

**PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - APPEAL DIVISION**

Citation: R. v. Mark Harold Bulger 2008 PESCAD 03

Date: 20080107
Docket: S1-AD-1129
Registry: Charlottetown

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

MARK HAROLD BULGER

RESPONDENT

Before: The Honourable Chief Justice G.E. Mitchell
The Honourable Mr. Justice J.A. McQuaid
The Honourable Madam Justice M.M. Murphy

Appearances:

Gerald K. Quinn, Q.C., counsel for the Appellant

W. Kent Brown, Q.C., counsel for the Respondent

Place and Date of Hearing

Charlottetown, Prince Edward Island
December 3, 2007

Place and Date of Judgment

Charlottetown, Prince Edward Island
January 7, 2008

Written Reasons by:

The Honourable Chief Justice G.E. Mitchell

Concurred in by:

The Honourable Mr. Justice J.A. McQuaid
The Honourable Madam Justice M.M. Murphy

CRIMINAL LAW - Sentence - Impaired driving causing bodily harm - 8 months conditional sentence order - upheld on appeal

Authorities Cited:

CASES CONSIDERED: *R. v. Proulx*, [2000] 1 S.C.R. 61 (SCC)

STATUTES CONSIDERED: *Criminal Code of Canada*, R.S.C. 1985, C-46, s.718 to 718.2, s.742.1

Reasons for judgment:

MITCHELL C.J.P.E.I.:

[1] The Crown seeks to have an eighth-month conditional sentence imposed on the respondent in Provincial Court by Lantz J. replaced by a term in a provincial correctional facility.

[2] The sentence the Crown seeks to have set aside was imposed on June 13, 2007 following the respondent's plea of guilty to a charge of dangerous driving causing bodily harm contrary to sections 253(a) and 255(2) of the ***Criminal Code***. The sentence imposed also included an 18-months probation order and a two-year driving prohibition.

[3] The agreed facts were set out by the prosecutor at the sentencing hearing as follows:

...At 9:11 p.m. on November 23, 2006, the R.C.M.P. received a 9-1-1 call reporting a motor vehicle accident. The police attended the scene and commenced their investigation. The collision involved two vehicles, a 1993 half-ton Ford truck, being driven by the accused west on Route No. 2, and a 2006 Toyota Corolla being driven by the victim, one Vernon Harris, 61 years of age, travelling east on Route No. 2 at a speed he estimated as being between 82 and 83 kilometres per hour. I would note that Mr. Harris is present before the Court with family members.

The accident occurred in the area in the front of the Two Sisters Restaurant in Miscouche. The accused, without signalling, suddenly turned in front of the Harris vehicle and the collision occurred. When the police arrived, the accused was still in his vehicle. The accused had an odour of alcohol on his breath and slurred speech. He admitted to consuming five or six beer. He was transported to the Prince County Hospital by the police as he refused to be transported by ambulance. Because of a facial injury, he was read a blood demand and two samples of blood were drawn at 10:33 and 10:35 respectively. When analyzed by the R.C.M.P. forensic lab in Halifax, the reading of the first sample of 141 milligrams of alcohol in 100 millilitres

of blood.

A witness 21 years of age observed the accused driving his motor vehicle from the Irving in St. Eleanors to the accident scene. She described the accused's motor vehicle as being "all over the road." In her statement she described the accused's driving as follows:

He was all over the road. He almost ran into the light. (referring to the traffic lights at Slemon Park intersection). Then he was all over the road until this turn. Then he was on the complete opposite side of the road. He was probably going 110 to 120 kilometres per hour. I was going 100 kilometres per hour and I couldn't keep up to him. He turned his signal light at the last second and pulled right in front of that little Corolla. He wouldn't have even made the turn had there been no cars coming; he probably would have hit the house.

And further in her statement there was a series of questions and answers:

- Q. *Did the green truck (referring to the accused) ever cross the centre line on Route No. 2.*
- A. *Yeah, probably four or five times since the Slemon Park lights and three or four times from between St. Eleanors lights and Slemon Park. he was all over the place.*
- Q. *Can you say that you saw the green truck signal a left turn before the collision?*
- A. *Just a second before and he was completely on the other side of the road.*
- Q. *Do you mean the green truck was completely in the eastbound lane?*
- A. *Yeah, he was completely in it.*
- Q. *Was there anything unusual about the driving pattern of the green truck that was of concern?*
- A. *He couldn't control his vehicle at all. He was swaying a little, he was completely all over the place going extremely fast for here.*

The distance from the St. Eleanors Irving to the accident scene was measured by the R.C.M.P. to be 3.1 kilometres. The victim, Mr. Harris, sustained injuries in the accident ...

