CITATION: R. v. Duval, 2024 ONSC 1829
COURT FILE NO.: CR-199/AP
DATE: 2024/03/28

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HIS MAJESTY THE KING	)	Kevin Ludgate, for the Crown
Respondent	)	
	)	
– and –	)	
	)	
Jessica Duval	)	Michael Venturi, for the Appellant
	)	
Appellant	)	
	)	**HEARD:** March 1 and 25, 2024

DECISION ON SUMMARY CONVICTION APPEAL

S.K. STOTHART J.

Overview

[1] The appellant, Jessica Duval, appeals against the sentence imposed by Justice L. Kim of the Ontario Court of Justice on January 31, 2024.

[2] On January 31, 2024, the appellant pled guilty to operating a conveyance while having over 80 milligrams of alcohol in 100 milliliters of her blood. Following her plea, the Crown and defence presented a joint sentencing position. The presiding judge rejected the joint submission and imposed a 6-month conditional sentence order and a 12-month driving prohibition.

[3] The appellant submits that the sentencing judge erred when he departed from the joint position. The Crown, as respondent, agrees.

The facts before the sentencing judge

[4] The facts presented in support of the guilty plea were that on December 12, 2023, the appellant was operating a motor vehicle when she hit the centre median on Barrydowne Avenue in the City of Sudbury.

[5] The police subsequently located the appellant sitting in the driver's seat of the motor vehicle, which was parked in a driveway nearby. The vehicle had damage to the front end, consistent with the earlier collision. The appellant exhibited several indicators of alcohol impairment and was placed under arrest.

[6] The appellant was taken to police headquarters, where she provided two samples of her breath into an approved instrument. An analysis of those breath samples revealed she had a blood alcohol concentration between 220-230 milligrams of alcohol per 100 milliliters of blood.

The proceedings at sentencing

[7] As part of sentencing, the court was advised that the appellant was 35 years old and had no prior criminal record. She was gainfully employed and had the support of her family. The appellant was remorseful for her actions, apologized to the court and was prepared to abide by any order that the court made.

[8] The court was advised that there had been discussions about the case between the Crown and the defence. As part of the plea and sentencing, the crown conceded that there were triable issues had the matter gone to trial.

[9] The Crown and defence jointly submitted that in the circumstances a $2000 fine and a 12-month driving prohibition should be imposed.

[10] Following these submissions, the trial judge advised counsel that he had serious concerns about the joint submission. He noted that the breath readings were high, the physical indica of impairment were strong, there had been an accident, and the appellant had left the scene. The trial judge expressed his opinion that these aggravating factors called for a term of imprisonment.

[11] The trial judge then asked counsel for further submissions with respect to whether the court should impose a term of counselling as part of probation, given that the parties were not submitting that a jail sentence be imposed.

[12] The court took a break so that the Crown and defence could speak about this and provide further submissions to the court.

[13] When the parties returned, counsel for the appellant provided the court with additional submissions in support of the joint submission. These included:

a. That it was a very early plea, within a week of receiving initial disclosure;

b. That the appellant was foregoing possible *Charter* applications that could have been brought at a trial, including an issue of overholding and the failure to provide a *Prosper* warning; and

c. That the appellant was a young professional, who would be significantly hampered in her profession because of the criminal conviction.

[14] Counsel for the appellant advised the court that they had discussed the matter further and given the trial judge's concerns it was now jointly submitted that if the court was considering not

going along with the joint submission, that a six-month probationary period with counselling could be added to the sentence.

[15] Following these additional submissions, the trial judge asked for further submissions with respect to how the sentence proposed would meet the sentencing principles of general deterrence, denunciation and proportionality given the aggravating facts. The trial judge then went on to express his concerns about the seriousness of the offence and that he felt the sentence being proposed was manifestly unfit and that there should be a term of imprisonment.

[16] The trial judge then asked the parties if they had a problem with a term of imprisonment to be served in the community that included terms of house arrest and counselling, in addition to the fine.

[17] Counsel for the appellant provided further submissions to the trial judge, reiterating that both counsel for the appellant and counsel for the Crown had sat down and discussed what was reasonable and appropriate in the circumstances, having regard to the strength of the Crown's case, the personal circumstances of the appellant and the societal impact of the offence.

[18] Having heard further submissions, the trial judge stated that in accordance with *R v. Anthony Cook*, if the sentence is so unfit that it brought the administration of justice into disrepute, that he did not have to accept the joint submission. The trial judge then asked for further submissions on whether a conditional sentence should be imposed.

[19] Counsel for the appellant made further submissions, indicating that he felt a conditional sentence was too high, repeating many of the prior submissions about the circumstances of the offender. Crown counsel then provided submissions setting out why the joint submissions had been arrived at and why it would not bring the administration of justice into disrepute.

[20] Having heard the additional submissions, the trial judge rejected the new joint submission. The trial judge found that the joint submission was not appropriate and would bring the administration of justice into disrepute because the offence was one worthy of imprisonment given the aggravating factors, the gravity of the offence, and because in his view the public was not getting the message about the grave dangers associated with drinking and driving. The trial judge then imposed a six-month conditional sentence and a one-year driving prohibition.

