Court of Queen's Bench of Alberta

Citation: R v Benjumea, 2022 ABQB 44

Date: 20220114
Docket: 201100435Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Oscar Fabian Benjumea

Accused

Reasons for Decision
of the
Honourable Mr. Justice Peter Michalyshyn

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1. Introduction

[1] On July 3, 2020 Oscar Benjumea lost control of a vehicle at an excessively high rate of speed, careened off the roadway before going airborne, then smashed into the side of a building. The vehicle's passengers – Emma MacArthur, Georgia Donovan and Faisal Yousef – died in the collision. Mr. Benjumea was the only survivor. He is now being sentenced for three offences of dangerous driving causing death and one of leaving the scene of a collision.

[2] The positions of the parties can be summarized as follows. The parties agree that the three counts of dangerous driving causing death should run concurrently and that the one count of leaving the scene should be consecutive to those concurrent sentences. The parties disagree

on the length of a fit and proportionate sentence: the Crown seeks a global sentence of 13 years incarceration based on 12 years concurrent for the dangerous driving causing death offences and one year consecutive for the offence of leaving the scene. The defence seeks a global sentence of five to seven years.

[3] In these reasons I describe what I find to be the circumstances of the offences, including their impact on surviving victims, and the circumstances of the offender. I consider all of these circumstances in the context of the purpose and principles of sentencing set out in the *Criminal Code* and as they have been interpreted by the courts. At the end of the day these considerations give rise to a sentence which I find to be fit in the sense that it is proportionate to the gravity of the offences and the degree of responsibility of the offender.

2. Circumstances of the offences

[4] The facts are set out in an initial five paragraph Agreed Statement of Facts dated May 7, 2021, and a more detailed 128-paragraph Agreed Statement of Facts dated July 29, 2021. A summary of the agreed facts follows. I will also make a number of fact findings elsewhere in these reasons.

The events of July 2, 2020 and Mr. Benjumea's alcohol consumption

[5] On July 2, 2020 Mr. Benjumea was initially in the company of Faisal Yousef. The two visited a number of bars and restaurants in downtown Edmonton starting around 7:30 – 8:00 pm. At one of the downtown locations Mr. Benjumea consumed "one shot of liquor". In due course the two drove in Mr. Benjumea's vehicle to a food/cocktail establishment near 82 Avenue and 104 Street in Edmonton (the "Whyte Avenue club").

[6] While at the Whyte Avenue club Mr. Benjumea initially consumed a "double-ounce Old Fashioned cocktail. Over the course of the night Mr. Benjumea consumed another "three tequila shots".

[7] At between 2:09-2:11 am on July 3, 2020, Mr. Benjumea paid one-half of the tab he and Faisal Yousef had started soon after they arrived at the Whyte Avenue club. The combined alcohol tab consisted of 20 one-ounce shots of tequila, two double-ounce Old Fashioned mixed drinks.

[8] The individual serving Mr. Benjumea at the Whyte Avenue club told police she "did not believe that Mr. Benjumea was 'over the limit' based on their conversations and her observations of the group".

Mr. Benjumea's driving

[9] At 2:11 am Mr. Benjumea and his three passengers drove away from the Whyte Avenue club and proceeded southbound on 104 Street. The posted speed limit from Whyte Avenue was 50 kph until 68th Street, where it increases to 60 kph.

[10] As Mr. Benjumea drove south on 104 Street, at about 81 Avenue, he swerved to within four-to-five inches of hitting another motorist's vehicle. This motorist's passenger noted the Benjumea vehicle "veering off of his lane and going to the left, and then he would quickly jolt back into the middle of the lane again". The passenger described the Benjumea vehicle being driven with multiple "random bursts of speed… [going] from like 50 to 120 it seemed". At times, the passenger told police later, the Benjumea vehicle was "veering over into the other

lane", then once about half-way into the other land, the driver would "catch himself and quick jolt back" into his own lane. The passenger thought to himself "I hope I don't see him down the road crashed somewhere".

[11] The driver of this third party vehicle likewise described Mr. Benjumea driving erratically southbound on 104 Street/Calgary Trail, "swerving across lanes" and "gunning it", then "braking aggressively. The driver estimated the speed of the Benjumea vehicle at 120 kph at around 104 Street and 72 Avenue southbound. He noted Mr. Benjumea going so fast "that my vehicle shook when he drove by us".

