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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,	)	Melissa A. Hazelton
	)	Charles P.R. Murray
respondent,	)	for the Crown
	)	
- and -	)	Matthew T. Gould
	)	Zachary B. Kinahan
CHANDBIR SINGH SANDHU,	)	for the (accused) applicant
	)	
(accused) applicant.	)	Judgment delivered:
	)	December 7, 2022

TURNER J.

I. INTRODUCTION

[1] On May 30, 2018, Mr. Sandhu pled guilty to operating a motor vehicle with a blood alcohol concentration in excess of 80 mg in 100 mL of blood ("driving over 80") in Provincial Court. He received the mandatory minimum sentence of a $1,000 fine. Because he is a foreign national, Mr. Sandhu will be deported given that he has a criminal record. He submits that he should have received a conditional discharge because that would not result in a criminal record. However, given that the offence of driving over 80 has a mandatory minimum sentence, a discharge is not available.

[2] Mr. Sandhu brings a constitutional challenge to the mandatory minimum sentence pursuant to sections 7 and 12 of the ***Canadian Charter of Rights and Freedoms***. He says that the mandatory minimum sentence is grossly disproportionate in his circumstances, and therefore is in violation of sections 7 and 12 of the ***Charter***, because it requires the Court to impose a criminal record.

[3] Mr. Sandhu also argues that amendments to ***The Highway Traffic Act***, C.C.S.M. c. H60 ("***HTA***"), that now allow a peace officer to issue an immediate administrative penalty (a roadside driving prohibition) significantly impact the proportionality of the mandatory minimum sentence. He says that because of the amendments, it is now possible that his conduct would not have resulted in a criminal charge.

[4] The Crown replies that the mandatory minimum sentence is not grossly disproportionate, even in light of the immigration consequences to Mr. Sandhu. It says that a conditional discharge is simply not an appropriate sentence on a charge relating to impaired driving.

[5] The Crown further argues that Mr. Sandhu's constitutional challenge should not be directed toward the ***Criminal Code*** of Canada. Rather, it should be directed toward the provisions of the ***Immigration and Refugee Protection Act***, S.C. 2001, c. 27 ("***IRPA***"), that require the deportation of a foreign national who is convicted of a criminal offence.

II. BACKGROUND

[6] Shortly after 10 p.m. on April 15, 2017, police observed a motor vehicle travelling on Portage Avenue, in Winnipeg. Mr. Sandhu was the driver. Police observed

Mr. Sandhu's vehicle travelling below the speed limit and swerving between lanes, and then accelerating rapidly to approximately 100 km/h (in a 60 km/h zone). As officers tried to pull him over, the vehicle hit the curb before ultimately coming to a stop.

[7] Police observed that Mr. Sandhu's eyes were bloodshot and glassy, there was a strong odour of liquor on his breath, his speech was slurred, and he was slow to respond to commands.

[8] Officers had reasonable grounds to believe that Mr. Sandhu's ability to operate a vehicle was impaired by alcohol, and he was arrested. Mr. Sandhu stated, "I'm sorry, I don't know the rules here in Canada. I didn't know about drinking and driving."

[9] Officers demanded that Mr. Sandhu provide a sample of his breath. Mr. Sandhu provided two breath samples, both with a blood alcohol concentration of 150 mg in 100 mL of blood.

[10] Prior to Mr. Sandhu's guilty plea on May 30, 2018, counsel advised the Provincial Court judge that Mr. Sandhu was seeking permanent resident status in Canada and that a key issue on the application would be whether he had been convicted of a criminal offence. Counsel agreed, and the Court accepted, that the sentencing would be delayed until 2019 to facilitate the advancement of the application.

[11] The sentencing was adjourned six times over the following twenty months. On January 24, 2020, counsel for Mr. Sandhu sought a further adjournment in order to argue a constitutional challenge to the mandatory minimum sentence. The adjournment was denied. Mr. Sandhu was sentenced to the mandatory minimum sentence of a $1,000 fine.

[12] Mr. Sandhu filed an appeal to this Court on the ground that the last adjournment request should have been granted. The appeal was allowed (see 2021 MBQB 22) and, as a result, this matter proceeded before me as a new sentencing, which included the constitutional challenge.

