

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

(Un) Revised
(Not) Restricted
(Not) Suitable for Publication

Case No. CR-15-0035

DIRECTOR OF PUBLIC PROSECUTIONS

v

PAUL FREDERICK SMITH

JUDGE: HIS HONOUR JUDGE PUNSHON
WHERE HELD: Melbourne
DATE OF HEARING: 15 November 2016
DATE OF SENTENCE: 22 November 2016
CASE MAY BE CITED AS: R v Paul Smith
MEDIUM NEUTRAL CITATION: [2016] VCC

REASONS FOR SENTENCE

Subject:
Catchwords:
Legislation Cited:
Cases Cited:
Sentence:

| <u>APPEARANCES:</u> | <u>Counsel</u> | <u>Solicitors</u> |
|---|----------------|-------------------------------|
| For the Director of Public Prosecutions | Ms C. Duckett | Office of Public Prosecutions |
| For the Accused | Mr N. Howard | Ressan Lawyers |

HIS HONOUR:

- 1 Paul Frederick Smith, on 10 November 2016, a jury at Ballarat found you guilty of one charge of negligently causing serious injury (Charge 1), one charge of reckless conduct endangering serious injury (Charge 2) and one charge of failing to render assistance after a motor vehicle accident (Charge 3).
- 2 The maximum penalty for Charge 1 and for Charge 3 is 10 years imprisonment. For Charge 2, it is 5 years' imprisonment.
- 3 The charges relate to a motor vehicle collision between your Commodore and a LandCruiser that occurred at about 6pm on Sunday 4 August 2013 in Lambert Street, Ararat.
- 4 You had been drinking at the Ararat Hotel during the afternoon and at the time of the collision it was estimated that you had a blood alcohol concentration (BAC) between .113 and .141 percent with the caveat that the concentration may have been lower than this range if there was still unabsorbed alcohol in your stomach at the time of the collision. There was unchallenged evidence that at this BAC level, you would have been incapable of having proper control of your car.
- 5 The speed limit for the road way on which you were travelling was 80 kilometres an hour. Some observations of your driving just before the collision, indicated that you were speeding, although neither of the witnesses who said this, namely the victim of Charge 1 and his friend who was in a separate vehicle travelling in the same direction, gave any estimate of your speed.
- 6 There was also evidence that you were veering from left to right but travelling within the speed limit shortly prior to the collision. The driver who made these observations lost sight of your car as you moved ahead of him around a bend and up a hill.

7 Immediately before impact, your vehicle crossed onto the wrong side of the road and collided head on with the LandCruiser, which contained seven family members.

8 The driver of LandCruiser is the victim of Charge 1. His injuries consisted of a right distal thumb partial amputation/distal phalanx fracture, a de-gloving injury, a forehead laceration, C2 fracture and T5 superior end plate fracture.

9 Although these injuries are not as devastating as often occurs in motor vehicle accidents, they are clearly serious, as was conceded, and have impacted very significantly on the primary victim.

10 The other occupants of the LandCruiser are the victims of Charge 2. They suffered minor physical injuries.

11 You left the scene of the collision, failing to immediately render such assistance as you could at the scene, in circumstances where the jury found you knew or ought reasonably to have known that a collision had occurred and that a person had suffered serious injury.

12 Victim impact statements were tendered from the driver of the LandCruiser and his wife. The driver noted the difficulties he encounters as the result of the loss of the top of his right thumb. He also noted the injury to his forehead, the injury to his neck and shoulders as well as facial scarring. He suffers back pain. He noted financial and emotional consequences to himself and his family generally. He has trouble sleeping and is anxious driving. The driver's wife has had trouble sleeping, as have child family members who were in the LandCruiser. The driver's wife says she and her husband have been traumatised by the accident and they both sometimes get upset for no reason.

13 The trial was contested on two principal issues. First, whether the prosecution could prove you were the driver of the Commodore and secondly, whether you left the scene in a condition that might have prevented you from being aware of

the collision as well as whether anyone had suffered serious injury as a result of the collision.

14 You left the scene soon after the collision and arrived at the home of a friend at about 2am. This friend had been alerted to the accident and was trying to locate you. After a relatively short time at his house, probably 15 to 20 minutes, you were taken to the police station, arriving around 2.30am and then to hospital for treatment after which you returned to the police station and were subsequently interviewed.

