SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Vanoostrum*, 2018 NSSC 144

Date: 20180628
Docket: Knt. No. 470673
Registry: Kentville

Between:

Her Majesty the Queen

Appellant

v.

John Alexander Vanoostrum

Respondent

Decision	
Judge:	The Honourable Justice Robert W. Wright
Heard:	April 26, 2018 in Kentville, Nova Scotia
Written Decision:	June 28, 2018
Counsel:	Daniel Rideout for the Appellant Zeb P. Brown for the Respondent

Wright, J.

BACKGROUND

[1] This is a summary conviction appeal from the sentencing decision of Associate Chief Judge Alan Tufts rendered orally on November 22, 2017 at the conclusion of a curative discharge application made under s.255(5) of the Criminal Code.

[2] By way of background, the accused was involved in a single vehicle accident on September 4, 2015 when his truck was found on its side in the ditch. The accused was found unconscious in the driver's seat and was transported to hospital where he was treated for minor injuries. His blood alcohol count was there measured at 347mg/100ml.

[3] Ultimately, in March of 2017 the accused entered a plea of guilty to two counts with which he had been charged, namely, the "over 80" offence under s. 253(1)(b) and a driving while disqualified offence under s.259(4) of the Criminal Code. Sentencing for these offences was adjourned to allow for the completion of a pre-sentence report.

[4] At about the same time as the entry of these guilty pleas, Mr. Vanoostrum began to take steps to overcome his addiction to alcohol and sought help from an addiction counsellor at Nova Scotia Health Authority in the person of Peter Kiefl. He regularly attended counselling sessions with Mr. Kiefl during the months leading up to the sentencing hearing on November 22, 2017.

[5] With the benefit of a seven month positive track record, defence counsel made an application at the sentencing hearing for a curative discharge in respect of the s.253(1)(b) offence. The defence also sought a Conditional Sentence Order in respect of the s.259(4) offence. The Crown opposed both of these proposed sentences, requesting the imposition of the minimum sentence of 120 days in jail for the s.253(1)(b) offence and an additional 30 to 45 days of jail time to be served consecutively with respect to the s.259(4) offence (due to a prior conviction for that same offence).

[6] The only witness who was called to testify at the sentencing hearing was Mr. Kiefl. Beyond that, the court was presented with the Crown's recitation of facts, the pre-sentence report, and a supplemental fact agreed upon by counsel after the revelation of an out of court statement by the offender's sister (which will be addressed later in this decision). The offender himself did not testify.

[7] After hearing the evidence of Mr. Kiefl and the presentations of counsel, the sentencing judge was satisfied that Mr. Vanoostrum met the test for the granting of a curative discharge in respect of the s.253(1)(b) offence (with strict conditions to be imposed over a two year period of probation).

[8] The sentencing judge further concluded that it did not make a lot of sense to put the offender in jail in respect of the s.259(4) offence, given his community based sentence of a curative discharge in the disposition of the impaired driving offence. He therefore imposed a three month conditional sentence in respect of the latter offence with the usual conditions, including a requirement that he reside with his sister, maintain an overnight curfew and abstain absolutely from the use and possession and consumption of alcohol.

[9] Two days later, the Crown filed its Notice of Appeal from this sentence, the grounds of which are stated as follows:

1. The sentence ordered inadequately reflects the objectives of denunciation and deterrence; and
2. The sentence ordered is inadequate having regard to the nature of the offence committed and the circumstances of the offence and the offender.

ISSUE ON APPEAL

[10] The essence of this appeal is whether the sentencing judge erred in granting a curative discharge to the offender in respect of the s.253(1)(b) offence on the evidence before him.

STANDARD OF REVIEW

[11] In addressing the standard of review on a sentencing appeal, I will make reference to two decisions of the Nova Scotia Court of Appeal for guidance.

