

 **R. v. Bishar-Mussa**

Ontario Judgments

Ontario Court of Justice

P. Robertson J.

Heard: October 25, 2018.

Judgment: December 4, 2018.

Toronto Court File No. 29510

[2018] O.J. No. 7008

Between Her Majesty the Queen, and Abdihared Bishar-Mussa

(53 paras.)

Counsel

Michael Coristine, counsel for the Crown.

David Perry, for the defendant Abdihared Bishar-Mussa.

Reasons for Sentence

P. ROBERTSON J.

1 Mr. Bishar-Mussa has pled guilty to careless driving.

The Offence

2 On March 21, 2018 Mr. Bishar-Mussa was operating his motor vehicle as an Uber driver. It was his second day working in that capacity.

3 At approximately 3:30 in the morning he responded to a request for an Uber. He went to the residence of Nicholas Cameron and his girlfriend, Monika Traikov. They were about to embark on a vacation and sought a ride to Toronto Pearson airport.

4 The accused programmed the airport destination into his phone/GPS which was mounted on the car's dashboard. Upon entering the Fred Gardiner Expressway he inadvertently went eastbound, away from the airport. Realizing his mistake he advised that he would turn around at the next exit, at Spadina Avenue. Once on Spadina he drove slowly in an attempt to navigate his

way back to the westbound expressway. He suggested he knew a shortcut to the airport via Dundas Street.

5 This was obviously not correct. Understandably, Mr. Cameron and Ms. Traikov directed Mr. Bishar-Mussa back to the Expressway, the most direct and logical route to the Airport.

6 While on route to the airport the accused's phone fell from its mount onto the floor. It was inaccessible. The accused pulled his car towards the shoulder of the highway just west of Park Lawn Road, stopped, retrieved his phone and re-mounted it its holder.

7 As he began to re-enter fully, the right live travel lane, a second driver, Mr. Jose Estacion, was preparing to exit the highway at the next exit, Islington Avenue. He was distracted in his driving, as he was looking at his phone. As he re-focused on the road ahead, there was no time to avoid the accused's motor vehicle which was now directly in front of him. He stuck the back left corner at 107 km/hr. Mr. Estacion made no attempt to apply his brakes before the collision.

8 Mr. Bishar-Mussa's car was sent careening across all four lanes of the highway, where it came to rest against the centre median, seven hundred feet west from the point of impact.

9 Due to the degree of force, the precise location of the impact, and the location of Mr. Cameron who was seated in the rear seat behind Mr. Bishar-Mussa, he suffered a fatal neck injury. Ms. Traikov suffered a concussion and other minor injuries.

10 Subsequent investigation determined Mr. Bishar-Mussa had either stopped his motor vehicle partly in the right live traffic lane or had re-entered the lane at a very slow speed. Mr. Bishar-Mussa's motor vehicle was travelling between 0-5 km/hr. when struck.

11 Drugs or alcohol did not play any role in the collision, for either driver.

Victim Impact Statements

12 Eleven Victim Impact Statements were read in Court. Those statements were from Nicholas' mother, his siblings, his relatives, his friends and from others, who he simply had touched their lives.

13 The statements were heart wrenching. I have read them several times. They spoke of Nick, if I may be permitted to refer to him as such, as sensitive, caring, and funny. He laughed a lot and made others do the same. He was a gifted writer. Something he clearly inherited from his mother and father. The tragedy of the loss of a child, the youngest son, the loss of a brother, of an uncle or cousin is hard to comprehend -- as much as I have tried to understand the grief, I don't pretend to fully understand. His loss clearly had and continues to have a profound impact on his family.

14 I recognize it is not only the loss of what was, but what could have been. Nick was only 28. I read the letter from Ahmed and his family. Nick's compassion, unselfish actions, humility and

dogged determination to help a Syrian refugee family continue on their journey said much of what Nick was made of. Nick had much to offer this world.