III. EVIDENCE AT THE NEW HEARING

[13] Mr. Sandhu was born and raised in India. He came to Winnipeg in 2014 as a student. He attended the University of Winnipeg and obtained a post-degree diploma in network security. Following his graduation, he obtained work authorization in Canada to work as a temporary foreign worker. He was hired as a night dispatcher with 4Tracks Ltd., a transportation company, and continues to work there today.

[14] While living in India, Mr. Sandhu never drank alcohol. Between his arrival in Canada and April 14, 2017, Mr. Sandhu testified that he would have had one beer at social events. He had no experience with hard liquor.

[15] On April 15, 2017, Mr. Sandhu attended a house party with a friend. He arrived at about 7 p.m. Someone at the party offered him a whiskey and, at first, Mr. Sandhu declined. A little while later, he was again offered a whiskey. He testified that he accepted because he felt pressured to do so. When the first whiskey was finished, he accepted a second one. He said that he started to feel sick to his stomach, but thought that it was something he ate. He accepted a third whiskey, drank a little, and left about half of the drink on the table.

[16] Mr. Sandhu left the party between 9:15 and 9:30 p.m. He testified that he felt sick, but did not think he was impaired by alcohol. He agreed that his arrest unfolded as set out above.

[17] Mr. Sandhu agreed that when he arrived in Canada, he was given information about Canadian laws. He knew that driving while impaired was illegal and confirmed that it is also illegal in India. He was aware that he could be deported from Canada if he was convicted of a criminal offence.

Mr. Sandhu's Immigration Situation

[18] In January 2017, Mr. Sandhu applied to Immigration, Refugees and Citizenship Canada for permanent residence in Canada, with his wife as a dependant. At the time of his arrest, his permanent residence application was still pending.

[19] After Mr. Sandhu's sentencing in Provincial Court, he was deemed to be inadmissible to Canada because of criminality and an order for his deportation was issued.[1]

[20] Mr. Kenneth Zaifman, who represents Mr. Sandhu and his wife in their immigration proceedings, explained that Mr. Sandhu's wife, as a dependant, will be deported with Mr. Sandhu. She has since commenced her own permanent residence application; however, if Mr. Sandhu remains inadmissible, she will not be able to obtain permanent residence in Canada.[2]

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[1] The sections of the ***IRPA*** regarding the removal of a foreign national and that person's right of appeal are rather convoluted. However, when sections 44, 62, 63 and 64 are read together (and based on the submissions of counsel), I am satisfied that Mr. Sandhu does not have a right to appeal his removal order to the Immigration Appeal Division. He would only have a right of appeal if he were a permanent resident or a protected person — he is neither.

[2] See section 42(1) of the ***IRPA***.

IV. THE ISSUES

[21] The parties agree that I should approach the issues as follows:

Issue 1:

What is a fit and appropriate sentence for Mr. Sandhu on this offence if there was no mandatory minimum sentence? In answering this first question, I must consider the principles of sentencing, the circumstances of the offence, and Mr. Sandhu's circumstances, including the collateral immigration consequences. If the fit and appropriate sentence is at or above the mandatory minimum sentence, no constitutional analysis is necessary.

Issue 2:

If the fit and appropriate sentence in all the circumstances is below the mandatory minimum sentence, a constitutional analysis regarding section 12 of the ***Charter*** is required. On this question, the burden is on Mr. Sandhu to demonstrate that the mandatory minimum sentence is grossly disproportionate to the sentence warranted in Mr. Sandhu's circumstances or in the circumstances of a reasonable hypothetical offender.

Issue 3:

Mr. Sandhu also argues that the mandatory minimum sentence violates section 7 of the ***Charter***. The onus is on him to establish that the mandatory minimum sentence for the offence of driving over 80 deprives him of his right to life, liberty and security of the person and that the deprivation is contrary to the principles of fundamental justice.

Issue 4:

The Crown submits that if I find the mandatory minimum sentence is unconstitutional, it does not seek to justify the violation under section 1 of the ***Charter***.

V. ANALYSIS

A. Issue 1: Fit and Appropriate Sentence

[22] Even if a conditional discharge were available, I conclude that it is not within the appropriate sentencing range for the offence of driving over 80. A $1,000 fine is the appropriate sentence, having regard to sentencing principles, the circumstances of the offence, and Mr. Sandhu's circumstances.