[12] The more recent of the two is **R. v. Skinner**, 2016 NSCA 54 which involved a Crown appeal from the sentencing decision of a Provincial Court judge for the commission of various firearm offences. Justice Saunders there articulated a very helpful commentary in explaining how the appropriate standard of review will vary depending upon how one characterizes the issue or ground of appeal, and why and in what circumstances limits have been placed on the power of appellate courts to intervene. In the interest of brevity, I will simply incorporate by reference paras. 15-28 of that decision. Paragraph 28, however, should be reproduced in full where it pertains to sentencing appeals:

> 28. The law relating to appeals from sentence is well-settled. The "test" to be applied is not how many years in prison I or any of my colleagues would have imposed had Mr. Skinner first appeared in this Court for sentencing. The law is such that our role on appeals from sentence is narrowly defined. The limitations on our authority were recently described by Justice Oland in *R. v. B.M.S.*, 2016 NSCA 35:
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> > [11] Trial judges have a broad discretion to impose the sentence they consider appropriate within the limits established by law*: R. v. Shropshire*, [1995] 4 S.C.R. 227 at para 46, *R. v. Nasogaluak*, 2010 SCC 6 at para 43 - 46. Absent an error in principle, failure to consider a relevant factor, overemphasis of the appropriate facts, or a sentence that is demonstrably unfit, a Court of Appeal should not intervene: *R. v. Proulx*, 2000 SCC 5 at para 123. Any error that may be identified by an appellate Court will only justify intervention if that error had an impact on the sentence ordered: *R. v. Lacasse*, 2015 SCC 64 at para 41, 43 - 44.

[13] The second appellate decision to which I refer is **R. v. Lohnes**, 2007 NSCA 24. In that case, an appeal was brought by the offender on the ground that the trial judge erred in refusing to grant a curative discharge for an impaired driving conviction, after finding that the offender was in need of curative treatment. The Court there adopted the standard of review from an earlier case as follows:

> 27. The standard of review on an appeal from sentence is as stated by Justice Oland in **R. v. Longaphy** (2000), 189 N.S.R. (2d), 102 [2000] N.S.J. No. 376 (Q.L.) at para 20 (C.A):
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> > [20] A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": **R. v. Shropshire (M.T.)**, [1995] 4 S.C.R. 227; 188 N.R. 284; 65 B.C.A.C. 37; 106 W.A.C. 37; 102 C.C.C. (3d) 193 at pp. 209-210. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence if the sentence is "demonstrably unfit": **R. v. C.A.M.**, [1996] 1 S.C.R. 500; 194 N.R. 321; 73 B.C.A.C. 81; 120 W.A.C. 81; 105 C.C.C. (3d) 327 (S.C. C.) at p. 374. The Supreme Court of Canada reiterated this standard of appellate review in reviewing a conditional sentence in **R. v. Proulx (J.K.D.)**, [2000] 1 S.C.R. 61; 249 N.R. 201; 142 Man. R. (2d) 161; 212 W.A.C. 161; 140 C.C.C. (3d) 449 at s. 123-126.

[14] These decisions, and the legal authorities cited in them, clearly articulate the limitations placed on appellate courts to intervene on a sentencing appeal.

THE TEST FOR A CURATIVE DISCHARGE

[15] It is s. 255(5) of the Criminal Code that confers the discretionary authority on a Court to permit the granting of a conditional discharge for curative treatment, instead of convicting a person of a s.253 offence, after hearing medical or other evidence. That section reads as follows:

> Notwithstanding subsection 730(1), a court may, instead of convicting a person of an offence committed under section 253, after hearing medical or other evidence, if it considers that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest, by order direct that the person be discharged under section 730 on the conditions prescribed in a probation order, including a condition respecting the person's attendance for curative treatment in relation to that consumption of alcohol or drugs.

[16] It is clear from a reading of this section that there are two criteria which must be fulfilled if a curative discharge is to be granted, namely, that the person is in need of curative treatment in relation to his consumption of alcohol or drugs, and that it would not be contrary to the public interest to grant that remedy. As recognized by the Ontario Court of Appeal in **R. v. Ashberry** [1989] O.J. No. 101 (at pg. 12), the onus rests on the offender seeking a conditional discharge to satisfy the Court on a balance of probabilities that the two criteria prescribed by s.255(5) have been fulfilled.

[17] It is the second of these two criteria that has presented the most difficulty as Courts have grappled case by case with the question of when a conditional discharge for curative treatment is not contrary to the public interest. The Criminal Code itself offers no assistance in the determination of that question and it has been left to the Courts to identify the relevant factors to be considered.