The Offender

15 Mr. Bishar-Mussa is 23 years old. He is refugee from Somalia. He lives in Toronto with his parents and 6 siblings in a 2 bedroom apartment. He arrived in Canada in December 2013. He has made attempts to improve his education. He attended high school but had to leave to assist in the support of his family. He is 2 credits short of his GED. He has worked as a cleaner and in a factory making windows but his family required more money. He applied for a loan, purchased a car and began to work for Uber.

16 At present he is not working but attending school to become a forklift operator. He is supported through Ontario Works and receives \$650 monthly, of which \$350 goes to rent, \$150 to transit and the rest to food and other essentials.

17 Mr. Bishar-Mussa has no criminal record and no driving record.

Positions of the Parties

18 The Crown seeks a fine of \$2000, the maximum fine under the legislation in force at the time, a 1 year driving suspension and a probation order for 1 year subject to terms requiring the accused to complete the "Missing You" program, not to occupy the front seat of a motor vehicle and to take a remedial driving course.

19 The Defence submits the appropriate sentence is a \$400 fine, due to Mr. Bishar- Mussa' financial position. A \$400 fine is the minimum fine under the legislation. Counsel submits a probation order should follow requiring Mr. Bishar-Mussa to take a remedial driving program and that he not be allowed to carry paying passengers. He submits a driving prohibition is not warranted. Crown Submissions

20 The Crown submits a number of mitigating factors informs their position on sentence:

- Mr. Bishar-Mussa has entered a guilty plea
- The plea was entered early in the proceedings
- His plea has saved the necessity of witnesses to testify and re-live the events
- He has apologized and expressed his remorse for his actions and acknowledges the resulting impact from Mr. Cameron's death
- There is an element of reduced blameworthiness in that the actions of a 2nd driver was a contributing factor to the gravity of the offence
- Mr. Bishar-Mussa has no criminal record; nor does he have a driving record
- He was co-operative with the police

- He was originally charged with dangerous driving causing death and criminal negligence causing death and served 1 day in custody before being released on bail

21 The Crown relies on a number of aggravating factors:

- The gravity of the offence or in other words the result of the accused's actions -- the death of Nicholas Cameron and the injuries to Ms. Traikov.
- The fact the accused was operating a commercial vehicle at the time and he had accepted a duty of care to his passengers
- The fact the accused appeared not to be comfortable driving in Toronto, as evidenced by seemingly being unaware of how to get to Pearson airport, a well-known location
- His extremely bad decision to stop on the highway
- His failure to ensure either when he stopped, he was entirely on the shoulder of the highway or when he re-entered the highway, he could do so safely

22 The Crown seeks the maximum fine to address the principle of denunciation.

23 They also seek only a 1 year driving suspension, in light that the accused has been without driving privileges since the incident in March 2018.

24 The Crown is not requesting a Community Service Order as the accused has been on a recognizance with terms since he was charged with offences under the Criminal Code.

Defence Submissions

25 The Defence highlight a number of mitigating factors in support of their position on sentence.

- that the manner of driving did not involve a sustained period of carelessness; the defence argues that pulling over on the highway was a reasonable choice as opposed to fishing around for the dropped phone
- that the careless conduct is not at the high end of what constitutes careless driving
- that there was a contributing factor to the gravity of the offence - the actions of the 2nd driver, thereby reducing the degree of moral blameworthiness attributable to the accused
- that the accused is a first offender and has neither a criminal record nor a driving record, and as such, rehabilitation is the principle consideration
- the fact the accused was charged criminally and therefore has been subject, since his arrest on March 28, to restrictions pursuant to a Recognizance of Bail
- that the accused's ability to pay is a relevant sentencing consideration; given the accused's very limited financial situation, it is argued that a fine of \$2000 would be crushing and that the minimum fine of \$400 is appropriate
- that the accused is pro-social as evidenced by the letters of support from his community documenting his history of volunteering, and

- that he is motivated to be a contributing member of society as demonstrated by his attempts to complete his education, his history of employment, his volunteering in his community, and his dedication to contributing financially to his family

The Law

26 Section 130 of the Highway Traffic Act provides that, "Every person is guilty of the offence of driving carelessly who drives a vehicle...on a highway without due care and attention or without reasonable consideration for other persons using the highway..."