[12] Another witness at a gas station on 104th Street and 58th Avenue southbound estimated Mr. Benjumea speed at 120-130 kph. This witness commented to a gas station store clerk that "there is something big gonna happen" and "the guys are driving crazy tonight". Just as he uttered these comments, the witness heard what he described as a "big explosion", which was the Benjumea vehicle crashing into a Starbucks at 5504 Calgary Trail.

[13] Moments before the crash, Mr. Benjumea lost control of his vehicle, began to slide off-road, then struck a curb causing his vehicle to become airborne before it collided with the Starbucks building.

[14] The Benjumea vehicle's data recorder revealed that Mr. Benjumea was travelling between 178 kph and 193 kph as he approached the curve on Calgary Trail at 56th Avenue. Mr. Benjumea failed to slow down and lost control of his vehicle. He crossed lanes toward the right-hand side of Calgary Trail, striking the curb north of the Starbucks, and shearing off a street sign which landed some 60 metres south of the Starbucks. The vehicle struck a curb and continued to skid sideways toward the building, bouncing as it did and at some points only on one tire. The vehicle struck a second curb, causing it to become airborne, flipping heels over head into a vertical position as it collided with the Starbucks building.

[15] The impact caused catastrophic damage to the front, top and passenger sides of the Benjumea vehicle. The passenger side front end and roof were ripped off the vehicle, peeling it all the way back to the vehicle's trunk, and exposing the occupant cabin. The brick façade of the Starbucks building crumbled. Ms. MacArthur and Mr. Yousef were both ejected from the vehicle during the collision.

[16] Event Data Recorder analysis revealed that 6.5 seconds before the collision Mr. Benjumea continued to depress the vehicle accelerator and thus gain speed. At 6.5 seconds he was travelling about 170 kph. At 3.5 seconds his speed had increased to about 184 kph. It was at 184 kph that Mr. Benjumea lost control the vehicle on the curve of the road. At 2.5 seconds he braked, reducing the vehicle's speed to about 173 kph. At 1.5 second before impact, speed was 158 kph, and at 1 second before impact, speed at 136 kph. At the impact with the Starbucks building, the vehicle was still travelling at least 98 kph.

Events at the collision scene

[17] The witness at the 104th Street/58th Avenue gas station attended the crash scene moments later. He observed Mr. Benjumea in the driver's seat of the Benjumea vehicle. He appeared to be unconscious. The witness helped Mr. Benjumea out of the vehicle. As he did so, the witness was also calling 911. While the 911 call was ongoing, Mr. Benjumea was initially seated on grass beside the vehicle wreck, then, with the witness's help, stood up to urinate. After relieving himself, Mr. Benjumea started walking away from the witness. The witness urged Mr. Benjumea

to stay but Mr. Benjumea insisted he only wanted to see if he could walk. Soon after, however, Mr. Benjumea walked away from the collision scene.

[18] Before leaving the scene, Mr. Benjumea asked the witness if he had a gun. Mr. Benjumea said: “Bro, if you have a gun please shoot me right away. Please help me, please help me”.

[19] Mr. Benjumea made similar comments to another witness who also stopped at the collision scene to provide assistance. This was the motorist whose vehicle Mr. Benjumea had almost hit near 104 Street and 81 Avenue. After noting Mr. Benjumea surveying the wreckage, this witness quoted Mr. Benjumea stating, repeatedly: “Do you have a gun”? and saying “I’m fucking done, I’m fucking done”.

[20] This witness did not observe Mr. Benjumea do anything to attempt to help his vehicle passengers, though the witness was unable to say for sure if Mr. Benjumea noted his passengers’ condition.

[21] Before he left the collision scene, these witnesses noted that Mr. Benjumea had sustained multiple injuries – on his head, which was bleeding with blood trickling down to his ear and neck, to his arm which had a gash and was covered in blood, and to his hand, which appeared to have broken fingers.

[22] At 2:28 am on July 3, 2020, an Edmonton Police Service member observed Emma MacArthur and Faisal Yousef on the ground nearby the Benjumea vehicle. Neither was moving or breathing. Georgia Donovan was observed still inside the vehicle. She was noted to be gasping for air and moving her head slightly. The breathing was agonal, as opposed to conscious breathing. Ms. Donovan was declared deceased at the scene, as were Ms. MacArthur and Mr. Yousef.