[18] The seminal case on this subject is **R. v. Ashberry**, **supra**, where a majority of the Ontario Court of Appeal addressed the relevant considerations as follows (at page 12):

> However, in those narrow circumstances where the evidence demonstrates that the accused is in need of curative treatment and that his or her rehabilitation is probable, then it would not be contrary to the public interest to grant a discharge subject to stringent terms of probation. Among the considerations relevant to the question of whether a given case is sufficiently exceptional to warrant recourse to the curative treatment/conditional discharge provisions of s. 255(5) of the Code are:
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> a. The circumstances of the offence and whether the offender was involved in an accident which caused death for serious bodily injury. The need to express social repudiation of an offence where the victim was killed or suffered serious bodily injury will generally militate against the discharge of the offender. Parliament has seen fit to expressly provide for more onerous sentences in those cases (s-ss. 255(2) and (3)).
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> b. The motivation of the offender as an indication of probable benefit from treatment. One can expect that a person facing a sentence of imprisonment may quite readily agree that he or she will take treatment for alcoholism and give up alcohol. The important question is the bona fides of the offender in giving such an undertaking. The efforts of the offender to obtain treatment before his or her conviction is of some importance. If the offender has a history of alcohol-related driving offences and has never before sought treatment for his or her condition, then one may regard with some suspicion his or her efforts to obtain treatment at this stage, when faced with a probable term of imprisonment.
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> c. The availability and calibre of the proposed facilities for treatment and the ability of the participant to complete the program.
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> d. A probability that the course of treatment will be successful and that the offender will never again drive a motor vehicle while under the influence of alcohol.
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> e. The criminal record and, in particular, the alcohol-related driving record of the offender. Normally, where the offender has a previous record of alcohol-related driving offences there is a high risk of the offence being repeated and a greater need for a sentence emphasizing specific and general deterrence. The offender with a previous bad driving record will obviously have a higher burden of satisfying the court that his or her case

> is exceptional and that a discharge with curative treatment is appropriate and in the public interest.
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> However, if all other conditions are met, specifically where the evidence establishes both the need for treatment and the probability of rehabilitation, the offender's bad driving record should not by itself deprive the offender of the remedy of a discharge with appropriate safeguards imposed as conditions of probation under s. 255(5) of the Code. The multiple offender may well be a more suitable candidate for curative treatment because of his or her chronic alcoholism or drug addiction. In addition, the fact that he or she has on a number of prior occasions received fines or sentences of imprisonment may lead the court to conclude that these penalties have had no deterrent effect on the offender and that the public interest would best be served by directing curative treatment under a formal supervised program.

[19] These guiding factors were adopted by the Nova Scotia Court of Appeal in **R. v. Lohnes**, **supra**, in dismissing a defence appeal where the sentencing judge declined to grant the curative discharge sought.

[20] Another appellate decision to which I have been referred is from the Alberta Court of Appeal in **R. v. Storr** [1995] A.J. No. 764. That decision made no mention of the **Ashberry** case but listed the following as some considerations that should be taken into account when determining if a curative discharge is appropriate, namely, the circumstances and gravity of the offence, the motivation of the offender to rehabilitate, the alcohol related criminal record of the accused, whether the accused was subject to a driving prohibition at the time of the offence, and whether the accused had received a prior curative discharge.

[21] Although there is obviously some variation in the listing of these factors from those identified in **Ashberry** (which were not intended to be exhaustive), clearly the judicial focus is primarily on an assessment of the offender's motivation to overcome his/her alcohol addiction and the prospects of a successful rehabilitation. As noted by Chief Justice Fraser in **Storr**, "The curative discharge

provision of the Criminal Code focuses on one purpose – the rehabilitation of the accused".

[22] Ordinarily of course, Courts have stressed the sentencing objectives of denunciation and deterrence when meting out sentences for drinking and driving offences which often result in jail time. However, Courts have also recognized that in exceptional cases where the offender suffers from chronic alcoholism, the public interest may best be served by imposing a curative treatment program as long as proper safeguards are imposed. If the rehabilitation program is successful, that bodes well for the protection of the public in the future, measured against the prospect of repeated incidents of impaired driving which may not be deterred by jail terms imposed on a chronic alcoholic. Each case must be judged on its own merits.

