

Citation: 2023 NBKB 156

Date: 2023 09 12

Docket: FCR-3-2022

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON



BETWEEN:

HIS MAJESTY THE KING

– and –

JASON ANDREW KING

SENTENCE

(Criminal Negligence Causing Death – s. 220 (b) CCC)

Date of Sentencing: September 12, 2023

Before: Justice E. Thomas Christie

At: Burton, New Brunswick

Appearances: Patrick McGuinty and Christopher Lavigne for the Crown
Patrick Hurley, K.C. and Sabrina Winters for Jason King

Christie, J. (Orally)

INTRODUCTION

[1] On June 5, 2023, this court entered a conviction against Mr. King on an indictment that alleged the following:

On or about August 16, 2018 at Fredericton, New Brunswick did, by criminal negligence cause the death of Michael Henderson contrary to s. 220(b) of the Criminal Code of Canada and amendments thereto.

[2] Subsection 220.(b) provides that:

220. Every person who, by criminal negligence causes death to another person is guilty of an indictable offence and liable:

(b) in any other case, to imprisonment for life.

[3] The substance of the offence is set out in s. 219 of the *Code* which provides that:

219(1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of others.

Definition of Duty

(2) For the purpose of this section, duty means a duty imposed by law.

VICTIM IMPACT STATEMENTS

[4] The court received and reviewed thirteen victim impact statements. Of those thirteen, twelve were read into the Record. Michael Henderson, who died on August 16, 2018, was loved. He touched many within his family. His friends were many. He was a recent high school

graduate starting his first job that would lead to his career in construction. His journey ended in the most tragic of ways. The depth of pain suffered by his family and friends was palpable as the statements of his family and friends were read. My words cannot capture the sense of loss and grief that was expressed in court. I wish that anything that could be done in this process could limit that loss.

[5] No one who has participated in this case, has not been touched by the tragedy of it all. I think of Michael Henderson's mother, Diane, who, in her statement and, reflecting on the impact the incident had on her son Eric who was working with Michael that day, wrote:

Eric relayed that he had been pulling on Michael's arms desperately trying to get him out of that hole. He could feel his brother squeezing his hands. At one point Eric went under the water feeling for Michael's mouth to give him air. He told me Michael's hands were blue. He was holding his brother's hands while he drowned.

I thank all those who participated by presenting their statements to me.

PRINCIPLES OF SENTENCING

[6] In coming to the determination of a just sentence, I must be mindful of the purposes of sentencing as those purposes are defined by statute. I note the applicable provisions of s. 718 of the Criminal Code which direct as follows:

718. The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,
 - (ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,
 - (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
 - (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

- (iii.2) evidence that the offence was committed against a person who, in the performance of their duties and functions, was providing health services, including personal care services,
- (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,
- (v) evidence that the offence was a terrorism offence,
- (vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*, and
- (vii) evidence that the commission of the offence had the effect of impeding another person from obtaining health services, including personal care services,

shall be deemed to be aggravating circumstances;

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[7] I will make specific mention of certain of the above principles later in these reasons. However, I am cognizant of the need that any sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[8] I take note of the decision of Justice Ferguson, as found in *R. v. Howe*, 2015 NBQB 75 (CanLII), 2015 NBQB 075 where at paragraphs 41 and 42 he summarized the sentencing regime as follows:

The principal purpose of sentencing is to protect the public by denouncing unlawful conduct, deterring offenders and other persons who might be inclined to commit crime, separating offenders where necessary from society, and assisting in rehabilitation of the offender through the promotion of a sense of responsibility in the offender.

Sentences must be proportional to the gravity of the offence given the degree of responsibility of the offender, and must be similar to sentences imposed on similar offenders who have committed similar offences in similar circumstances.

FACTS FOLLOWING TRIAL

[9] In the reasons following trial, cited as *R. v. King*, 2023 NBKB 084, I set out at some length the facts as I found them to be. Those facts are fresh in the minds of those present. It serves no purpose to fully review those facts in this exercise. However, it goes without saying that the facts, as set out therein, form the basis for the sentencing exercise in which the court is now engaged. By way of summary, I set out the following.