[23] An abundance of previous case law from across Canada has emphasized that impaired driving, including driving over 80, is an extremely serious offence that contributes to death and serious injury all over this country. In ***R. v. Bernshaw***, [1995] 1 S.C.R. 254, 1995 CanLII 150 (SCC), Cory J. wrote:

> [16] Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country.

[24] Parliament has continually increased penalties for impaired driving offences over time. If Mr. Sandhu had been charged after the most recent amendments to the ***Criminal Code***, in 2018, he would be subject to a mandatory minimum sentence of a $1,500 fine. See section 320.19(3)(a).

[25] Although Mr. Sandhu was charged before the 2018 amendments, the declaration that is now included in section 320.12 of the ***Criminal Code*** was just as true at the time he was charged:

> **Recognition and declaration**
>
> **320.12** It is recognized and declared that
>
> **(a)** operating a conveyance is a privilege that is subject to certain limits in the interests of public safety that include licensing, the observance of rules and sobriety;
>
> **(b)** the protection of society is well served by deterring persons from operating conveyances dangerously or while their ability to operate them is impaired by alcohol or a drug, because that conduct poses a threat to the life, health and safety of Canadians;
>
> [emphasis added]

[26] Mr. Sandhu had been fortunate to not injure or kill anyone on April 15, 2017. Not only was he driving at almost double the legal alcohol limit, but he was also swerving and driving at 100 km/h on Portage Avenue, a busy thoroughfare, at approximately 10 p.m. on a Saturday night.

[27] Although perhaps not an experienced drinker, Mr. Sandhu voluntarily chose to drink and then chose to drive. Despite his comments to the police upon his arrest, he was well aware that driving while impaired by alcohol was a criminal offence and was aware that a criminal conviction could result in his deportation from Canada.

Collateral Immigration Consequences

[28] The collateral immigration consequences for Mr. Sandhu are a relevant factor for consideration in sentencing. See ***R. v. Arganda (J.R.)***, 2011 MBCA 54 at para. 29; ***R. v. Pham***, 2013 SCC 15, [2013] 1 S.C.R. 739 at para. 13. However, the focus on sentencing must be on the fundamental principle of proportionality. The sentence has to

be fit, having regard to the particular crime and the particular offender. In ***Pham***, the Supreme Court of Canada stated:

> [15] The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.
>
> [16] These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a *de facto* if not a *de jure* special range of sentencing options where deportation is a risk.

[29] A conditional discharge would be an unfit sentence. It would be an artificial sentence to circumvent Parliament's will and would overemphasize the collateral immigration consequences. It would be inconsistent with the sentencing principles set out in the ***Criminal Code*** and would be contrary to the public interest.

Conclusion on Issue 1: Fit and Appropriate Sentence

[30] For a conditional discharge to be imposed, it must be in the best interests of the accused and not be contrary to the public interest. A conditional discharge would certainly be in Mr. Sandhu's interest. However, for all the reasons set out above, it would not be in the public interest on an offence of driving over 80.

[31] The fit and appropriate sentence is a $1,000 fine.

[32] If I am incorrect regarding the fit and appropriate sentence for Mr. Sandhu, I will consider the ***Charter*** arguments advanced.

B. Issue 2: Section 12 of the *Charter*

[33] Section 12 of the ***Charter*** prohibits cruel and unusual punishment. The onus is on Mr. Sandhu to establish that the mandatory minimum sentence for the offence of

driving over 80, and therefore the unavailability of the conditional discharge, is in breach of his section 12 ***Charter*** right.

[34] In order for a sentence to be cruel and unusual, Mr. Sandhu must show that it is grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender. The sentence must be "so excessive as to outrage standards of decency" to the point that Canadians must find the punishment "abhorrent or intolerable". See ***R. v. Nur***, 2015 SCC 15, [2015] 1 S.C.R. 773 at para. 170; ***R. v. Lloyd***, 2016 SCC 13, [2016] 1 S.C.R. 130 at para. 87.

[35] The Supreme Court of Canada has confirmed that a finding of a breach of section 12 of the ***Charter*** would be a rare and unique occasion and that the test is very properly stringent and demanding. See ***Steele v. Mountain Institution***, [1990] 2 S.C.R. 1385 at 1417.