Analysis

[21] A joint position on sentencing following a guilty plea should only be rejected in exceptional or rare cases. This is because such positions are vitally important to the well-being of our criminal justice system. Joint positions help resolve cases and promote a fair and efficient criminal justice system. As such, deference to joint positions is the rule and not the exception. *R v. Anthony-Cook*, 2016 SCC 43 at para. 25; *R v. Fuller*, 2020 ONCA 115 at para. 16.

[22] The effective and efficient operation of our justice system relies on litigants enjoying a high degree of confidence that the joint submission will be accepted when guilty pleas are entered. *R v. Fuller* at para. 17; *R v. Harasuik,* 2023 ONCA 594 at paras. 21-22.

[23] A joint position should only be interfered with in circumstances where the proposed sentence would bring the administration of justice into disrepute or is otherwise not in the public interest.

[24] In *R v. Anthony-Cook,* the Supreme Court expressly rejected the application of the "fitness test" to joint submissions. The fitness test provided that a trial judge could depart from a joint submission if, having regard to the circumstances of the case and the applicable sentencing principles, they concluded that the proposed sentence was not fit. Instead, the court adopted a "public interest" test that was more stringent in order to reflect the many benefits that joint submissions bring to the criminal justice system and the corresponding need for a high degree of certainty in them. *R v. Anthony-Cook,* at para. 31.

[25] In *R v. Anthony-Cook,* at para. 34, Justice Moldaver described the public interest as follows:

> a joint submission should not be rejected lightly…Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold…

[26] The Supreme Court set out in detail why such a stringent test is required before a joint submission can be rejected. From the perspective of an accused person, the court recognized that most accused persons will not give up their right to a trial on the merits, and all of the procedural safeguards that it entails, unless they have some assurance that the trial judge will, in most instances, honour agreements entered into by the Crown. *R v. Anthony-Cook* at para. 37.

[27] The Supreme Court also recognized that there are several benefits to certainty in joint submissions from the Crown's perspective, including that the Crown's case may have flaws; there may be information that an accused can provide that is invaluable to other investigations or prosecutions; and there may be a benefit to the victim or witnesses. Further, the Crown benefits from a sense of certainty that what it has determined to be in the public interest will not be undercut. *R .v Anthony-Cook* at paras. 38-39.

[28] Finally, the Supreme Court recognized that there are benefits to the criminal justice system at large, including the fact that guilty pleas save precious time, resources, and expenses, that can be channeled into other matters. Justice Moldaver noted at para. 40:

> This is no small benefit. To the extent that they avoid trials, joint submissions on sentence permit our justice system to function more

> efficiently. Indeed, I would argue that they permit it to function. Without them, our justice system would be brought to its knees, and eventually collapse under its own weight.

[29] I would note that the comments of Justice Moldaver in *R v. Anthony-Cook* pre-date the COVID pandemic of 2020/2021 which saw the shut-down of courts and the postponement of trials, something unseen in the history of our justice system. The effects of the COVID pandemic continue to this day and courts continue to struggle to keep up with the ensuing backlog and the increasing demands placed on our criminal justice system. This adds to the public importance of early resolution of criminal matters.

[30] There is no question that the appellant committed a serious offence. There is also no question that there were aggravating factors surrounding the commission of the offence. They included hitting the median on the road; leaving the scene and parking nearby; and the appellant having almost three times the amount of alcohol legally permitted in her bloodstream.

[31] However, there were other significant mitigating factors, including an early plea, a plea in the face of what both the Crown and defence agreed that were triable issues; a youthful offender with no prior criminal record; a genuine expression of remorse; the appellant's unique personal circumstances including her health challenges; and the specific impact that a criminal record would have on the appellant given her profession.

[32] While the trial judge referred to test as set out in *R v. Anthony-Cook,* when his reasons are read as a whole, they reflect the application of the fitness test. The trial judge was concerned that the sentence was not fit when assessed against the nature of the offence, the circumstances of the offence, the circumstances of the offender and the fundamental principles of sentencing.

[33] As stated by the Ontario Court of Appeal in *R v. Harasuik*, at para. 24, a trial judge must not only explain why the sentence did not accord with the aggravating circumstances and the applicable sentencing principles in the case, he or she must also explain why the joint submission is so unhinged from reality that it would cause a reasonable person to believe that the proper functioning of the justice system had broken down.

[34] It is clear that the trial judge felt that there were aggravating features in this case that did not support the imposition of the minimum penalty provided for the offence. It is also clear that the trial judge felt that general deterrence was not met with the sentence being proposed.

[35] That being said, the trial judge's reasons do not explain why the joint submission in this case, which was lenient, made this one of those "rare" and "exceptional" circumstances where the joint submission was "so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down".

[36] In my view, there was no basis to reject the joint submission proposed. A reasonable informed member of the public, aware of all of the circumstances, including not only the seriousness of the offence but also the appellant's lack of criminal record, early acceptance of responsibility, her remorse, the fact that she gave up her right to trial, the Crown's acceptance that there were triable issues, and the importance of promoting efficiency and certainty in the criminal justice system by way of timely resolutions, would not conclude that the justice system had broken down.

[37] For these reasons, the appeal is allowed, and the sentence is varied to a $2000 fine, to reflect the joint submission proposed. The appellant did not seek a stay of her driving prohibition, and so it will continue to run for the 1-year period imposed.

Justice S.K. Stothart

Released: March 28, 2024

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