[23] Bearing these principles in mind, I turn now to a review of the evidence heard by the sentencing judge and his decision to grant a curative discharge.

SENTENCING HEARING AND DECISION

[24] As noted earlier, the only witness called at the sentencing hearing was Peter Kiefl, an experienced addictions counsellor with Nova Scotia Health Authority. Mr. Kiefl's qualifications and expertise in the field of addiction counselling was acknowledged by the Crown.

[25] Mr. Kiefl began his testimony by confirming that he had been treating Mr. Vanoostrum since April 27, 2017 who had attended eight counselling sessions since that time to address a significant alcohol use problem. The offender had

reported to him that he had been drinking about a dozen beer an evening and, on the weekends, more than that.

[26] Mr. Kiefl went on to testify very positively about Mr. Vanoostrum's motivation to overcome his alcohol addiction. He said that Mr. Vanoostrum acknowledged to him initially and throughout that he clearly had an alcohol problem and he needed to stop; that he had caused a lot of harm in his life and to his relationship with his sister and girlfriend which he had to do something about. Mr. Kiefl further testified that Mr. Vanoostrum has shown a high level of commitment to the process, maintaining that his primary reason for going to Addiction Services was to curb his alcohol problem, and not just because of the criminal charges he was facing. He also reported that he had abstained from the use of alcohol since April (a duration of about seven months).

[27] Mr. Kiefl went on to discuss the counselling strategies being applied and opined that Mr. Vanoostrum had done very well thus far. He described the efforts that Mr. Vanoostrum reportedly had taken to avoid triggers for the use of alcohol and that as he began to realize success with sobriety, his confidence has gone up and his physical appearance looks much better. It was Mr. Kiefl's opinion that Mr. Vanoostrum's prognosis is good where he has been able to stay sober and improve his life.

[28] As it happens, Mr. Kiefl intended to retire in March of 2018 and he reported that Mr. Vanoostrum wants to continue counselling with his successor. He said the plan going forward would be to continue with monthly counselling sessions and that because he has done very well, there was no immediate need to "up the ante with a residential treatment program".

[29] All in all, Mr. Kiefl testified in very positive terms about Mr. Vanoostrum's genuine motivation to overcome his alcohol addiction and strong prospects for successful rehabilitation, albeit that his opinion was based on self-reporting information from the offender. Mr. Kiefl's opinion was not in any way shaken or undermined by cross-examination.

[30] After hearing closing submissions, the Court recessed to enable counsel to speak to the offender's sister who was in the courtroom. The judge was obviously weighing his sentencing options and wanted to know whether or not it was open to the offender to live with his sister for the next few months if a community based sentence were to be imposed.

[31] When the court reconvened, counsel disclosed the revelation from their discussion with the offender's sister that on one occasion in August or September, she had returned home from a camping trip and found that the offender had been drinking. This fact was conceded by defence counsel and was something that the offender had not confided in with Mr. Kiefl. The offender's sister nonetheless remained supportive of him and was agreeable to allowing her brother to continue to live with her for some period, suggesting at the same time that he be placed in a residential treatment program.

[32] After speaking with his client, defence counsel confirmed that Mr. Vanoostrum was agreeable to entering a residential treatment program and submitted to the Court that despite the revelation of this one relapse, the matter was better dealt with by way of a rehabilitation sentence than by a custodial sentence.

[33] ACJ Tufts thereupon launched into his sentencing decision. He began with a general recognition of the sentencing objectives of deterrence and denunciation in respect of drinking and driving offences and the need to send a message to the public that these types of offences cannot be condoned. At the same, however, he was cognizant of the offender's significant alcohol problem which, if left unaddressed, and even if he were to be incarcerated, would likely land him back on the streets within months, thereby putting the public at further risk. The judge was also cognizant of the offender's criminal record which, over the prior five years, had consisted of two impaired driving offences and five offences for failure to comply with conditions (including a driving while prohibited offence).

