

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

STEVEN WANG

R E A S O N S F O R S E N T E N C E

BEFORE THE HONOURABLE JUSTICE F. CREWE
on February 1, 2019, at TORONTO, Ontario

APPEARANCES:

M. Shumka

Counsel for the Crown

A. Anwar

For P. Lindsay, counsel for the defendant

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No evidence was heard

E X H I B I T S

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No exhibits were entered

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LEGEND

[sic] - Indicates preceding word has been reproduced verbatim
and is not a transcription error

(ph) - Indicates preceding word has been spelled phonetically

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FRIDAY, FEBRUARY 1, 2019

- R E A S O N S F O R S E N T E N C E -

CREWE, J: (orally)

Mr. Wang was driving westbound on Highway 401 sometime after 5:30 a.m. on September 9, 2016, and he attempted to exit the highway at Warden Avenue in east Toronto. Motorist John Tuset, having taken the same exit on his way to work, saw Mr. Wang's vehicle speed past him at a pace that, in his view, looked dangerous, too fast to negotiate the off-ramp. He was correct.

Mr. Wang's vehicle went straight over the curb into the median, coming to rest only after striking a piece of road repair machinery that was parked there, fortunately unoccupied. Within a very short time the construction workers were on-site beginning their day's work when Police Officer McGilp arrived just before 6 a.m. Mr. Wang's vehicle had extensive front-end damage and the airbags had deployed.

Mr. Tuset had called emergency personnel, including police, as, in his view, Mr. Wang was drunk. Subsequent breath tests revealed blood alcohol concentration levels of 174 milligrams per 100 millilitres of blood at 8:15 a.m. and 180

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milligrams at 8:40 a.m. A toxicology report filed as Exhibit 5 estimated that his blood alcohol content at the time of driving, which was roughly 5:45 a.m., would have been between 175 and 220 milligrams of alcohol per 100 millilitres of blood.

Mr. Wang was found guilty after a lengthy trial which took place on several days over the course of a number of months commencing in May of 2018. He was found guilty of both impaired driving and drive with excess alcohol. The issue today is the imposition of a fit sentence.

Positions of the parties:

Mr. Shumka, on behalf of the Crown, submits that Mr. Wang's actions call for a deterrent sentence, one of 45 to 60 days in jail, in view of his elevated breath readings, the completely preventable serious accident, the dangerous nature of his driving, and his prior finding of guilt for dangerous driving in 2014, an incident which also involved alcohol consumption and for which he received a conditional discharge. He urges a two-year driving prohibition.

Mr. Lindsay submits that Mr. Wang ought to receive an elevated fine, perhaps \$4000, and a lengthy driving prohibition. The conditional

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discharge, he submits, ought to play no role in
the sentence in this matter.

Principles of sentence:

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The fundamental principle of sentence as per
section 718.1 of the *Criminal Code* is the
principle of proportionality which states that
the sentence must be proportionate to the gravity
of the offence and the degree of responsibility
of the offender.

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The Supreme Court of Canada in R. v. *Lacasse*,
[2015] 3 SCR 1089, at paragraph 12 refers to the
proportionality principle as, "the cardinal
principle that must guide appellate courts in
considering the fitness of a sentence imposed on
an offender. The more serious the crime and its
consequences, or the greater the offender's
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degree of responsibility, the heavier the
sentence will be. In other words," the Court
continues, "the severity of a sentence depends
not only on the seriousness of the crime's
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consequences, but also on the moral
blameworthiness of the offender."

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The Court continues on, "Both sentences that are
too lenient and sentences that are too harsh can
undermine public confidence in the administration
of justice."

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Deterrence and denunciation:

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The majority in *Lacasse* also addresses the importance of deterrence in drinking and driving cases, noting at paragraph 73 that, "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*."

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In that case, *Proulx*, the Supreme Court observed that otherwise law-abiding persons are the ones most likely to be deterred by the threat of severe penalties.

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Mr. Shumka submits that, quite apart from the frequently referred to importance of general deterrence in drinking and driving cases, the facts of this case warrant a jail sentence on the principle of specific deterrence alone. Mr. Wang's behaviour and his elevated blood alcohol readings warrant a jail sentence even in the absence of his prior conditional discharge for dangerous driving in circumstances where he had been drinking. Mr. Shumka submits it was sheer luck that Mr. Wang did not seriously injure

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someone. It is difficult to find fault with that statement.

