July 2023), Brandon CR18-02-01836 (MBKB), leave to appeal to MBCA requested: the accused was sentenced to six years' imprisonment for impaired driving causing death;

- *R v Stuart*, 2018 MBQB 54: four years' imprisonment concurrently imposed on a nineteen-year-old offender for impaired driving causing death and dangerous driving causing death;

- *R v Hansell*, 2015 MBQB 109: twenty-six months' imprisonment concurrent for the offences of impaired driving causing death and dangerous driving causing death for a youthful first offender; and

- *R v Smoke*, 2014 MBCA 91: four and one-half years' imprisonment for impaired driving causing death for an eighteen-year-old Aboriginal offender with no prior record of traffic offences and a limited and unrelated criminal record.

[82] Jurisprudence outside of Manitoba demonstrates increased emphasis on denunciatory sentences. See, for example:

- *R v Randhawa*, 2020 ONCA 38: seven years' imprisonment for three counts of impaired driving causing death for a youthful offender who suffered very serious injuries, including a traumatic brain injury;

- *R v Davis-Locke*, 2020 ONCJ 13: six years' imprisonment for a youthful first offender for impaired driving causing death and four years' imprisonment concurrent for impaired driving causing bodily harm;

- *R v Altiman*, 2019 ONCA 511 at para 70: wherein the Court stated that there was a range of four to six years for impaired driving causing death where the offender does not have a prior criminal or driving record and a range of between seven and one-half to twelve years where the offender has a prior criminal or driving record.

[83] Having said that, there are situations wherein courts have imposed a sentence below the two-year range. See, for example:

- *R v Gejdos*, 2017 ABCA 227: a ninety-day intermittent sentence increased to nine months' imprisonment for impaired driving causing death and six months consecutive for leaving the scene of an accident; and

- *R v Coutu*, 2016 MBQB 5: eighteen months' imprisonment imposed for driving impaired causing death.

[84] In *Suter*, the majority was of the view that a sentence of fifteen to eighteen months' imprisonment would be a fit disposition that recognized the mitigating factors in that case. These factors included that the accused was found not to be impaired at the time of the collision, that he failed to provide a breath sample due to erroneous legal advice and that he was attacked by vigilantes who had cut off his thumb with pruning shears (*ibid* at para 92). The majority emphasized that, but for those circumstances, "a sentence of three to five years in the penitentiary would not have been out of line" (*ibid* at para 93).

[85] In the end, the majority imposed a sentence of time served, noting that the accused had "already served just over 10 and a half months of his custodial sentence" (*ibid* at para 103) and that he had spent nine months awaiting the Court's disposition (out of custody). They were of the view that to impose what "would have been a fit disposition at the time he was sentenced would cause [the accused] undue hardship, and serve no useful purpose" (*ibid*).

Error by the Trial Judge and Fit Sentence

[86] The trial judge stated that denunciation and deterrence were factors in imposing a sentence of six months' imprisonment. However, it is clear that he underemphasized these factors and overemphasized the mitigating effects of the letters provided by the community, as well as the accused's personal circumstances. While it is not necessary to find that these errors resulted in an unfit sentence in order for this Court to impose its own sentence (see *Friesen* at paras 25-28), we are also of the view that the sentence is unfit. The sentence imposed was not merely outside of the range, it constituted a "substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes" (*Parranto* at para 69, quoting *R v M (CA)*, 1996 CanLII 230 (SCC)).

[87] In consideration of the accused's young age, lack of prior record and expression of remorse, it is important to recall that, in *Lacasse*, the Court emphasized at paras 73-74:

> While it is true that the objectives of deterrence and denunciation apply in most cases, they are particularly relevant to offences that might be committed by ordinarily law-abiding people. It is such people, more than chronic offenders, who will be sensitive to harsh

sentences. Impaired driving offences are an obvious example of this type of offence, as this Court noted in *Proulx* [*R v Proulx*, 2000 SCC 5]:

> . . . dangerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by otherwise law-abiding persons, with good employment records and families. Arguably, such persons are the ones most likely to be deterred by the threat of severe penalties: see *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145 (Ont. C.A.), at p. 150; *R. v. Biancofiore* (1997), 119 C.C.C. (3d) 344 (Ont. C.A.), at paras. 18-24; *R. v. Blakeley* (1998), 40 O.R. (3d) 541 (C.A.), at pp. 542-43. [para. 129]

As I mentioned in the introduction, courts from various parts of the country have adhered to the principle that the objectives of deterrence and denunciation must be emphasized in imposing sentences for this type of offence. For example, the Quebec Court of Appeal made the following comments in *Lépine* [*R v Lépine*, 2007 QCCA 70]:

> [TRANSLATION] Sentences imposed for crimes involving dangerous operation of a motor vehicle while under the influence of alcohol must be aimed at deterring the public generally from driving in that manner. This Court has therefore upheld significant custodial sentences for such offences: *R. v. Kelly*, J.E. 97-1570 (C.A.).
>
> Very often, the objective gravity of such crimes is based more on their consequences and the extent of those consequences than on consciousness of guilt, which is why Parliament has increased the maximum sentences on the basis of the consequences of the operation of the vehicle.
>
> A loss of human life caused by the operation of a vehicle while impaired is a consequence that cannot be remedied, which is why it is important for the courts to convey a message of denunciation to those who put themselves in potentially dangerous situations, even if the offender does not have a criminal record and did not wish to cause the tragic accident. [paras. 19-21]

[88] Accepting the mitigating factors identified by the trial judge, we are of the view that a sentence of eighteen months' imprisonment is appropriate in the circumstances of this case—which we imposed at the hearing. While the focus of these reasons has been on the impaired driving aspect of the case, a concurrent sentence of eighteen months' imprisonment on the charge of dangerous driving causing death was also imposed and is appropriate in these circumstances. Together, they reflect the serious nature of the offences committed by the accused.

[89] In some circumstances, this Court has ordered that an increased sentence be stayed. Amongst other things, a court may consider (1) the seriousness of the offence, (2) the elapsed time since the offender gained their freedom and the date the appellate court hears and decides the matter, (3) whether any delay is attributable to one of the parties and (4) the impact of reincarceration on the offender (see *R v Letkeman*, 2021 MBCA 68 at para 91).

[90] In this case, the accused was charged in the spring of 2018, and was sentenced on September 29, 2022. He had long since served his period of imprisonment and was completing his period of probation at the time of the appeal hearing on October 18, 2023. The accused had not been reinvolved. In these circumstances and given the other personal circumstances of the accused, we determined that the sentence of imprisonment should be stayed.

Disposition

[91] As earlier indicated, at the hearing of the appeal, the accused's conviction appeal was dismissed.

[92] The Crown's application for leave to appeal was granted and the sentences for the impaired driving causing death and dangerous driving causing death convictions were each increased to 18 months' imprisonment, to be served concurrently. We stayed the increased sentence of imprisonment. In all other respects, the sentence remains the same.

Cameron JA

Steel JA

Pfuetzner JA