[34] Following that introduction, the sentencing judge addressed the test to be applied under s.255(5) and the two criteria to be met by the offender. As to the first criterion, the judge had no doubt that Mr. Vanoostrum was in need of curative treatment in relation to his consumption of alcohol. He then turned his mind to the second criterion, being the public interest component. In so doing, he made brief reference to the **Lohnes** and **Ashberry** cases which set out the factors to be considered. He declined to go through these factors in chapter and verse but in fairness to the sentencing judge, he had only been made aware that same morning that a curative discharge application was going to be made.

[35] ACJ Tufts then focused on the evidence of Mr. Kiefl about the motivation of the offender and the prospects of success for rehabilitation. He first noted that the program being offered is one that is well recognized by the Court and that Mr. Kiefl had testified before his Court on numerous occasions. The judge said that he was impressed with Mr. Kiefl's testimony and his assertions about the offender's motivation and his prospects of success.

[36] He then recognized that there were three detracting factors to be taken into account. One, of course, was the revelation of the one relapse incident above mentioned but the judge recognized that with an alcohol addiction, this was not to be unexpected and that it did not necessarily detract from Mr. Vanoostrum's motivation or the prospects of his success in rehabilitation.

[37] A second detracting factor was that the offender did not take steps to address his alcohol addiction until March of 2017 when he entered guilty pleas to charges that had been laid in September 2015. The judge was there referring to the factor set out in subparagraph (b) in **Ashberry** above quoted concerning the *bona fides* of the offender in his motivation to give up alcohol. However, ACJ Tufts said that he was not satisfied that that procrastination would destroy his confidence in Mr. Vanoostrum's motivation or his prospects for success.

[38] The other factor he took into account was the suggestion in the pre-sentence report that the offender reported to the probation officer that he did not believe that he had a drinking problem. However, as the judge alluded to, that passing comment had not been placed in any context in the report and he understandably preferred the evidence of Mr. Kiefl and the offender's direct acknowledgement to the Court during the sentencing that he knew he had a drinking problem. All things considered, the judge stated that he was satisfied that the offender was motivated to overcome his serious drinking problem.

[39] The judge then made indirect reference to the proposition from the **Ashberry** case that a prior drinking and driving record alone should not preclude the granting of a curative discharge, particularly where the evidence establishes genuine motivation and the likelihood of rehabilitation.

[40] After considering all these factors, the sentencing judge concluded as follows:

> So I've considered those factors. I've considered the accident. I've considered the record. I've considered the program, the motivation, the prospects of success. Balancing all those, I'm satisfied it wouldn't be contrary to the public interest to order a Conditional Discharge and it would be conditional on a number of quite strict conditions.

[41] ACJ Tufts then granted the curative discharge application with a probation period of 2 years. In addition to the usual conditions, the offender was directed to continue his counselling with Mr. Kiefl or his replacement on retirement, and to enter a residential treatment program as recommended by his probation officer. Mr. Vanoostrum was also made subject to a curfew for the first three months (while residing with his sister) and required to take assessment treatment and counselling for issues of a personal nature as well.

[42] As indicated earlier, with respect to the s.259(4) charge, the offender was sentenced to a Conditional Sentence Order of 3 months' duration whereby he was to reside with his sister, be under a curfew and required to abstain absolutely from use and possession and consumption of alcohol.

[43] Lastly, the Court also imposed a 2 year driving prohibition order which was to run concurrently with the 4 year prohibition earlier imposed by another judge.

[44] All of these conditions are in keeping with the following passage from **Ashberry** found at page 13:

> One should not overlook the fact that the principle of specific deterrence is not undermined by granting a conditional discharge under s. 255(5), having regard to the strict obligations imposed on the offender under the probation order and the consequences attendant on a breach by the offender of any of these terms. Unlike s. 736, s. 255(5) of the Code does not provide for absolute discharges. The offender who is

> discharged will always be subject to a probation order with the mandatory condition that he or she attend for curative treatment and, in addition, he or she should be subject to other stringent conditions to afford a measure of protection to the public. The offender should be ordered as a term of his probation to abstain from the consumption of alcoholic beverages and will be subject to a mandatory order prohibiting him or her from driving under s. 259(1) of the Criminal Code.