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Mr. Lindsay does not quarrel with the need for deterrence, including specific deterrence, but he submits it is not necessary in this case that it include a custodial sentence. A significant driving prohibition of three years would provide specific deterrence, he submits. As well, in accordance with the Ontario regulations, the mandatory three-year licence suspension is accompanied by an additional three years of mandatory interlock. At a yearly cost of \$1700, that represents a total of more than \$5000, also a significant specific deterrent.

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If deterrence requires a custodial sentence, he submits, such deterrence can be found in a conditional sentence.

The conditional discharge:

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Mr. Shumka observes that many of the letters of support filed on behalf of Mr. Wang pray for a second chance for this young man. He submits that Mr. Wang has already been granted a second chance in the form of a conditional discharge just two years before this offence was committed. Mr. Lindsay submits that, in accordance with the discharge provisions of the *Criminal Code*, Mr.

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Wang was not convicted of his prior offence and it ought therefore to be disregarded in sentence on this matter.

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It is, of course, clear that had Mr. Wang been convicted of a prior offence under section 253 or 254, the drinking and driving provisions, it would have resulted in a minimum sentence of 30 days custody for this offence, so to that extent a prior finding of guilt for an offence other than a section 253 or 254 offence does not mandate an increased penalty.

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However, that is not to say it is of no moment at this sentence. While it is not relevant for purposes of considering increased mandatory penalties, it is relevant in considering what works for this offender in terms of specific deterrence. Having been charged previously with an offence in circumstances that involved the consumption of alcohol before driving has arguably not worked to deter him from drinking and driving. Likewise, having previously been found guilty and placed on probation for one year seemingly did not deter him from drinking and driving, so to that extent the prior discharge has some relevance.

In his letters of support filed on sentence

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people have asked that he be given a second chance. I agree with Mr. Shumka that he has already received a second chance. To that extent, the conditional discharge is relevant. It would be disingenuous of the Court to treat it otherwise.

So, to be clear, the conditional discharge for dangerous driving does not, standing alone, warrant a jail sentence on this matter, but it is but one factor to be considered along with the relevant aggravating and mitigating circumstances.

The aggravating circumstances in this case are as follows:

1. The elevated breath readings in this case, truncated to 170 and 180. Section 255.1 of the *Criminal Code* mandates that I shall consider readings that exceed 160 to be aggravating circumstances on sentence. 160 is, of course, twice the legal limit, and Mr. Wang was in excess of that standard. According to the toxicologist report submitted by Ms. Marie Elliot, filed as Exhibit 5, his blood alcohol concentration at 5:49 a.m., the approximate time of driving, would have been 175 to 220 milligrams of alcohol per 100 millilitres of blood.

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The first breath sample was taken more than two hours after Mr. Wang last drove, the second sample just about three hours after he last drove. Thus at the time of driving his blood alcohol content was between just over twice the limit to just under three times the limit.

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2. The collision. According to Mr. Tuset it was clear that Mr. Wang's vehicle was travelling too fast to negotiate the off-ramp to Warden Avenue and a significant collision occurred. No brake lights were visible to Mr. Tuset. Extensive damage was caused to the front of Mr. Wang's vehicle and, according to police, it was rendered inoperable. The airbags had deployed.

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Fortunately for Mr. Wang and, of course, for the crew working the road repair equipment, they were not at work when the collision occurred. Mere minutes later they were at work. Mr. Wang's driving could easily have led to a catastrophe in this case.

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3. Symptoms of impairment. It was the opinion of all of the Crown witnesses who had contact with Mr. Wang that he was noticeably impaired, including Mr. Tuset, Officers McGilp and Otchere, as well as the breath technician, Sergeant Saldenah.

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Symptoms noted by the witnesses include a strong odour of an alcoholic beverage emanating from his breath, slurred speech, swaying even while sitting, talkativeness, red glossy droopy eyes, difficulty walking straight while maintaining his balance. As well, in my view, as expressed in my reasons for judgment, his excessive speed and failure to recognize the impending hazard due to his manner of driving was indicative of impairment. A sober individual would easily have recognized the need to slow down for the off-ramp and would equally easily have recognized the danger of not doing so, as did Mr. Tuset.

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4. The night of the offence Mr. Wang advised Mr. Tuset, and as well acknowledges in his apology letter filed as part of Exhibit 2, he was upset after having a heated argument with his girlfriend. He left their home and made the regrettable decision to drive to a bar and meet some friends to relieve his stress.