27 At the time of this offence, Section 130(2) of the Act provided that, "On conviction under subsection (1), a person is liable to a fine of not less than \$400 and not more than \$2000 or to imprisonment for a term of not more than six months, or to both, and in addition his or her driver's licence or permit may be suspended for a period of not more than two years.

28 Section 72(1) of the Provincial Offences Act permits, "Where a defendant is convicted of an offence in proceedings commenced by information, the court may ... in addition to fining the defendant or sentencing the defendant to imprisonment, direct that the defendant comply with the conditions prescribed in a probation order."

29 Counsel have provided me a number of cases in support of their respective positions. I have reviewed each case. Like all sentencing cases, the ultimate determination of sentence turns on individual facts. I am not going to list all of the cases referred to, except two. The first is R. v. Martinez [1996] O.J. 544 (Ont. C.A.) which sets out some of the fundamental guiding principles in cases of this nature. The second case is R. v. Stupar [2015] O.J. 3308 (O.C.J.), which both counsel relied on, and which refer to a number of cases which deal with the principles of sentencing and the distinctions between cases of dangerous driving and careless driving. It also sets out a thorough review of sentencing cases involving careless driving involving a death, some of which counsel had referred me to, as well as others.

30 Carelessness is made out based on the accused's acts or omissions of his driving, not on the consequences. Mr. Bishar-Mussa didn't intend to hurt or harm anyone that morning. There was no intention or wilful aspect about the accused's driving. This is not to say that the consequences of his acts or omissions, in this case, the death of Mr. Cameron and the injuries to Ms. Traikov, are not relevant -- they are on consideration on sentence; see R. v. Martinez at para. 11 -- But while the consequences of Mr. Bishar- Mussa's conduct must be considered in determining a fit sentence, his level of moral blameworthiness is less than the fault requirement required for dangerous driving.

31 This was a difficult case for the Crown. Mr. Coristine is a very able, conscientious crown attorney who takes his role as a minister of justice very seriously. He is not shy to take on a difficult case, but he is also not averse to making tough decisions -- even unpopular ones. Based on the available evidence to the crown, his decision in this case not to pursue a charge of dangerous driving or criminal negligence is well founded in law.

32 The appropriateness of proceeding with the careless driving charge under the Highway

Traffic Act was based on the results of the Accident Reconstructionist. It showed Mr. Bashir-Mussa may have stopped his motor vehicle either partly in a live traffic lane, or he had re-entered the live lane at a very slow speed and without yielding to the oncoming vehicle, or both. In either case, it amounted to careless driving.

33 As for the defence submission that while acknowledging that some of the accused's actions or omissions were careless, the decision of his client to stop on the highway was a reasonable action - others may disagree. Both counsel submit that the gravity of the offence, is a shared responsibility of 2 drivers. Others may disagree. Arguably this accident would not have happened but for the accused placing his motor vehicle in a position to be struck by the other driver. I accept the driving of Mr. Bishar- Mussa wasn't the worst example of the type caught by careless driving, but it involved more than one bad decision.

34 However, as stated in R. v. Martinez, and I agree, I do not think there is much to be gained by attempting to grade the actions of Mr. Bishar-Mussa within the range of driving which would constitute careless driving. It is suffice to say that the accused failed to drive with due care and attention.

35 A sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender.

36 Mr. Bishar-Mussa's degree of responsibility is linked to his careless actions. His level of moral blameworthiness must be assessed in that context.

37 The gravity of the offence is informed by the consequences of his actions. Mr. Bishar-Mussa made a decision or a series of bad decisions that contributed to the death of Mr. Cameron and the injuries to Ms. Traikov.

