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R. v. Tsalis

Between
Her Majesty the Queen, and
Nick Tsalis, accused

[1986] O.J. No. 2716

Ontario Supreme Court - High Court of Justice
Van Camp J.

Oral judgment: November 21, 1986.

Counsel:

M. Brown, for Crown.
T. Rosen, for accused.

¶ 1 **VAN CAMP J.** (orally):— The accused Nick Tsalis was convicted of dangerous driving by reason of an accident which occurred on May 4, 1985, in the Municipality of Metropolitan Toronto, which caused the death of two of the passengers in his car and severe injury to another passenger and injury to himself.

¶ 2 He had been charged with criminal negligence causing death. The jury returned the verdict of dangerous driving. The maximum sentence for that offence is two years. A brief summary of the events preceding the accident may help in understanding the problems that arise in sentencing.

¶ 3 The accused, who was within a few weeks of his nineteenth birthday, had been asked to a party by a friend, and the two of them drove two of her friends to the party and were driving them home when the accident occurred. It occurred on a cool, clear night on a dry road on Don Mills Road in the City of Toronto, which is paved asphalt with three marked lanes for northbound traffic. That road proceeds northerly from Sheppard Avenue for some two blocks before it divides around an oval with northbound traffic going up one side and southbound traffic coming down the other side. The two sides join again at the north of the oval. The accident occurred just before the traffic going northerly on one side of the oval would join again in one road going northerly.

¶ 4 Mr. Tsalis, who had experience with cars since he was about 14 and had had his licence to drive since he was 16, had shown himself in the past as a responsible driver. He had no record of driving offences. On that night he had shown himself responsible until shortly before the accident.

¶ 5 He had worked that day and then met his friends and they had sat for one to one-and-a-half hours talking over a couple of beers. They had then gone to the house of a friend where he had another drink in the next fifteen minutes. He had again shown himself responsible in refusing to take a group of people in his car as they went on to the next party. They were at that party from about 11 o'clock to sometime after 1.30 a.m. He had had one beer when they had first gone there and he had finished a second quickly when his friends indicated that they should leave as they were to be working the next day.

¶ 6 In the car all four of them were joking with the music playing. He understood that the two girls in the back seat were to be let out at the north end of the oval. They were to let him know when to turn. He was familiar with the configuration of the street because he had travelled south on it.

¶ 7 When he was stopped at the red light at Sheppard Avenue and Don Mills he had noticed a car stopped beside him with two young people in it and he indicated to them that he wanted to race. He had revved his car up. He had moved it forward. He had waved to them. He took off quickly when the light turned green but he was watching the light at the next intersection and he stopped there. The other car passed him at about this point and he decided to catch up. He took off at speed accelerating, and he had no trouble with the first curve as he went around the bottom of the oval. The inference is that he did slow somewhat for that at that point, but in the short distance towards the top of the oval he had accelerated to a speed that meant that he was going at almost 80 miles an hour. The evidence as to the speed is clear. The evidence as to the exact speed is not clear.

¶ 8 The two pedestrians who were coming southerly had their attention drawn because of the noise of the speed of the two cars. It was sufficient that in the mind of one of them there was certain to be an accident. It was the evidence of the police officer that that curve at the north could not be turned at 80 miles an hour, although it could be made at 60 miles an hour. Whatever the exact speed, the speed was excessive for that place and for that type of road. It was well beyond the marked speed limit. Admittedly there was little traffic at that time of night. I have already referred to the type of night and to the good condition of the road except for its configuration. But the accused had to know that he was approaching a curve. He had to know the general nature of the curve and he had three passengers in the car with him.

¶ 9 As the accused passed the other car he had looked in the rear-view mirror to check where the other car was, some one-and-a-half car lengths behind him. Someone in the back of the car said that he should turn and he turned his head looking back to the road and was turning forward again when he felt the car pull to the right. One of the passengers in the back seat had screamed at him to slow down because of the speed. There had been no attempt to turn into the road which led off the most easterly lane and where the girls lived. The accused had been driving in the most westerly lane.