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The decision to drive to the bar, knowing full well he may have a number of drinks with his friends, was extremely irresponsible, in my view, and particularly so in view of the fact that just over two years prior he had been found guilty of dangerous driving in an incident that involved poor driving and alcohol consumption. Indeed,

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his probation period for that offence had expired just over one year prior to this incident.

Mitigating circumstances.

1. Mr. Wang is still a young man with stable employment and a good education. By all indicators, he is hard-working and has a bright future in the financial industry.

2. According to his girlfriend, Ms. Song, he has not consumed alcohol since this incident, at least not in her presence.

3. He has strong family and community support, as evidenced by the numerous letters of support filed in Exhibit 2.

4. He has taken counselling for alcohol abuse with Just For Today Harm Reduction Services, albeit after conviction and after becoming aware that the Crown would be seeking a jail sentence. Nonetheless, it is deserving of credit.

5. Mr. Wang expresses sincere remorse, as do others who seem to know him well. I note, however, that his expression of remorse comes at the close of a full trial.

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Analysis.

5 I have reviewed and considered the authorities provided by both counsel, including the well-known case of R. v. *McVeigh* which is filed at Tab 2 of the Crown's materials, and there are a couple of paragraphs which I propose to read into the record.

10 At page 6 of *McVeigh* the Court of Appeal for Ontario states as follows: "In my view, the sentences for the so-called lesser offences in this field should be increased. The variations in the penalties imposed for drinking and driving are great and increasing sentences for offences at the lower end would emphasize that it is the conduct of the accused, not just the consequences, that is the criminality punished.

15 "If such an approach acts as a general deterrent then the possibilities of serious and tragic results from such driving are reduced. No one takes to the road after drinking with the thought that someone may be killed as a result of his drinking. The sentences should be such as to make it very much less attractive for the drinker to get behind the wheel of a car after drinking. The public should not have to wait until members of the public are killed before the courts' repudiation of the conduct that led to the

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killing is made clear. It is trite to say that every drinking driver is a potential killer.”

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And I pause here to note that in 2016 in the case of, notorious case of Mister - his name is escaping me right now. Just give me one moment - Muzzo, Justice Fuerst, in imposing a lengthy sentence noted that those words continue to go unheeded, the words of the Court of Appeal in *McVeigh*.

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Turning back to the *McVeigh* decision, again at page 6, the next paragraph, “Members of the public when they exercise their lawful right to use the highways of this province should not live in the fear that they may meet a driver whose faculties are impaired by alcohol. It is true that many of those convicted of these crimes have never been convicted of other crimes and have good work and family records. It can be said on behalf of all such people that a light sentence would be in their best interests and be the most effective form of rehabilitation.
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“However, it is obvious that such an approach has not gone any length towards solving the problem. In my opinion, these are the very ones who could be deterred by the prospect of a substantial sentence for drinking and driving if caught.

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General deterrence in these cases should be the predominant concern, and such deterrence is not realized by over-emphasizing that individual deterrence is seldom needed once tragedy has resulted from the driving."

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And finally, the Court notes at the end of page 7, "I have sought to make clear that, in my view, the 'attack' should, indeed, be on all impaired drivers."

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As well, I have reviewed the cases provided by both counsel where jail sentences were imposed and were not imposed where statutory minimums did not apply, including the case of *R. v. Sivanadi*, and *Greavette*, a judgment of Justice Rose of this court in Newmarket from 2018. I do not propose to set out in detail any facts or reasons from those cases. I am well aware that there are many more cases involving first time offenders for drink-driving offences where custody is not imposed. Indeed, the vast majority are of such a nature.

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The aggravating factors in this case are, in my view, too serious to ignore. Notwithstanding the able submissions of counsel, steps taken by Mr. Wang - and steps taken by Mr. Wang, pardon me, I am of the view that a deterrent sentence is

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5 required in this case. I have considered this case at great length and I have also considered whether a conditional sentence will provide the required specific deterrence as well as general deterrence. In my view, it would not.

10 So, in my view, the appropriate sentence in this case, having regard for all of the mitigating circumstances, including the fact that Mr. Wang has not been convicted of a prior offence of drinking and driving, the appropriate sentence is one of 21 days in custody. I am prepared to allow him to serve that sentence on an
15 intermittent basis if that is his wish, Counsel. Is that the desire of your client?

MS. ANWAR: Yes, that would be the....

20 THE COURT: All right. So he will be taken into custody today and he will be released on Monday morning at 6 a.m., and he will re-attend the jail on Friday of next week, which is the - I don't see the calendar. Oh, here we go.