15 It is not clear precisely what route you took from the collision scene to your friend's house, but about 8 hours must have passed before you arrived. The distance from the collision scene to your friend's house if you walked along a railway line, as it seems you did, is about seven kilometres, perhaps a little more.

16 You told medical staff, your doctor, the friend at whose house you attended and the police that you suffered memory loss concerning the collision and events both before and after the collision. This claim seems to have been based on trauma to your head in the collision and consequent concussion. You have consistently maintained that such loss was from about lunch time on the day of the collision, until finding yourself walking en route to your friend's home.

17 The jury verdict on Charge 3 means that you must have had some awareness of your surroundings at the time you left the scene but your counsel maintains that this is not inconsistent with subsequent memory loss as claimed.

18 I do not think that this issue needs to be resolved for the purposes of sentencing, but at present I would not make the positive finding that you did suffer the claimed memory loss without further evidence as discussed during submissions.

19 Your counsel said that you accept the jury verdict, but still have effectively no

memory of events from lunchtime before the collision until you became aware of walking at some location after the collision and continued to your friend's house. You do have some flashes of recollection, for example, you told police you recall a bang and you recall speaking to people at or in the vicinity of the 'Golden Gate', a building in the vicinity of the collision scene.

20 I am prepared to accept that you have some victim empathy. For example, you expressed this to your friend and the police. However, this needs to be seen in the context of you leaving the scene without rendering any assistance.

21 I noted in discussion that I was not able to identify any evidence of remorse. Your counsel did submit that you express "constant remorse for what he has done to the complainants and their daily lives". I do not understand what was meant by this as an indicator of remorse. As I followed your counsel's submissions, you were not prepared to accept that you were the driver until, at least, the jury verdict. This matter was canvassed once again just before I began my sentencing remarks.

22 You are not entitled to the benefits that normally follow a plea of guilty. However, of course, you must not be punished for pleading not guilty.

23 Your offending occurred well over 3 years ago. There are a number of reasons for the delay. The delay is not your fault. It is too long. Your counsel submitted that the charges have had a profound effect upon you.

24 I think it is obvious that you would have been under pressure whilst waiting for the trial. You are still being treated by your doctor for PTSD and sleeping disorders. I think the fact of lengthy delay and its impact on you, entitles you to some mitigation in penalty.

25 As noted earlier, only two issues were agitated before the jury. All other elements, particularly concerning Charges 1 and 2 were admitted. Although no submission was made by your counsel concerning this, I consider you should

- also receive some benefit for this.
- 26 You were born in 1972 and have recently turned 44. You come from a close and supportive family, members of which attended the proceedings. Members of your family are here again today. Until remanded you were sharing accommodation with a younger brother.
- 27 You have a nine year old son who resides with his mother, your former partner, with whom you maintain a close relationship. You are also closely connected to your son and there is some possibility that you might reconcile with your former partner.
- 28 You were educated to Year 10. You then completed an apprenticeship. You have worked in various jobs, and for most of your adult life, have also sub-contracted as a shearer in the Western District.
- 29 Your health is generally good.
- 30 You have a relevant criminal record. You have convictions for exceeding the prescribed concentration of alcohol, albeit some time ago in 1996 and 1999 with respective readings of .109 and .175.
- 31 Concerning the latter, you were also speeding and were not to be relicensed except by order of a Magistrate. You have other driving convictions including careless driving in 1992 and 2012. You also have convictions for violence for which you have been imprisoned.
- 32 Your counsel said you changed your ways when your son was born and your record confirms that aside from being convicted for refusing to leave a place after a warning in 2013, your most recent offending seems to have occurred in 2003.
- 33 To your credit, you consented to me making an order for the taking of a forensic sample. I will make the order. My reasons will appear in the order. I need to

tell you that a police officer may use reasonable force to obtain the sample.

34 I was referred to a number of cases by the parties. Indeed, I was given a folder of cases by the prosecution. Subsequent to the plea hearing, I was also specifically referred to *Miller* [2012] VSCA 265 by the prosecution.

35 The cases to which I was specifically referred also refer to many other cases.

36 As I followed, I was referred to *Towle* [2009] VSCA 280, principally, to draw my attention to the principle that orders for accumulation are appropriate and necessary where criminally bad driving has caused multiple deaths or injury.