Leaving the collision scene

[23] After walking away from the scene, Mr. Benjumea walked southbound circuitously through parking lots and alleys. He stopped at a convenience store at 4950 Calgary Trail and asked for assistance to call a taxi. The request was declined, and Mr. Benjumea left the store on foot.

[24] Mr. Benjumea’s passage after leaving the collision scene was captured on a variety of CCTV cameras. At about 7:07 am he was noted attending the apartment of a former friend. There Mr. Benjumea showered and changed his clothes. He asked the friend to launder the clothes he had worn at the time of the collision. He arranged for a ride from the friend’s apartment to Mr. Benjumea’s own residence.

[25] At some point after his ride showed up, Mr. Benjumea obtained a pay-as-you-go cell phone which he subsequently used to make and receive a series of phone calls between 10:53 am and 12:07 pm. One of the calls, at 12:03 pm, was to an EPS member. To this officer Mr. Benjumea indicated he had been in an accident and needed an ambulance. Police were already nearby and encountered Mr. Benjumea outside his residence. Mr. Benjumea was arrested at 12:09 pm for three counts of dangerous driving causing death and one count of driving while prohibited.

Statements to EMS/police

[26] Soon after his arrest Mr. Benjumea provided a 35-minute statement to police. He was also attended to and had conversations with EMS members.

[27] To EMS members Mr. Benjumea recounted that he was driving his vehicle, with his seat belt on, prior to the collision. "Faisal" was in the front seat; "the girls" were in the back seat. He stated he was going "I want to say 65-70…75". He stated he lost control around the corner "because it's a wide corner to turn on and the car is low, ah it has run-flat tires, so I think that I caught into a pothole which shifted the car over. And then with the, with the, with the, with the shift it tweaked my hand over and, and it's – that's as far as I recall".

[28] Mr. Benjumea also described to EMS members that he woke up face down on the pavement by the Starbucks between about 9-10 am. He said he walked for about three hours to his house where he changed his clothes. He denied having consumed any alcohol or drugs the previous evening. Soon after making that statement, and after having been administered medication, Mr. Benjumea stated he had consumed a beer at 5 pm the day before, and a second beer at 7 pm, also the day before.

[29] Days after the July 3, 2020 collision Mr. Benjumea told police that "I don't have any recollection…whatsoever" of the events between leaving the Whyte Avenue club and the collision. In the same statement, however, he speaks of driving down Calgary Trail and passing a Shell gas station and school zone, and "that's about where I draw a blank". Still in the same statement he states that aside from a flash of memory after the collision of getting up and looking back at the car, he had no further memory of the night, but then spoke of waking up underneath a car or a truck at about 9 am, and eventually acknowledged he recalled attending his former friend's apartment, getting cleaned up, and being dropped off at home.

[30] Though not part of an agreed statement of facts, through counsel Mr. Benjumea told the court during argument that:

> Mr. Benjumea wishes he could explain why he drove so fast, so dangerously. He has no recall of the driving itself. He advises that his last memory is pulling the seats forward so the two young ladies could get into the back seat. Mr. Faisal [sic] did that on his side, and Mr. Benjumea did in on the driver's side. That's his last memory.

[31] I will return later in these reasons to what findings I am able to make coming out of the contradictory evidence of Mr. Benjumea's recollection of the events of July 2/3, 2020.

[32] Mr. Benjumea's physical injuries are outlined at paragraph 96 of the Agreed Statement of Facts. He was also seen for a psychiatric assessment. He denied being suicidal, but admitted he had made comments about wanting to die after the incident.

[33] Blood seized from Mr. Benjumea at 1:35 pm on July 3, 2020 was analyzed and revealed less than 10 milligrams of ethyl alcohol in 100 millilitres of blood. A minimum of 20 milligrams of ethyl alcohol in 100 millilitres of blood is required to conduct a forensic extrapolation to determine a person's blood alcohol content at the time of an incident. The Agreed Statement of Facts does not deal with, one way or another, whether Mr. Benjumea consumed alcohol after leaving the scene of the collision.

[34] A police search of Mr. Benjumea's residence revealed a Dodge Caravan registered to Mr. Benjumea with his blood on the steering wheel and two plastic bags sitting between the driver and front passenger seats.

