DATE: 20040607
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COURT OF APPEAL FOR ONTARIO

LASKIN, CHARRON and LANG JJ.A.

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	Susan G. Ficek
	)	for the respondent
Respondent	)	
	)	
- and -	)	
	)	
KEVIN DOXTATOR	)	Jeanine E. LeRoy
	)	for the appellant
Appellant	)	
	)	
	)	Heard: June 3, 2004

On appeal from the conviction entered by Justice Roland J. Haines of the Superior Court of Justice, sitting without a jury, on January 29, 2003 and from the sentence imposed on April 24, 2003.

CHARRON J.A.:

[1] The appellant was convicted of impaired driving causing death and breach of recognizance. He was sentenced to 12 months' imprisonment on the driving charge and one month consecutive on the breach of recognizance. He appeals against both conviction and sentence in respect of the charge of impaired driving causing death.

[2] The charge arose out of a single motor vehicle accident that occurred early in the morning of June 11, 2000. The appellant and the deceased, Mark Doxtator, were both in the vehicle at the time of the accident. The only issue at trial was whether the appellant had been driving at the time the vehicle left the road and rolled over in the ditch. When the accident was discovered, the appellant was still in the vehicle. Mark Doxtator had been expelled from the vehicle and his body was found in the ditch.

[3] The appellant submits that the verdict was unreasonable. The main thrust of the appellant's argument was that the trial judge erred in failing to give effect to the evidence of the expert accident reconstructionist called by the defence. It was that expert's opinion

that the appellant was likely in the back seat of the vehicle and not in the driver's seat when the vehicle left the road. Despite the fact that the trial judge found the expert "credible" and his testimony "helpful", he was satisfied beyond a reasonable doubt on the whole of the evidence that the appellant was the driver. The appellant submits that this conclusion was unreasonable.

[4] We did not call upon Crown counsel to respond to this argument. In our view, the verdict was amply supported by the evidence. In particular, we note the following items of evidence:

- One witness, David Antone, testified that shortly before the accident he had encountered the appellant and Mark Doxtator. At that time, the appellant was driving his vehicle and Mark Doxtator was "passed out" in the front passenger seat. Although Mr. Antone agreed in cross-examination that Mark Doxtator had awakened at one point and talked, he disagreed with the suggestion that Mark Doxtator had seemed more awake by the end of the conversation.
- The Crown's expert accident reconstructionist was of the opinion that the appellant had been the driver at the time the vehicle went into the ditch and the trial judge accepted the facts underpinning this opinion.
- The defence expert conceded that, if the two occupants were in the front seat at the time of the accident, it was likely that the appellant was the driver and Mark Doxtator, the passenger.
- The physical evidence showed that the driver's head had likely hit the windshield. Both experts agreed that the head injuries suffered by the appellant were consistent with hitting the windshield.
- The trial judge rejected the appellant's testimony.

[5] For these reasons, we dismissed the appeal against conviction and called upon the Crown only on the sentence appeal.

[6] Counsel for the appellant submits that the trial judge erred in failing to impose a conditional sentence, having regard more particularly to the fact that the appellant is an aboriginal offender. Counsel relies on the principles set out in *R. v. Gladue*, [1999] 1 S.C.R. 688. She also relies heavily on this court's decision in *R. v. Logan* (1999), 139 C.C.C. (3d) 57 (Ont. C.A.) where, having regard to the "very unique circumstances" of the case, this court substituted a sentence of 30 months' imprisonment with a 20-month conditional sentence in respect of charges of impaired driving causing death and impaired driving causing bodily harm.

[7] Counsel for the appellant submits that there are so many parallels between this case and the circumstances of the offender in *Logan* that the trial judge erred in reaching

a different conclusion. In particular, she notes the following facts, all accepted by the trial judge:

- the appellant's good work history;
- his responsible contribution to his community, including having previously been Chief of the Oneida Nation of the Thames for two years;
- his participation in the National Native Alcohol and Drug Awareness Programme, both before and since the incident;
- his helpfulness in the community with both youth and elders;
- the continuing support of family, friends, and community as evidenced in letters filed at the sentencing;
- the limited significance of his dated conviction for drinking and driving in 1986;
- his abstinence from alcohol record for a number of years before the accident and since the accident; and
- his responsibility to his spouse and to his children.

[8] Crown counsel submits that the trial judge's reasons for sentence do not reflect an error in principle. Counsel argues that both *Gladue* and *Logan* were submitted to the sentencing judge and that there were sound reasons to depart from the result in *Logan* in this case.

[9] In particular, this accused's circumstances demonstrated the following:

- the extremely high level of blood alcohol content (256 mg), which appears to have been the only reason for the accident;
- the appellant's prior conviction for drinking and driving which, although dated, should have signalled to the appellant the potentially devastating consequences of impaired driving;
- the appellant's decision to drink and drive notwithstanding his ongoing involvement in the Native Alcohol and Drug Awareness programme at the time of the accident;
- the appellant's driving for social reasons subsequent to the offence contrary to a condition of his recognizance;
- the fact that no restorative programme was available to him in the aboriginal community;
- and finally, the appellant's failure to make efforts to reconcile with the members of the victim's (his cousin's) family or to assist them, causing them much pain and anguish, as evidenced in their victim impact statements.

[10] Finally, Crown counsel submits that it is apparent from the quantum of sentence that the trial judge properly took into account the aboriginal background of the offender.

[11] Having regard to all the circumstances, we are not satisfied that the sentence was demonstrably unfit as contended. Leave to appeal the sentence is granted but the appeal is dismissed.

Released: JUN 7 2004
JIL

Signed: "Louise Charron J.A."
"I agree John Laskin J.A."
"I agree Susan Lang J.A."