[45] After completing his sentencing decision, ACJ Tufts gave the offender a bit of a pep talk and made it very clear to him what the penal consequences would be if he were to breach any of the conditions imposed under either the curative discharge or the conditional sentence order. He then concluded with these remarks:

> So I've done this to protect the public and to hopefully get you straightened around so that you can live your life in a way that alcohol is not the dominating feature… And as I indicated at the very beginning, this is a balancing between sending the appropriate denunciatory message – I could send you to jail and that would send a very strong message but I'm not sure that it would solve the whole problem. What I'm trying to do, attempting to do, is really solve the real problem here and that's your alcohol consumption.

MERITS OF THE APPEAL

[46] The main thrust of the Crown's submissions, emphasized in oral argument, is that there was an absence of reliable evidence before the sentencing judge to justify the exceptional remedy of a curative discharge. Although the Crown does not take issue with Mr. Kiefl's professional qualifications or expertise in the field of addiction counselling, it is argued that Mr. Kiefl's opinion was based solely upon the self-reported information given to him by the offender who chose not to testify. The Crown characterizes such evidence as uncorroborated hearsay which lacks a proper foundation for the opinions expressed in his testimony. In short, the Crown suggests that the evidence provided in support of the curative discharge

sought was inadequate and inconsistent and should not have been relied upon by the Court, resulting in an unfit sentence.

[47] The Crown further argues that the sentencing judge made an error of law in stating in his decision that the public interest would also be protected by the curative discharge because if the offender went sideways on any of the attached conditions, he would run the risk of the conditional discharge being set aside and then being sent to jail. In support of that contention, the Crown has referred to paragraph 23 of the **Storr** decision where the Alberta Court of Appeal found that the trial judge in that case erred when he said that the public interest would be served even if Mr. Storr should re-offend. The Court of Appeal went on to say that to reason that an accused can be charged with yet another offence in the future if he should re-offend, fails to address what is in the public interest now and that this is not part of the test of what is "contrary to the public interest".

[48] On this latter point, defence counsel points out that the sentencing judge made the impugned statement when he was speaking directly to the offender and that taken in context, the sentencing judge was really just sending a warning to Mr. Vanoostrum of the consequences of a breach of the conditions being imposed. In my view, nothing turns on the interpretation to be given to these judicial comments. Even if the judge did misspeak in this regard in his public interest analysis, I am satisfied that it had no material impact on his decision to grant the curative discharge.

[49] Returning to the main issue, this is not a case where there was no evidence to support the granting of a curative discharge (which would otherwise be an error of law). Here, in applying the proper test for the granting of a curative discharge,

the sentencing judge assessed Mr. Kiefl's supporting evidence and expressly stated that he was impressed with his testimony and his assertions about the offender's genuine motivation and prospects of a successful rehabilitation (despite the three detractors earlier recited). Obviously, the sentencing judge did not have the benefit of hearing the testimony of the offender himself (which he was not required to give) but the judge, in weighing the testimony of Mr. Kiefl, had sufficient confidence in its reliability to support his granting of the curative discharge. It bears repeating that Mr. Kiefl was well-known to that Court for his expertise in the field of addiction counselling.

[50] It is not the function of this Court on a Summary Conviction Appeal to reweigh the evidence of Mr. Kiefl so as to come to a different conclusion on the curative discharge application. The role of this Court is to determine whether or not the sentencing judge made an error of law in exercising his discretion to grant a curative discharge.

[51] I find that the judge's reasons, taken as a whole, do not disclose an instance where he committed an error of law or failed to properly instruct himself in any way. He identified the proper legal test for a curative discharge, considered in substance the relevant factors to be applied and, based largely on Mr. Kiefl's evidence which was for him to assess for reliability, reached the conclusion that a curative discharge would not be contrary to the public interest. In the course of his analysis, he balanced the strong sentencing objectives of deterrence and denunciation in impaired driving cases before concluding that the protection of the public would likely be better served here by a rehabilitative sentence. He then imposed strict probationary conditions in keeping with appellate court guidelines.

[52] Lastly, the sentencing judge imposed a three month conditional sentence with respect to the s.259(4) offence, given the community based sentence imposed on the offender for curative treatment on the s.253(1)(b) offence.

[53] It is my conclusion that the sentencing judge made no error in exercising his discretion to grant a curative discharge as he did in this case. The sentence imposed was neither unreasonable nor unfit. This appeal accordingly stands dismissed.

J.