[10] Michael Henderson died on August 16, 2018, by drowning, in a hole in the middle a clarifier being built in Fredericton. Mr. King was the site supervisor for the construction project. As a supervisor, there were certain legislated duties upon Mr. King meant to prevent, to the degree possible, workplace injuries or death. Moreover, there were certain company policies in place meant to achieve a similar purpose. Mr. Henderson died because those legislative duties and obligations on Mr. King, as supervisor, were ignored - were never put in place. At trial, Mr. King acknowledged that he had not informed himself as to what was legally required of him.

[11] Of particular note, are the regulations and duties applicable to work in confined spaces. Mr. Henderson was working in a confined space when he died. He was in a setting in which the height of the hole he was in was over his head. A rubber plug that was in an adjoining pipe let lose, and trapped Mr. Henderson against the concrete wall of the space he was in. It was instantaneous with no chance to react. Water rushed into the space and, within a matter of minutes at most, Mr. Henderson had drowned.

[12] The rubber plug let loose as a result of water pressure on the opposite end being exerted by Mr. King who was performing a leak test on the pipe system. Mr. King had indicated in his Worksafe interview that he knew Mr. Henderson was likely in the whole when the test was being performed. Mr. King's safety plan consisted of having someone available to pull Mr. Henderson out of the hole in the event of an emergency. This plan was, in reality, no plan at all.

[13] As the water rushed into the confined space, Michael Henderson's brother Eric tried in desperation, to pull him out. The rubber plug had Michael pinned so tight that any attempt to move him was futile. Nevertheless, Eric tried and recalled in his victim impact statement what had happened. It conforms in substance to his evidence at trial.

[14] The regulations called for certain safety precautions to be in place for anyone working in confined spaces. None of those were put in place by Mr. King. His failure, as was found at trial, to even inform himself of what his responsibilities were as a supervisor was a particularly telling point in the evidence. His failure to even read the site-specific safety manual, or to identify anything he did to enhance the safety of the work he had assigned Michael Henderson, led the court at trial to consider his conduct to reflect a wanton and reckless disregard for the lives and safety of those under his supervision.

[15] In addition, the manufacturer's safety directive, that no one should be working in proximity to the plug when it was in use, was ignored. As I summarized at trial the evidence, taken as a whole, appeared to reflect a circumstance where the question was not whether Mr. King had done enough to secure the safety of those under his control – he had done, essentially, nothing.

PRE-SENTENCE REPORT

[16] It would be accurate to characterize Mr. King's pre-sentence report as positive. He is 46 years old. The report's author notes Mr. King's cooperation throughout. He also records that Mr. King has expressed remorse. The author wrote at p. 4:

The subject [Mr. King] was emotional when reflecting on the incident and acknowledged wrongdoing towards the victim, his family and all those impacted.

[17] The report describes Mr. King's upbringing. It was not ideal. He has half-siblings with whom he has little meaningful contact. He has seen violence in his home between his mother and her partner. Yet, his mother worked hard to ensure he had the necessities of life. Mr. King has had a good relationship with his mother. His relationship with his father developed further once they started working together in construction following Mr. King's graduation from high school. While Mr. King has had breaks in his employment in the construction industry it has been his primary work over many years. For most of his career, he has worked for Springhill Construction, as he was on the day Michael Henderson died. He is no longer with the company. His report notes his comments that Springhill provided him with no training on how to assume the duties of a supervisor. He is currently employed by a different construction company run by his uncle.

[18] The report identifies his contributions to his community. This includes work for the Legion and on the maintenance of ATV trails. It was noted in the report that Mr. King wants this present process over with as it has been a weight he has carried.

AGGRIVATING CIRCUMSTANCES

[19] The Crown asserts that Mr. King's prior conviction for manslaughter in 2006 is indicative of his disregard for human life. His prior defendant history report contains several convictions for assault which pre-date 2000 and are of no consequence in the present proceeding. While the Crown accepts that the 2006 incident is somewhat dated, it was argued as being reflective of Mr. King's lack of appreciation for the welfare of others. Mr. King's counsel that it is not as simple as it appears to the Crown. Mr. King argues that the underlying circumstances in this case, particularly that he was unaware of his required duties, or that he was in a position he did not really want, or that his employer did not properly train him, should mitigate his moral blameworthiness for the offence. It is a fact, the Crown asserts, that this case, along with the manslaughter conviction, establish that two persons have died as a result of Mr. King's actions.