[35] Alberta Traffic Collision Statistics for 2018 were referred to by the Crown. They show, amongst other things, 289 collision-related deaths in 2018, being a decrease from the previous four years measured.

3. The circumstances of the offender

[36] Mr. Benjumea was 25 years old at the time of the collision, 27 at the date of his sentencing. He was born in Columbia and raised by his mother and, for a time, his maternal grandparents. He moved with his mother to Queens, New York until his age of 12. The family then moved to Ontario. He became a Canadian citizen before his 18th birthday. He is said to have excelled at school, graduating with grade 12 but opting to pursue work rather than further education.

[37] Mr. Benjumea worked from the age of 14, first selling newspaper subscriptions, then working with an HVAC company becoming sales manager by the age of 20. In 2014, with a business partner he started a marketing solutions company. In 2017 the partners came to Edmonton and invested in a legalized marijuana sales company. At the time of the collision the partners had three marijuana sales outlets. All three have since closed – it was suggested as a result of Covid but also as a result of an apparent boycott campaign arising from Mr. Benjumea's role in the collision.

[38] A series of nine reference letters in Mr. Benjumea's support were exhibited before the court. They are from family, friends and business associates. Mr. Benjumea is described as a person with a strong work ethic, intelligent, dependable, kind-hearted, responsible, and respectful of others.

[39] For about seven months while in remand Mr. Benjumea participated voluntarily in the "Boot Camp program". He volunteered as well as a cleaner. He was removed from the program due to an infraction involving prohibited interactions with a female inmate.

[40] Also, while in remand Mr. Benjumea has engaged in 11 self-study courses as more fully described in his affidavit sworn December 1, 2021. While remanded at the Fort Saskatchewan Correction Centre he acted as a Unit Representative with certain additional roles and responsibilities.

[41] Mr. Benjumea was prohibited from driving at the time of the offences by reason of a one-year prohibition imposed on him as part of his October 29, 2019 sentence of refusing to comply with a breath demand, the offence date of which was September 23, 2018. He has a related provincial driving record including speeding 29 kph over the posted limit (2019) and a suspension for engaging in a racing contest or stunt (2019).

4. The purpose and principles of sentencing

[42] The purpose and principles of sentencing are set out in ss 718, 718.1 and 718.2 of the *Criminal Code*, together with the many authorities interpreting these provisions, a recent example of which is ***R v Parranto***, 2021 SCC 46 at paras 108-114 (certain citations omitted):

> [108] ... In common with other common law jurisdictions, Canadian courts adopted an approach to sentencing emphasizing discretion, proportionality and individualization. This approach was notably articulated by the Court of Appeal for Ontario in ***R v Willaert***, [1953] O.R. 282, in an oft-cited passage:
>
> > I am respectfully of opinion that the true function of criminal law in regard to punishment is in a wise blending of the deterrent and reformative, with retribution

> not entirely disregarded, and with a constant appreciation that the matter concerns not merely the Court and the offender, but also the public and society as a going concern. Punishment is, therefore, an art — a very difficult art — essentially practical, and directly related to the existing needs of society. . . . It is therefore impossible to lay down hard and fast and permanent rules. [Emphasis added; p. 286.]

[109] Although Parliament later gave additional direction to sentencing judges, the "wise blending" approach remains good law: judges must use their discretion to weigh different penal aims in light of all circumstances to arrive at sentences that are "fit" for the offence and the offender (Manson et al., at p. 41a).

[110] In its 1996 sentencing reform, Parliament codified the objectives and principles of sentencing in ss. 718 to 718.2 of the *Criminal Code*. Section 718 now provides that 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". This purpose is achieved having regard to six objectives: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation, and the promotion of a sense of responsibility in the offender and acknowledgement of the harm caused to the victim and to the community.

[111] As mandated by s. 718.1 of the *Criminal Code*, in all cases, "whatever weight a judge may wish to accord to the objectives listed above, the resulting sentence *must* respect the fundamental principle of proportionality" (*Nasogaluak*, at para. 40 (emphasis in original)). Proportionality is the "*sine qua non* of a just sanction" (*Ipeelee*, at para. 37). This principle provides that "sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (*Friesen*, at para. 30). There are two converging perspectives on proportionality: first, it serves a restraining function as it requires that a sentence not exceed what is just and appropriate, and second, it seeks to ensure that the sentence "properly reflects and condemns [the role of offenders] in the offence and the harm they caused" (*Nasogaluak*, at para. 42). At the end of the day, a just sanction is one that reflects both of these "perspectives on proportionality and does not elevate one at the expense of the other" (*Ipeelee*, at para. 37).