[36] Having found that the mandatory minimum $1,000 fine is the fit and appropriate sentence for the offence, for the reasons set out above I conclude that it is not grossly disproportionate in Mr. Sandhu's particular circumstances. See ***Nur*** at para. 46.

The Reasonable Hypothetical

[37] I must go on to consider whether there are reasonably foreseeable situations where the mandatory minimum sentence would be grossly disproportionate. See ***Nur*** at para. 65.

[38] In his materials, Mr. Sandhu offers just one potential hypothetical: if an offender had the characteristics and background of Mr. Sandhu but was driving a sick or injured family member to the hospital.

[39] I cannot conclude that the mandatory minimum sentence would be grossly disproportionate in those circumstances. Although perhaps that hypothetical person's motivation for driving while their blood alcohol level was over the legal limit is a factor to consider on sentencing, they would still present the same concerns and dangers on the road. Other options such as a taxi, ambulance, or another, sober driver would surely be available. A fine would still be a fit and appropriate sentence, while a conditional discharge would still be contrary to the public interest.

[40] I contrast Mr. Sandhu's suggested reasonable hypothetical with what the Supreme Court of Canada has accepted to be reasonable hypotheticals when considering section 12 of the ***Charter***:

R. v. Nur

- Mr. Nur and Mr. Charles were convicted of possessing loaded prohibited firearms, which required mandatory minimum sentences of three and five years (depending on whether it was a first or subsequent offence).
- While the Court held that the mandatory minimum sentences were appropriate for Mr. Nur and Mr. Charles, there were reasonably foreseeable cases in which the sentences would be grossly disproportionate.
- The section of the ***Criminal Code*** that required the mandatory minimum sentences applied to a wide variety of potential conduct. It could create a grossly disproportionate sentence for the licensed and responsible gun owner who stored his unloaded firearm safely with ammunition nearby, but made a mistake as to where it could be stored. Given the minimal blameworthiness of

that potential offender and the absence of any harm or real risk of harm from the conduct, a three-year sentence would be grossly disproportionate.

R. v. Lloyd

- Mr. Lloyd was convicted of possession of Schedule I drugs for the purpose of trafficking. Because he had a recent prior conviction for a similar offence, he was subject to a mandatory minimum sentence of one year of imprisonment.
- While the Court found that the one year sentence was fit and appropriate for Mr. Lloyd, they held that it could be grossly disproportionate in reasonably foreseeable cases.
- The mandatory minimum sentence would apply to the addict who is charged for sharing a small amount of drugs with a friend or spouse, and finds herself sentenced to a year in prison because of a single conviction for sharing marihuana in a social occasion nine years earlier. The Court held that most Canadians would be shocked to find that such a person in those circumstances could be sentenced to one year in prison.
- Another reasonable hypothetical is an addict convicted of trafficking who has a prior conviction for trafficking. In both cases, he was trafficking to support his own addiction. Between conviction and the sentencing on the second offence, he attended rehabilitation and conquered his addiction. Under the mandatory minimum sentence, the sentencing judge would have no choice but to send him to prison for at least one year. The Court held that would be grossly disproportionate in the circumstances.

[41] I conclude that Mr. Sandhu has not presented a reasonably foreseeable situation, and I cannot envisage one where the mandatory minimum sentence would be grossly disproportionate.

Conclusion on Issue 2: Section 12 of the *Charter*

[42] The mandatory minimum sentence does not force me to impose a sentence that is grossly disproportionate. The mandatory minimum sentence of a $1,000 fine is fit and appropriate. Mr. Sandhu has not demonstrated a breach of his section 12 ***Charter*** right.

C. Issue 3: Section 7 of the *Charter*

[43] To engage section 7 of the ***Charter***, Mr. Sandhu must establish that the mandatory minimum sentence for the offence of driving over 80 deprives him of his right to life, liberty and security of the person and that the deprivation is contrary to the principles of fundamental justice. See ***Blencoe v. British Columbia (Human Rights Commission)***, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 47.