MITIGATING CIRCUMSTANCES

[20] As it concerns mitigating factors, the parties both acknowledge (as do I) a positive pre-sentence report. Mr. King's service to his community is also noted. I also note the expression of remorse by Mr. King as captured in the pre-sentence report and in his comments to the court directly.

AUTHORITIES CITED

[21] Unlike offences where a range of sentences can be discernible upon a review of like cases, criminal negligence causing death cases present as an exception. The parties joined in the submission that such cases defy a uniform sentencing pattern due to the infinite variables in the facts of each case. As Coady, J. wrote in *R. v. Fraser*, 2020 NSSC 223 at para. 41:

It is especially important to keep proportionality in mind in criminal negligence causing death cases because the offence has no set sentencing range due to it encompassing an endless variety of acts or omissions with varying degrees of blameworthiness.

[22] Therefore, the exercise of fully recounting in these reasons the circumstances in each of the authorities cited to me may appear to be a fruitless exercise. Nevertheless, there are certain themes that emerge, perhaps most notably, the need to ensure that the sentence imposed be proportionate to the circumstances of the offence. As noted in *R. v. Wolfe*, 2022 SKCA 132, at para. 32:

In my view, this reference to *Ipeelee*, when read alongside the trial judge’s explicit recognition later in his reasons of the need to consider restraint, demonstrates that he was keenly aware of that principle, and understood how it intersects with the fundamental sentencing principle of proportionality.

[emphasis added]

[23] In *Wolfe*, the sentence imposed was 6 years on each of 2 counts of criminal negligence causing death. The sentences ran concurrently. The accused had consumed alcohol and drove at highway speeds on the wrong side of a divided highway. A collision occurred killing two. Others were seriously injured. The Court of Appeal, at para. 18, noted the comments of the sentencing judge:

He [the trial judge] concluded that, in light of the “terrible circumstances” and “absolutely devastating consequence” of Mr. Wolfe’s offences, “any sentence below incarceration in a penitentiary would not meet the fundamental principle of proportionality, would not meet the primary concerns of denunciation and deterrence, and would be such an outlier that parity would not be observed.

[24] In *R. v. Francisco*, 2023 BCCA 228, the accused pled guilty to a charge of criminal negligence causing death and was sentenced to 4 years of incarceration. He sought to appeal a 4-year driving ban that was imposed as part of sentencing. He did not appeal the period of incarceration.

[25] In *R. v. Sillars*, 2022 ONCA 510, Mr. Sillars had taken a boy, who was under his charge, out in a canoe in conditions he had been warned were not safe. Nor had he provided adequate safety equipment for the trip. Mr. Sillars was impaired. The canoe capsized and the child died. Mr. Sillars was sentenced to 6 years – a term upheld on appeal. The court noted the sincere remorse expressed by Mr. Sillars. I, too, recognize the sincere remorse expressed presently by Mr. King. Mr. Sillars was in a position of trust and authority over the child. Mr. Sillars' moral blameworthiness was high. Mr. Sillars also had a criminal record.

[26] Of particular note to the Crown was the case of *R. v. Kazenelson*, 2018 ONCA 77, which upheld the reasons on sentencing by the trial judge. An incident occurred on a construction site resulting in the death of four workers. A swing stage, on which the workers were standing high above the ground, collapsed. Mr. Kazenelson was the project manager on the site. The victims, who had not been tethered to a secure mount, fell 100 feet to their death. Being tethered to a point of safety was required by law and industry practice. It was found at trial that Mr. Kazenelson had not ensured the proper safety equipment was available for the workers. Mr. Kazenelson was onsite at the time of the incident. The trial judge, at para. 1 of the reasons on sentence (2016 ONSC 25), wrote:

None of the workers was attached to a lifeline as required by both law and industry practice. Mr. Kazenelson, Metron's project manager, was with the workers at the time of the collapse. He had taken no steps to ensure that lifelines were available for the workers and that they were used.