[112] For its part, s. 718.2 provides a non-exhaustive list of secondary principles that must guide the sentencing process. These principles include "the consideration of aggravating and mitigating circumstances, the principles of parity and totality, and the instruction to consider 'all available sanctions other than imprisonment that are reasonable in the circumstances', with particular attention paid to the circumstances of aboriginal offenders" (*Nasogaluak*, at para. 40, quoting s. 718.2 of the *Criminal Code*). In particular, parity requires that "similar offenders who commit similar offences in similar circumstances. . . receive similar sentences" (*Friesen*, at para. 31). It is principally because of parity that appellate courts sometimes adopt sentencing ranges or starting points to serve as a guide for sentencing judges (*Lacasse*, at paras. 56-57). In *Friesen*, this Court explained that parity is an expression of proportionality: "A consistent

> application of proportionality will lead to parity. Conversely, an approach that assigns the same sentence to unlike cases can achieve neither parity nor proportionality. . .” (para. 32).
>
> [113] In order to produce proportionate sentences, sentencing must be a “highly individualized exercise” (*Lacasse*, at para. 58; *Boudreault*, at para. 58). Sentencing judges must decide a profoundly contextual issue: “. . . For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*?” (*Gladue*, at para. 80 (emphasis in original)). They must determine which objectives of sentencing merit greater weight and evaluate the importance of mitigating or aggravating factors, to best reflect the circumstances of each case (*Nasogaluak*, at para. 43)
>
> [114] Individualization flows from proportionality: a sentence that is not tailored to the specific circumstances of both the offender and the offence will not be proportional to the gravity of the offence and the degree of responsibility of the offender (*Proulx*, at para. 82). Simply stated, [TRANSLATION] “[a] proportional sentence is thus an individualized sentence (J. Desrosiers and H. Parent, “Principles”, in *JurisClasseur Québec – Collection droit pénal –Droit pénal général* (loose-leaf), by M.-P. Robert and S. Roy, eds., fasc. 20, at para. 17).

[43] Alongside these general sentencing admonitions, courts have recognized that regarding certain driving offences the objectives of deterrence and denunciation are “particularly relevant to offences that might be committed by ordinarily law-abiding people. It is such people, more than chronic offenders, who will be sensitive to harsh sentences”: ***R v Lacasse***, 2015 SCC 64, at para 73, citing ***R v Proulx***, 2000 SCC 5, at para 129:

> . . . dangerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by otherwise law-abiding persons, with good employment records and families. Arguably, such persons are the ones most likely to be deterred by the threat of severe penalties: [citations omitted]

5. Victim Impact Statements

[44] A total of 63 persons provided Victim or Community Impact Statements. They describe the devastating impacts the deaths of Emma MacArthur, Georgia Donovan and Faisal Yousef have had on mothers, fathers, siblings, grandparents, uncles, aunts, cousins, in-laws, friends and acquaintances.

[45] Section 722(1) of the *Criminal Code* provides that

> 722 (1) When determining the sentence to be imposed on an offender... in respect of any offence, the court shall consider any statement of a victim prepared in accordance with this section and filed with the court describing the physical or emotional harm ... suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim

[46] The role of victim impact statements was recently revisited in ***R v Friesen***, 2020 SCC 9 at para 85:

> [85] When possible, courts must consider the actual harm that a specific victim has experienced as a result of the offence. This consequential harm is a key determinant of the gravity of the offence (see *M. (C.A.)*, at para. 80).

[47] However, as noted by Renke J in ***R v Pettitt***, 2021 ABQB 773 at para 62, the court must take care that victim impact statements are not used improperly to aggravate or increase the length of sentence. Justice Renke cited ***R v Theriault***, 2020 ONSC 6768, affd 2021 ONCA 517 at para 17 (SC, per Di Luca J):

> [17] .... I am mindful that when properly considered, victim impact statements provide important and potentially aggravating context to the sentencing process. They inform the seriousness of the offence committed and the harm caused. However, they cannot be used to *improperly* aggravate or increase the length of sentence ....