[44] Laws that are arbitrary or overbroad will be contrary to the principles of fundamental justice under section 7 of the ***Charter***. See ***Canada (Attorney General) v. Bedford***, 2013 SCC 72, [2013] 3 S.C.R. 1101 at paras. 96–97.

[45] The Supreme Court of Canada has specifically stated that the principle of proportionality in sentencing is not a principle of fundamental justice under section 7 of the ***Charter***. Section 7 of the ***Charter*** cannot give rise to a constitutional remedy against a punishment that does not infringe section 12. See ***Lloyd*** at paras. 40–47; ***R. v. Malmo-Levine; R. v. Caine***, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 160.

[46] Deportation can engage an individual's section 7 ***Charter*** right to life, liberty and security of the person when there is a substantial likelihood an individual would be tortured in the country to which they are deported. See ***Suresh v. Canada (Minister of Citizenship and Immigration)***, 2002 SCC 1, [2002] 1 S.C.R. 3. That is not the situation Mr. Sandhu is facing in India.

[47] I cannot conclude that the mandatory minimum sentence for the offence of driving over 80 is arbitrary. It is logically connected to Parliament's objective to deter individuals from driving while impaired.

Conclusion on Issue 3: Section 7 of the *Charter*

[48] I cannot conclude that the mandatory minimum sentence is overbroad. For a law to be overbroad, it must go too far and interfere with conduct that bears no connection to its objective. See ***R. v. Heywood***, [1994] 3 S.C.R. 761. The punishment provisions regarding impaired driving target and capture exactly the conduct Parliament intended.

[49] Mr. Sandhu has not established a breach of his section 7 ***Charter*** rights.

VI. THE *IMMIGRATION AND REFUGEE PROTECTION ACT*

[50] Without commenting on the veracity of any other potential constitutional challenge, I agree with the Crown that Mr. Sandhu's complaint regarding his deportation should not be directed toward the provisions of the ***Criminal Code***.

[51] If it is unconstitutional that a foreign national and his family are automatically deported for any criminal conviction, regardless of the particular circumstances of the offence and the offender, then the constitutional challenge should be directed toward the relevant provisions of the ***IRPA***.

VII. ***THE HIGHWAY TRAFFIC AMENDMENT ACT (IMMEDIATE ROADSIDE PROHIBITIONS)***

[52] Although not necessary given my findings above, I will address Mr. Sandhu's argument regarding the relatively new provisions of the ***HTA*** allowing administrative penalties in certain circumstances.[3]

[53] As of December 16, 2019, peace officers in Manitoba are allowed to impose immediate roadside prohibitions on drivers based on blood alcohol content. Essentially, officers can use their discretion to impose a roadside prohibition rather than lay a criminal charge.

[54] The availability of a roadside prohibition is limited. An officer can only proceed by way of a roadside prohibition, instead of a criminal investigation, when they have made a demand for a breath sample into an approved screening device (an ASD), pursuant to section 320.27 of the ***Criminal Code***.[4] An ASD demand pursuant to section 320.27 of the ***Criminal Code*** is made based on the standard of reasonable grounds to suspect a person has alcohol in their body.

[55] An officer cannot proceed by way of a roadside prohibition if they make a demand for a breath sample pursuant to section 320.28 of the ***Criminal Code***, based on the standard of reasonable grounds to believe a person's ability to operate a vehicle is impaired by alcohol.

[56] Officers had reasonable grounds to believe that Mr. Sandhu was driving while impaired by alcohol, as evidenced by the fact that they immediately arrested Mr. Sandhu

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[3] See ***The Highway Traffic Amendment Act (Immediate Roadside Prohibitions)***, S.M. 2019, c. 6.
[4] See section 263.1(2)(f.1) of the ***HTA***.

for impaired driving rather than making an ASD demand. Even if the immediate roadside prohibition was an available option to officers in April 2017, it would not have applied to Mr. Sandhu given that officers had reasonable grounds to believe he was impaired.

VIII. CONCLUSION

[57] The mandatory minimum sentence does not violate section 7 or section 12 of the ***Charter***.

[58] A conditional discharge is not in the public interest and therefore is not an appropriate sentence in the circumstances of Mr. Sandhu's offence. Mr. Sandhu is sentenced to a mandatory minimum of a $1,000 fine and a one year driving prohibition.

_____J.