[4] The sentencing judge also received a pre-sentence report prepared by Kathy Campbell of Probation Services. It included the following:

Family and community sources suggest Mark Bulger is an extremely giving and caring individual who offers his assistance to others whenever possible in whatever manner he can. Personal sources expressed shock, surprise and disbelief upon learning of Mr. Bulger's present legal predicament. One source commented he made a poor judgment call to drive his vehicle subsequent to consuming alcohol, noting Mr. Bulger is generally the designated driver at social gatherings and events. Sources contacted did not perceive the Offender to have ever experienced any personal problems in relation to substance abuse issues, specifically with his alcohol consumption.

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EMPLOYMENT BACKGROUND:

Mark Bulger's chosen profession is a fisher, reporting he has been self-employed in the shellfish industry for approximately twenty (20) years. He relates he fishes clams, bar clams and quahogs in the spring and fall seasons out of the Cascumpec, Bedeque and Charlottetown areas. In addition to fishing shellfish, he has been employed with the Department of Forestry located in Wellington, PEI for approximately ten (10) years, on a seasonal basis performing general labour duties along with being a Foreman of a work crew. Mr. Bulger stated he lost this job position in 1996 around the time of provincial government changes.

Mark Bulger secured employment in July 2006 with Arthur Surette & Sons Inc., a concrete business based out of Saint John, New Brunswick. This labour job position is located at the Summerside Sewage Treatment Plant, and consists of pouring concrete for the holding tanks at this facility. He reportedly works on a full-time basis, earning \$18.75 as an hourly wage; the expected completion date of this contract position is June 2007. Mr. Bulger anticipates obtaining contracted employment in the near future through the PEI Labourer's Union Local.

Mark Landry, Supervisor, Arthur Surette & Sons Inc. confirmed Mr. Bulger's employment as a labourer with the Summerside Sewage Treatment Plant. Mr. Landry described Mark Bulger as the 'best labourer on the work site,' because he is dependable, responsible, able to work independently and always available to work extra hours when required.

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...Mark Bulger enjoys fishing, spending quality time with his spouse and their son, and performing volunteer firefighter duties with the Miscouche Fire Department. Mike Arsenault, Fire Chief, Miscouche Fire Department, confirmed Mr. Bulger has served as a Volunteer Firefighter for approximately ten (10) years. Mr. Arsenault stated he has successfully completed the First Responder Course, the Jaws of Life Course, and the

Pump Operator Course. Mr. Arsenault characterized the Offender as a 'dependable top notch firefighter,' who is currently on a leave of absence with this Fire Department until his outstanding Court matter is dealt with. Fire Chief Arsenault further stated that Mr. Bulger is a sensible person whom in the past has always demonstrated responsible drinking behaviours.

MARK HAROLD BULGER AS A PERSON AND SUMMARY REMARKS:

Mark Harold Bulger, the Offender, aged thirty-nine (39) years appears before the Provincial Court on one (1) count contrary to Section 255(2), CCC. He is not known to have any prior criminal convictions. Mr. Bulger was cooperative and forthright during the preparation of this investigative report. He accepts full responsibility for his involvement in the present offence, he expresses sincere regret and remorse for his actions and he appears to realize the seriousness of the incident in relation to the impact it has had on the victim, his family, friends and possibly with his employment status.

Mark Bulger benefited from a stable, healthy home environment and upbringing. He currently resides with his spouse and their son in their own home located on the Kinsmen Road, west of Summerside. Mr. Bulger is a shell fisher by trade who is presently employed as a labourer at the Summerside Sewage Treatment facility; this employment position will terminate in June 2007. He anticipates securing additional contracted labour positions through the PEI Labourer's Union Local in the immediate future.

Family, personal and community sources expressed surprise and disbelief regarding Mr. Bulger's present legal plight, indicating the incident is totally out of character for him. Sources expressed concern for Mr. Bulger and they continue to offer him their assistance and support. It does not appear that alcohol has played an important part in Mark Bulger's life, up to the time of the present offence. Mr. Bulger along with sources contacted did not identify alcohol consumption as presenting any previous problematic areas in his life. He is however, willing to participate in an addictions assessment if ordered by the Court.

In addition to any other sentence deemed appropriate by the Court, a period of Probation with conditions relating to addictions assessment, counselling and treatment and a letter of apology to the victim would be recommended.