25 MR. SHUMKA: It would be the 8th, I expect.

30 THE COURT: The 8th of February, not later than 6:30 p.m. and he will remain in custody until the following Monday morning at 6 a.m., and he will continue to surrender at the jail on consecutive Fridays until his sentence is served in full.

In addition to the term of custody, it is my view

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that the appropriate prohibition against driving in this case is one of three years and that will be the length of the prohibition. So Mr. Wang, you are prohibited from driving a motor vehicle on any street, highway, or other public place in Canada for a period of three years commencing today's date.

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Furthermore, you will be placed on probation for a period of one year. The terms of the probation are as follows: You will report to the probation officer in this building not later than Tuesday of next week, which will be the 5th of February, before the close of business and you will report thereafter as required by the probation officer.

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You will take counselling as recommended by the probation officer and you will sign releases to allow the probation officer to follow your progress in that regard, including, if she sees fit, counselling for alcohol consumption. And I do note that you have already taken such counselling.

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And finally, you will take the Missing You Program at the recommendation of the probation officer and complete that program to the satisfaction of the probation officer. Are there any other conditions, Mr. Shumka, that

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felt were appropriate?

5 MR. SHUMKA: Only with respect to reporting to
the jail for the intermittent sentence...

THE COURT: Yes.

10 MR. SHUMKA: ...I believe in a sober condition.
I think Madam Clerk likely has that standard
term.

15 THE COURT: Yes. So, so sir, while you are
serving your intermittent sentence you will be on
probation with the requirement that you will
surrender at the jail in sober condition, which
means you will have a zero blood alcohol
concentration, do you understand, and you will
also not have in your system any other
intoxicating substances such as marijuana, which
is now legal in this country. So you will not
20 have any intoxicating substances in your system
when you surrender to the jail to serve your
sentence. I think those are all of the things
that I was asked to deal with, Mr. Shumka.

25 MR. SHUMKA: That's correct, Your Honour. Thank
you.

THE COURT: That is the sentence.

30 MS. ANWAR: Your Honour, if I may address the
time that Mr. Wang is to surrender on Fridays, is
it - can I please request that he turn himself in
at 9 p.m. on Friday?

THE COURT: No.

MS. ANWAR: Okay.

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THE COURT: No.

MS. ANWAR: To allow himself some time to...

THE COURT: 6:30.

MS. ANWAR: 6:30.

THE COURT: 6:30 is the latest.

MS. ANWAR: Okay. Thank you.

THE COURT: All right. Thank you.

MR. SHUMKA: Thank you for your consideration.

THE COURT: Thank you, Mr. Shumka.

MS. ANWAR: Thank you, Your Honour. If I may be excused?

THE COURT: Yes, of course. Thank you, Counsel.

...*SOTTO VOCE* DISCUSSION BETWEEN MADAM CLERK AND THE COURT AND BETWEEN MR. SHUMKA AND MR. KELLY FOLLOWED.

MR. SHUMKA: Your Honour, I apologize for interrupting. Mr. Kelly, with his usual wisdom, has brought one more - Officer, I just - I might require Mr. Wang's attention and counsel's attention. I'm just reviewing the driving prohibition periods.

THE COURT: Yup.

MR. SHUMKA: My recollection is the driving prohibition typically commences at the conclusion of sentence. Because it's the intermittent sentence is spread out over a period it may well - I'm just looking at the pro - he might need a 'you will not drive' on the probation order as

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well.

THE COURT: Yes. Okay. Thank you.

MR. SHUMKA: Just a moment's indulgence while I look at the specific provisions.

THE COURT: That's fine. You may well be right about that, Mr. Shumka.

MR. SHUMKA: I just want to double-check. And it's section 259.

THE COURT: Well, in any event, Madam Registrar, we will include a term in the probation order that while serving the intermittent sentence he will not operate a motor vehicle in any province or any highway or public place in Canada.

MR. SHUMKA: Thank you. That solves the problem.

THE COURT: All right? So I think that should cover...

MR. SHUMKA: Thank you.

THE COURT: ...the issue.

MR. SHUMKA: And thanks to my colleague.

THE COURT: All right. Thank you, Mr. Kelly, for that. All right, good luck to you, Mr. Wang.

THIS IS TO CERTIFY THAT
the foregoing is a true and
accurate transcription of the notes
and recordings of Julie Coussons
to the best of my skill and ability.

.....
Janice Roach, Authorized Court Transcriptionist
Dated February 11, 2019, at the City of Toronto

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Evidence Act, subsection 5(2)

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