¶ 10 The evidence is not greatly in conflict as to the effect of the beers that he had consumed that evening. The surviving passenger had no impression that he had been drinking. The car had after swerving continued to the most easterly side of the road up the boulevard and had struck a concrete pole. The first police officer who was there very soon afterwards saw no sign of any problem as they walked the 100 feet more or less over to the police car. The police officers who drove him to the station said that he spoke rationally and his speech was not slurred, but there was a strong odour of alcohol in the car. The investigating officer, who for a few minutes was confronted with a man whose eyes were a little bloodshot and glassy, unsteady on his feet with a slight odour of alcohol, had ordered him arrested. At the preliminary hearing he had said that he would then be able to investigate further.

¶ 11 The doctor who examined him said that he was alert. The breathalyzer operator had readings of .065 and .062. The operator had said that he was alert, coherent, [showed] no visible signs of the effect of the alcohol and he would have classified him as able to drive. The eyes and the speech were coherent with the fact that he had been crying and had had some injury.

¶ 12 The expert from the forensic centre noted that one can be affected by a reading of less than 80. She found the reading consistent with the amount of alcohol that he had said he had consumed. There were various factors that had to be considered by her, but she found nothing to contradict the evidence as to the amount of consumption.

¶ 13 The pre-sentence report and the evidence shows, as is often the case, that this young man had no criminal record and was considered by his employer as a conscientious, reliable employee, well liked by the customers and the fellow employees. He had been a quiet, responsible son in the family. His school record does not show him to be a top student. He had an average of 60 per cent for Grades X and XI, and he had changed to another school in September 1984 to try to obtain his secondary school graduation diploma. He had passed two of his three subjects with an average of 51 per cent.

¶ 14 From September 1985 to March 1986, subsequent to the accident, he attended Centennial College in an accounting financial management course but he was not ready to return to school and he did not complete the first year. He has now been accepted by a private institution, the DeVry Institute, as a full-time student for an 18-

month course in electronics engineering technician programme commencing March 9, 1987. He has not been a serious student in the past. However, while at school he has been employed since 1981 on a part-time basis at the North York Extended Care Nursing Home where he worked in the kitchen approximately 45 hours on a biweekly basis. In addition, in February 1985 until the time of the accident he had worked at a Gulf Canada Service Station.

¶ 15 He had as a teenager at the age of 17 used marihuana and hashish a few times but not continued it. At that same age he had begun drinking about ten beers a week and has now reduced it to two to three beers a week. The doctor states that there is no alcohol problem. There is a continuing epileptic condition controlled by medication since 1976.

¶ 16 The remorse of the accused was evident as he gave his evidence and the doctor indicates that he is still in a depressed state and in need of treatment to deal with it.

¶ 17 As I have indicated, there is nothing in the history of the accused that would increase a sentence in any way. The problem is the nature of the offence which has been a subject of concern for our Courts for many years, and which has become increasingly a cause of concern.

¶ 18 In the early years, the Court looked seriously at the fact that the accused would never again commit that offence: that the accused was not a person who needed rehabilitation. Specific deterrence was not a factor that had to be considered in sentencing. Concern then of the Court in this type of offence has been predominantly the question of general deterrence, and that concern has been repeated in many of the cases, especially since the decision in R. v. McVeigh (1985), 22 C.C.C. (3d) 145. That was a case involving a conviction for criminal negligence causing death, but the general approach of the Court towards driving offences in which there had been some consumption of alcohol was shown in that decision. The Court there considered that, with heavier sentences as a general deterrent, the possibilities of serious and tragic results from driving are reduced.

¶ 19 I interrupt myself at this point to say one thing. I think many of us have seen what the loss of a child can mean to a family. In so many cases it has almost shattered the family. We recognize what all the years bringing up a child and caring for a child, and the thought of the future without that child must mean to the parents. So often the person who is killed is a person who would have made a great contribution to the community. There is no way that sentencing can ever compensate for the loss of a child and sentencing is never directed towards that purpose. That loss is recognized always but sentencing is not retribution. It is not punishment. It is no longer the law of the jungle or of an eye for an eye. The purpose of sentencing is to ensure that offences such as this do not occur again.