37 Some of the cases I was referred to are highly pertinent to Charges 1 and 3. In particular, *Gorladenchearau* [2011] VSCA 432 and more significantly, *Harrison and Rigogiannis* [2015] VSCA 349, contain statements of principle concerning the inadequacy of current sentencing practices for the crime of negligently causing serious injury at least in driving cases, given the increase in the maximum penalty from 5 years to 10 years in 2008.

38 The focus in *Harrison* was on offending at the upper end of seriousness, and the Court stated that sentences needed to be “uplifted”. The Court also stated that, inevitably, such a change will have a flow-on effect on sentencing for mid-range and low range instances of NCSI by driving.

39 In *Gorladenchearau*, President Maxwell noted that cases of driving related NCSI have a “shocking similarity”. He continued,

40 “The critical features recur: speed, inattention, intoxication (alcohol or drugs) and (often) prior convictions for driving offences”. All those features are present in your case.

41 In *Sarikaya* [2015] VSCA 236, the Court referred to the five-fold increase in maximum sentence for breaching s.61(1) of the *Road Safety Act* [1986] in 2005. The Court stated that this increase made it plain that Parliament intended that

- general deterrence be given significant weight in the exercise of the sentencing discretion in a case such as the one before the court where the offender had struck an 89 year old pedestrian walking on a footpath. Immediately after the collision the offender drove off, leaving the victim lying on the ground.
- 42 Fortuitously, it seems passers-by, including a registered nurse, rendered first aid to the victim and paramedics soon attended and she was stabilised. Unfortunately, she did not recover and died five hours later. However, it could not be said that the offender's conduct in leaving the scene reduced the victim's chances of recovery. Court emphasis in that case was on the charge of failing to stop after an accident, attracting a sentence of four years' imprisonment, rather than the charge of failing to render assistance, which attracted a sentence of nine months. After referring to the principles in *Wassef* [2011] VSCA 30 the Court considered the sentence of four years to be within range.
- 43 Of course, the charge of which you have been found guilty is failing to render assistance. In some cases such conduct might be profoundly callous or inhumane. Whist your conduct is clearly reprehensible, I think it likely that at the time you fled you were aware of the presence of others who were in a position to render assistance to the injured. I think the prosecution submission that you fled because you knew you were intoxicated, to be highly likely the explanation for your flight.
- 44 I accept the prosecution submissions that deterrence, both specific and general, just punishment, denunciation and protection of the community are relevant sentencing factors. No submission was made specifically directed to your rehabilitative potential but I cannot see why you would not learn from this experience and on release from prison adopt a responsible attitude to drinking and driving, as you seem to have shown on the evening before the offending.
- 45 The parties agree that it is open to me to impose an aggregate sentence. I intend to do that.

46 You will be convicted on each charge and sentenced to an aggregate sentence of five years imprisonment. I fix three years as the time you must serve before being eligible for release on parole.

47 Submissions were made by the prosecution concerning the need to disqualify you from driving after release from prison. Your counsel was not in a position to say what your employment circumstances will be when released, however, it is obvious that a licence is likely to considerably improve your employment prospects.

48 Nevertheless, I consider that I should disqualify you for some time after release from prison. You have prior convictions for driving in excess of the prescribed BAC and had your licence cancelled as a result in the past. Indeed, in 1999 you lost your licence for 30 months. There is a need to reflect community dissatisfaction with your offending by cancelling your licence and remind you that your licence is a privilege and you need to avoid drinking and driving.

49 Pursuant to s.89A of the *Sentencing Act* [1991] your driver's licence will be cancelled and you will be disqualified from obtaining another licence starting today and continuing for a period of 12 months from the day of your release from prison.

50 You have served 12 days pre-sentence detention. This period is to be reckoned as time already served under the sentence I have imposed.

51 Anything I have overlooked?

52 MR HOWARD: No, Your Honour.

53 MS DUCKETT: They are all the orders required, thank you, Your Honour.

54 HIS HONOUR: Thank you. Mr Smith, you will have to go with the prison authorities I am afraid. I can see your family is here, but there are instructions that people not have contact with their family, Mr Smith, so you will need to go

with the prison officer.

55 PRISONER: When will I be able to ring me son, 'cause it's been 14 days, so he's really worried.

56 HIS HONOUR: I cannot control what happens to you in prison. If I could do something about it, I would obviously recommend that you be able to have contact with your family. That is very important, but I cannot control that. Thanks very much. Thank you counsel, I will leave the Bench.

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