38 When applying these principles Doherty J. observed in R. v. Hamilton and Mason (2004), 186 C.C.C. (3d) 129 (Ont. C.A.), at para. 93 that, "the gravity of the offence may point in a different sentencing direction than the culpability of the individual offender."

Sentence

39 Mr. Bishar-Mussa is a 23 years old, youthful first offender. He has no driving record and no criminal record. I have considered the nature of his careless acts and although not the worse example of careless driving, nevertheless, careless due to a series of bad decisions. He has plead guilty, a sign of remorse and has expressed his remorse both orally and in writing to the Court and to Mr. Cameron's family. I accept his statements as genuine. He served a day in custody before obtaining bail. He has been on bail since March with some restrictions. He is a refugee to Canada and is of extremely limited means. He appears to live a pro-social life and has a history of actively volunteering in his community as documented in a number of letters I have received. He has strong support from his family and from within his community.

40 I have also considered the aggravating facts. Mr. Bishar-Mussa was driving a commercial vehicle at the time. By acceptance of that employment, he had accepted a duty of care to his

passengers and yet he had very little understanding of the road network of the City. Most significantly, the gravity of the offence; the results of Mr. Bishar-Mussa's actions or omissions -- the death of Mr. Cameron and the injuries to Ms. Traikov. Mr. Cameron was 28, only a few years older than the accused. He had a bright future. The suffering of his family and friends is palpable, The loss of what could have been, is clearly hard to bear.

41 Both the crown and the defence submit that a non-custodial sentence is appropriate. Case law would support that submission.

42 The remaining sanctions available to this Court are limited. A fine. A driving suspension. A probation order on terms ordering community service if the accused consents, and terms appropriate to prevent similar unlawful conduct in the future; see s. 72(3) of the Provincial Offences Act.

43 Mr. Bishar-Mussa if you would please stand.

44 I have struggled to structure a meaningful sentence. One that reflects your level of responsibility -- your level of moral blameworthiness, and at the same time reflects the gravity of the offence. There will be no agreement the sentence I'm about to impose is adequate. No sentence can restore a life. But a sentence can strive to ensure that you, at least in part, pay back to society the harm caused by your actions and you are never again able to place someone in harm's way until you are ready to take on the privilege of driving.

45 In my view, the amount of the fine has little deterrent value. It may reflect an element of denunciation but within the range available under the legislation, not significantly so. In light of your precarious finances, the fine will be in the amount of \$1000.

46 A driving suspension is justified for a period of 1 year.

47 You will also be subject to a probation order, for the maximum period of 2 years.

48 The terms of the Order are as follows:

- You will report forthwith and thereafter as directed by your Probation Officer.
- You are not to occupy the driver seat of a motor vehicle during the first year of this Order.
- You will take the Missing You Program within the first year of the Order.
- You will perform 50 hours of community service at a rate of not less than 5 hours per month starting within 30 days of this Order; the hours to be completed within the first year of the Order. How you perform those hours I leave to Probation, but speaking at schools of the need and importance of safe driving would be appropriate.
- You will, in year 2, take a remedial driving course from an accredited driving school which has a practical component.
- During the period of probation you will not transport any paying passengers.

- You will sign any and all releases as required by your Probation Officer to monitor your compliance with the terms of this Order.

49 A Victim Fine Surcharge of \$125 will be added to your fine.

50 If you are in possession of your driver's licence, please provide it to my Clerk.

51 You may take a seat.

52 I direct my last comments to Ms. Cheryl Hawkes Cameron, to Nick's siblings, and to the extended Cameron family.

53 No sentence, no punishment can restore things to the way they were or to the way they should be. I said earlier Nick had much to offer this world. I sincerely hope as a family, an extended family, you can rally together and find the glue Nick once was, and to continue to offer the world those things Nick showed to a family of downtrodden refugees.

P. ROBERTSON J.