¶ 20 I took the time last night to review in detail all of the cases that had been referred to me. I had reviewed them under the year in which the decision was given; the Court in which the decision was given; the state of impairment; the age of the accused; the prior record of consumption of alcohol; prior criminal records; the nature of the driving; and, the sentence that was given. I do not intend to review that now. It would be impossible.

¶ 21 What is so clear is that in each case, all of the circumstances have to be considered. I recognize that in recent years the sentences have been for longer periods. It is thought that this is the only way in which there can be general deterrence. One has to consider also, however, and I do not see much reference to it, the loss to the community when a young person goes to jail for the first time. I have not seen a study of the effect in future life of sentences of one-to-two years for persons of otherwise good record, and such a study would be helpful. It is difficult to think that anyone comes out of such a sentence the better for it, and society loses when any young person loses the chance to reach his potential. Consequently what has to be balanced is what will ensure a general deterrence with the least possible detrimental effect on the specific accused.

¶ 22 Much of the sentencing has concentrated on the sentencing of the person who gets into his car knowing that he should not drive, and the different decisions have said that that, together with the nature of the driving, influences the sentence.

¶ 23 Here the amount consumed was relatively little. The effect was that the accused was not disqualified from driving. The effect was that a young man was made more reckless than he otherwise would have been. He did something that was completely foreign to his way of life. It is not a case where there was any prior warning to him of how he would be affected.

¶ 24 Primarily the offence here was the offence of what I find was racing combined with excessive speed on a road that was known to be one in which care had to be exercised by reason of the fact that there were two curves on that road, and by reason of the fact that there were three passengers in the car. Again, care ought to be exercised because at some time those passengers were going to be telling him to turn. Consequently, the nature of the driving was not that of going through a red light, going the wrong way down a ramp, the wheel dropping off the side of a road. There was the additional factor of a decision to do something that had the element of danger in it.

¶ 25 Counsel have referred me to many of the cases. I made a short survey also of the sentences for criminal negligence causing death and I found that the average for that offence in the recent cases was from 14 months to 3 years where the maximum is life imprisonment. I have before me the averages for the offence of dangerous driving where the maximum is two years and the factors which have influenced those sentences.

¶ 26 By reason of the fact that the major offence here was the driving and the impairment was not even impairment the consumption was so small, one would tend towards the lower end of the scale. However, the nature of the driving to the extent that it was a decision, not a momentary loss of attention, again draws one towards the higher end of the scale. I have considered those together with all the other factors herein.

¶ 27 Would you stand, Mr. Tsalis?

¶ 28 The sentence that I impose is one of ten months together with a period of probation for one year during which you will perform such community service as your probation officer may decide preferable, if possible among persons who have suffered as a result of an automobile accident. In addition, the statutory period of suspension of licence will be increased by a further three years.

¶ 29 You may sit down.

¶ 30 MR. ROSEN: My lady, there are two comments I have. The first is that I think you have to specify a number of hours of community service and I have spoken with the probation officer and she is recommending 100 hours of community service and I agree to that.

¶ 31 **THE COURT**: Yes, and the other change that you may or may not be referring to I have added the words "community services recommended" -

¶ 32 MR. ROSEN: Yes. I think it should be as part of the probation order that there be community service of a period of 100 hours to be designated by the probation officer rather than leaving it in a vague state and then there is some certainty to the order. I think that is what is required by the Code.

¶ 33 **THE COURT**: Mr. Brown:

¶ 34 MR. BROWN: I have no submissions.

¶ 35 MR. ROSEN: The other matter, my lady, is I again ask for a recommendation that he be considered for the temporary absence programme so that he might either attend work or school during the day, although he will have to go back at night in custody if he is granted the programme but I ask for the recommendation.

¶ 36 **THE COURT**: That recommendation then has been added.

VAN CAMP J.

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