[emphasis added]

[27] I reproduce the words of the trial judge at para. 23 of his reasons:

It has not been suggested that a term of imprisonment is required in order to deter Mr. Kazenelson from committing further offences, to protect the public by separating him from society, to promote a sense of responsibility in him, or to assist in his rehabilitation. He was of good character prior to the accident and he has continued to be of good character in the six years since. He is hardworking, devoted to his family, and involved in the community. He is quite unlikely to commit further criminal offences of any kind, and he is remorseful. Notwithstanding that, it is common ground that a term of imprisonment is necessary to adequately denounce Mr. Kazenelson's conduct and to deter other persons with authority over workers in potentially dangerous workplaces from breaching the legal duty set forth in s. 217.1 of the Code to take reasonable steps to prevent bodily harm from befalling those workers.

[28] Counsel for Mr. King presented me with the decision of the Supreme Court of Canada in *R. v. Proulx*, 2000 SCC 5, as authority for the proposition that, where appropriate, conditional sentences are a legitimate option for the court to consider in cases of this type. *Proulx* was a case involving an impaired driver who drove several friends home after a night of drinking. The car used was not in proper repair. His driving caused an accident that killed one person and injured another. He was sentenced to 18 months incarceration. The Court of Appeal allowed the appeal to permit the sentence to be served in the community. The Supreme Court recognized that, absent a specific minimum term of imprisonment, courts should be encouraged to consider and apply, in proper circumstances, conditional sentences. Such sentences can be proper and adequate expressions of the court's need to deter and denounce.

[29] At para. 115 of *Proulx* is found the following:

Finally, it bears pointing out that a conditional sentence may be imposed even in circumstances where there are aggravating circumstances relating to the offence or the offender.

[30] With that said, however, it is also worth noting what the Court had said in paragraph 114:

Where the punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction.

[31] I accept that there may be cases where it is appropriate for imposed periods of incarceration to be served in the community under conditions. Of course, as s. 742.1 of the *Code* provides, such conditional sentences are only available if the sentence imposed is less than two years.

[32] Examples of such cases provided by Mr. King include *R. v. Bauman*, 2019 ONCJ 569, a tragic case of a father running over and killing his son in a farm accident. The sentencing judge noted the desire of Mr. Bauman, from the beginning of the legal process, to take full responsibility for his actions. He pled guilty and sentencing was suspended. I do note that the sentencing judge acknowledged that, to a certain degree, the conviction itself can serve as sign of the court's expression of denunciation.

[33] In *Fraser, supra*, two police officers were charged after a person in their care died in custody. In the circumstances, the court was satisfied that the principles of sentencing could be served by a suspended sentence.

[34] *R. v. Holding*, 2000 BCCA 425, involved a driver who had suffered an epileptic seizure and caused an accident. His two-year old son, who was with him in the car, died in the accident. Mr. Holding had been warned about driving unless his seizures were under control. The trial judge sentenced him to two years less a day. The Court of Appeal determined that the sentencing judge was overly focused on deterrence and failed to sufficiently consider the propriety of a conditional sentence. It imposed one in place of the sentence following trial.

[35] *R. v. Tayfel*, 2008 MBQB 101, involved a pilot who ran an air taxi business. On a flight with passengers his plane ran out of fuel and landed on a street. Several persons were injured, one died. The industry was highly regulated including requirements to carry more than sufficient fuel for the intended flight. Mr. Tayfel did not fully comply with the regulations. Even though the judge determined that a period of incarceration was necessary, he was prepared to sentence at a level that permitted a conditional sentence, that is, two years less a day.

[36] In *R. v. Condon*, 2007 BCSC 1334, Ms. Condon suffered a cocaine induced seizure while driving and killed a pedestrian when she drove her car up onto a sidewalk. Given that she had no prior record and a new baby, and had pled guilty, the court was prepared to allow for a conditional sentence.

[37] Finally, I refer to *R. v. Hariczuk*, [1999] O.J. No. 3110, a case where a father left a prepared methadone dose in his refrigerator. Confusing it for a fruit drink, his child drank it and died. The court, in consideration of the father's ongoing drug addiction treatment needs, found it fit to allow him to serve his sentence in the community.