Justice Renke went on to cite Blair JA in ***R v Taylor***, 2004 CanLII 7199, at para 42 that "victim impact statements, like criminal records, do not justify double punishment – once for the crime against society, and again to counterbalance the harm done to the victims (a sort of criminal revenge in lieu of civil damages)," and ***R v AG***, 2015 ONCA 159 at paras 72 and 73, that a victim impact statement cannot be used to increase a sentence to an inappropriate level. Proportionality remains the governing sentencing principle.

[48] In ***R v CC***, 2018 ONCJ 542, the court noted at paras 12-14:

> [12] In conformity with the principles in this legislation, sections 718 and 722 of the *Criminal Code* were amended to facilitate the informed involvement of victims of crimes in the criminal process, ensuring that their rights are respected, their harm considered and that they are treated with compassion and dignity. Section 718 states that one of the fundamental purposes of a sentencing is to denounce the harm done to the victims and the community at large and to provide reparations for the harm done to the victims:
>
> > 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**.

> [13] Although the sentencing provisions in the *Criminal Code* have changed and there are a couple of decisions that have found that these provisions cannot be applied retrospectively, these concepts are hardly new in criminal law. Rather, for the most part, it is a codification of what Judges have done for decades. During a sentencing hearing, a Judge has to engage in balancing the aggravating and mitigating features of the offender and the offence. An important consideration is how the conduct of an offender and the nature of an offence has harmed the victims, how their lives have been impacted and the consequences that criminal conduct has visited on innocent people. This essential information is provided by the victims of crimes. In addition, one of the goals of sentencing has always been to make reparations for the harm done to victims. Providing victims with a voice in the proceedings is one means to make reparations.
>
> [14] While some parts of the victim impact statements that were submitted in this case may be improper and I will not consider any fact that is not in evidence nor will it impact the outcome of the sentencing, this sentencing hearing is not just about the outcome. The process itself is an invaluable experience for all of the participants. It is an opportunity for [the offender] to hear directly from the victims about the immense harm that his actions have caused which may achieve some of the principles of sentencing by deterring this offender from harming other children, promoting a sense of responsibility and encouraging rehabilitation. It is an opportunity to treat these victims with compassion and dignity by allowing them to voice their pain and suffering. It is a means to begin making reparations and a chance to start the process of healing. As result, the sentencing provisions allow for some flexibility to achieve a just result and a fair hearing while permitting the victims a fulsome opportunity to express themselves within some boundaries.

[49] The comments above are consistent with what author Elizabeth Janzen describes (in "The Dangers of a Punitive Approach to Victim Participation in Sentencing: Victim Impact Statements after the *Victims Bill of Rights* Act" 2020 Manitoba Law Journal Volume 43 Issue 4 85-106; also 2020 CanliiDocs 2571) as the "communicative" or "expressive" role that victim impact statements properly have, as distinct from the so-called "instrumental" role – by which victim impact statements are treated as evidence of harm meant in a concrete way to impact the sentence imposed on the offender.

[50] I have taken into account the many victim impact statements before me as communicating and expressing views that are relevant to the impact of Mr. Benjumea's crimes on them. I have taken care however to ensure that the victim impact statements do not improperly aggravate or increase the length of Mr. Benjumea's sentence.

[51] Before moving on, I pause to note that although I will deal with aggravating and mitigating factors shortly in these reasons, counsel for Mr. Benjumea correctly argues that *Criminal Code* s 218.2(a)(iii.1) is of no effect here as a statutory aggravating factor in that the victims referred to in that provision are the deceaseds, and as their deaths are an element of the offences to which Mr. Benjumea has pleaded guilty.

6. Aggravating and Mitigating Factors

[52] Section 718.2(a) of the *Criminal Code* requires the court to ensure a sentence is "increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender."

Aggravating factors

[53] I find the following aggravating factors:

a. Mr. Benjumea's dangerous driving caused three deaths. Of course, that death was caused is an element of each of the offences. I must take care not to treat an element of the offence itself as an aggravating factor. But the reality is that in the context of concurrent sentences for multiple offences, the *number* of deaths is indeed a highly relevant consideration in sentencing. As is common in criminal driving cases, heavier sentences are appropriate when multiple victims are injured or killed: ***R v Goodstoney***, 1999 ABCA 110 at para 18.

b. Mr. Benjumea's driving pattern was excessively dangerous. The Crown fairly notes that mere dangerousness is not an aggravating factor. However, I agree with the Crown's submission that where conduct far exceeds the requisite conduct to support a conviction, excessive dangerousness is relevant to the driver's moral blameworthiness, and is aggravating.