[5] The trial judge also received the following written impact statement from the victim, Mr. Vernon Harris:

As a result of this incident I suffered 3 broken fingers on my left hand. Cracked right wrist, broken toe on right foot, bone chips in pelvic area. Several bruising over body, cut in chest area, hips scraped and bruised. I missed 13 work days. My wife missed 2 days of work to provide care to me. I seen Dr. G. MacLean in Summerside on November 29, 2006 and

January 10, 2007; Dr. A. Profit at Queen Elizabeth Hospital on February 8, 2007. Dr. Nicholson on November 27, 2006, December 15, 2006, January 9, 2007, and February 13, 2007 at Summerside Medical Centre. I had X-Rays taken on November 28, 2006, December 19, 2006 and January 9, 2007 at PCH. Two fingers on my left hand have sustained permanent damage which will have impact on my employment. It causes me great worry because if they worsen or are complicated by arthritis the effect could be more severe.

Emotional Impact:

I am more nervous driving as I don't trust others on the road. I have to pass by this spot every day on the road on my way to work. I have difficulty sleeping some nights and the sound and sights of the crash come back to me.

Financial Loss:

My car which was a 2006 Toyota Corolla was wrote off. The insurance replaced my car. I missed 13 days of work that I covered with 8 sick days and overtime. I'm expecting the insurance to pay these back. My expenses for medical appointments is to be covered by insurance.

Other Comments and Concerns:

This individual phoned to apologize, however, if people are drinking they should not get behind the wheel of a car and put others, like myself in harms way.

[6] The Crown sought a term of six to nine months in a provincial correctional facility. The defense sought a conditional sentence or, in the alternative, an intermittent sentence in a provincial correctional facility.

[7] As mentioned above, the sentencing judge imposed an eight-month conditional sentence of imprisonment plus probation and a driving prohibition. The Crown contends the sentence was inadequate from a number of perspectives.

[8] The Conditional sentence of imprisonment was imposed pursuant to the provisions of s. 741.2 of the ***Criminal Code***. Under that section there are four statutory criteria that must be fulfilled before a court may impose a conditional sentence of imprisonment: (1) The offender must be convicted of an offence that is not punishable by a minimum term of imprisonment; (2) the court must impose a sentence of imprisonment of less than 2 years; (3) The safety of the community would not be endangered by the offender serving the offence in the community; and (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the ***Criminal Code***.

[9] Much of what I had to say in the recent decision of this court in **R. v. John Alvin Gallant** 2008 PESCAD 01 regarding the deference owed sentencing judges, the nature, purpose and availability of conditional sentence orders, as well as their ability to address denunciation and deterrence objectives is also applicable to the present case.

[10] The Supreme Court of Canada in **R. v. Proulx**, [2000] 1 S.C.R. 61 has made it clear that in every case where the first three criteria of s.741.2 are satisfied, a sentencing judge must give serious consideration to the imposition of an order for a conditional sentence of imprisonment in the community rather than incarceration in a correctional facility. **Proulx** at para. 90.

[11] In the case at bar the sentencing judge considered the criteria set out in s. 742.1 of the **Criminal Code** and concluded that the respondent was “very suitable for a conditional sentence order.” He reached that conclusion notwithstanding acknowledging earlier in his reasons that deterrence and denunciation were paramount objectives of sentencing in such a case as this one. The sentencing judge, however, concluded that both punitive and restorative objectives could be addressed by an appropriately crafted conditional sentence order. In **Proulx** at para. 100, Lamer C.J. said: “to the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration”.

[12] The sentencing judge stated that if he were to impose a term in a correctional facility it would have been in the area of six months. Instead, he opted to impose a term of community imprisonment that was a couple of months longer and which had attached to it stringent punitive conditions. These included: supervision, house arrest, visitor restriction, and 80 hours community service. In addition the sentencing judge imposed an eighteen-month probation order to take effect at the end of the conditional sentence order. He also imposed a driving prohibition of eighteen months.

[13] It is trite law that sentencing judges have wide discretion. Appeal courts should pay their decisions great deference and not interfere absent demonstrable error. I can find no such error in this case.

[14] The sentencing judge took into account all the relevant mitigating and aggravating factors, he considered the purpose and principles of sentencing, he specifically acknowledged and addressed the need for denunciation and deterrence in such cases, and he imposed a sentence within the appropriate range.

[15] I would grant the Crown leave but the appeal is denied.

The Honourable Chief Justice G.E. Mitchell

I AGREE: _____
The Honourable Mr. Justice J.A. McQuaid

I AGREE: _____
The Honourable Madam Justice M.M. Murphy