POSITION OF THE PARTIES

[38] The Crown argues that a sentence of 3.5 years of incarceration is appropriate in all the circumstances.

[39] Mr. King's counsel argues that an appropriate sentence would be 12-18 months incarceration but, that it be served in the community on conditions.

SENTENCE IMPOSED

[40] Let me begin by noting that the present circumstances are tragic. Nothing in the sentence to be imposed will reduce the pain and loss suffered by the family. There is no meaningful restitution I can order. While we talk in criminal law about principles of proportionality, deterrence or denunciation, these principles may mean nothing to those who have carried the weight of the loss following Michael's death. The court's duty at times like this, is to punish those who have broken the law but to do so according to the principles I just mentioned – ever mindful of the victims of the crime. I read and listened to the victim impact statements provided to me yesterday. They have left an impression on all who heard what was said.

[41] The principle of proportionality must be front-of-mind for the sentencing judge. The difficulty here is that sentences considered to be 'proportionate' vary widely depending on the circumstances of each case. As noted above, we have seen sentences in which 6 years was considered appropriate in the circumstances where a boy died, as in *Sillars*. Lesser sentences are seen in cases like *Kazenelson* at 3.5 years where four deaths were involved. What justifies the difference?

[42] Principles of denunciation are important to convey the court's disapproval at the conduct giving rise to the offence. Deterrence is necessary to convey to the public that criminal acts will not go unpunished and deter others from committing similar acts. In this case, I am mindful of the role deterrence can hopefully play in passing the sentence I will shortly.

[43] Mr. King, and all supervisors, forepersons or employers in the perhaps hundreds or thousands of construction or industrial sites in this province, large or small, carry the same duties to protect those the law places under their charge. The failure to know those rules, and apply them will, when accidents result in death because of such failure, surely lead to the likelihood that prison time awaits.

[44] I have considered the aggravating factors, most notably Mr. King's conviction for manslaughter. I also have considered the mitigating factors which include the positive pre-sentence report and Mr. King's expression of remorse, which I accept as being genuine. I have also considered Mr. King's argument, through counsel, that he was placed at a disadvantage by his employer, Springhill Construction, which did nothing more than change his title to that of supervisor. It was argued that Springhill did nothing to train him in the legal duties that attached to the position they assigned him. This, he argues, limits his moral blameworthiness.

[45] In my view, the present circumstances do not lend themselves to a sentence of incarceration of less than two years. Unlike certain of the authorities presented where that was the case, here Mr. King stands before the court with a prior conviction for manslaughter which, all noted is 'dated' to a degree, but recent enough that it cannot be ignored. Moreover, in certain of the cases cited, where a conditional sentence was imposed, the person was prepared to plead guilty which is, in certain cases, a mitigating factor.

[46] While I accept that the *Kaznelson* case most closely fits the present fact scenario, being a construction case, I am concerned, to be honest, as to how much weight I can place on the arguments that the alleged failure of Springhill to train Mr. King in his duties should impact Mr. King's moral blameworthiness, even if minimally so. In *Kaznelson*, the sentence imposed was 3.5 years. It is obvious that the Crown's present submission is grounded in that case as a comparator sentence. However, I am not prepared to follow that lead as far as the Crown would like.

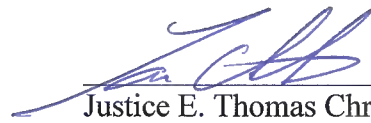
[47] As noted, nor am I prepared to accept that there should be a sentence of less than 2 years as suggested by Mr. King's counsel.

[48] Mr. King, please stand:

[49] In consideration of the arguments submitted by counsel, and the evidence I have received on sentencing which included your prior defendant history report, and keeping in mind the principles of proportionality, parity, denunciation and deterrence, it is the sentence of this court that you serve a term of imprisonment I set at 3 years.

[50] Deputy, Mr. King is now in your custody and care.

[51] Counsel – are there any ancillary orders I should consider making or other matters for today?



Justice E. Thomas Christie
Court of King's Bench of
New Brunswick, Trial
Division