   In Mr. Benjumea's case, the dangerousness of his driving was excessive having regard for its duration over several kilometres, and for its speed, ultimately more than three times the posted limit of 60 kph; it was with regard to the near-miss of colliding with another motorist on 104 Street; and it was with regard to what inferentially was Mr. Benjumea's *awareness* of the driving pattern and at least wilful blindness of its likely consequences – and thus his ability to change his behavior before the collision. This later factor takes into account that on the record before me Mr. Benjumea was not impaired by alcohol before the collision; as the Crown put it in argument, "Where there is no impairment by alcohol, the Crown submits that a driver is functioning at a higher level of moral capacity making decisions in the context of their best cognitive functioning when they make deliberate choices to engage in dangerous driving".

   I have noted the evidence regarding Mr. Benjumea's memory for the events following his departure from the Whyte Avenue club and leading to, and after, the collision. I have noted the submissions of Mr. Benjumea through counsel at the sentencing hearing itself – that he had virtually no memory for the events. The record on the whole is contradictory. It is suggested the contradictions can be explained by Mr. Benjumea's head injury in the collision, said to be circumstantial evidence that he struck his head and that he had some temporary amnesia.

   Having considered all of the evidence, I find no support for the conclusion that Mr. Benjumea sustained a head injury that altered his consciousness and thus explained his contradictory statements regarding the collision and the event leading up to it, and events that followed. The evidence rather leads to the conclusion, and I find, that Mr. Benjumea had at least a partial memory of driving southbound on Calgary Trail before the collision; he had a memory of being at the scene after the collision; he was able to converse with witnesses; he was able to walk away from the scene, interact with a convenience store

clerk, locate the apartment of his former friend, clean himself up and direct that his clothes be laundered, obtain a cell phone with which to make a number of calls including to a business associate to obtain a ride to Mr. Benjumea's residence.

It is relevant that Mr. Benjumea, after the collision, was this sound cognitively. That he was contributes to the conclusion, and I find, that before the collision – whether he remembers or is willing to admit he remembers it all or not – Mr. Benjumea was aware of his driving and its extreme dangerousness and the risks it created to both himself, his passengers, and other members of society.

c. Mr. Benjumea drove dangerously along a roadway on which, even in the early morning hours of July 3, 2020, other motorists and pedestrians could be expected. This is indeed a somewhat aggravating factor, less so perhaps that driving dangerous in rush-hour or against traffic, but still, the aggravation here is supported by the video exhibited before the court showing several cars as well as a pedestrian passing by a few minutes following the collision.

d. Mr. Benjumea was disqualified from driving. He was nine months into a 12-month criminal driving prohibition. I agree with the Crown that his intentional disobedience of a court order "is a clear, unequivocal and offender-specific expression of a lack of respect for the law. The need for denunciation and deterrence in that context is clear": ***R v Hogg***, 2009 ABPC 230 at para 37-38. This is a serious aggravating factor by virtue of statute (s 320.22(g) of the *Criminal Code*) and at common law.

e. Related, it is also seriously aggravating that Mr. Benjumea has relevant prior convictions under the *Criminal Code* and under provincial law. In July, 2017 he pled guilty to refusing to provide a breath sample following his arrest for that incident in September, 2018. His driver's abstract includes several convictions and suspensions in 2018 and 2019 including failing to proceed as directed at a green light in 2017, driving in breach of a prohibition condition in June, 2018, speeding in September, 2019 and a seven-day suspension, in May, 2019, relating to a racing or stunting offence.

f. Mr. Benjumea chose to drive in the face of other alternatives. The defence disputes this is an aggravating factor in that driving is an essential element of the offence, and Mr. Benjumea's status as a disqualified driver is itself a separate aggravating factor; I agree with the Crown however that somewhat aggravating here is Mr. Benjumea's decision to drive in the presence of readily-available alternatives to driving, most obviously commercial transportation.

g. I am not persuaded that the evidence of alcohol consumption before the driving around 2 a.m. on July 3, 2020 is significantly aggravating. Granted, the mere consumption of an intoxicant while driving is to some extent aggravating. Even if its role in an offence has not been proven beyond a reasonable doubt, courts in criminal driving cases have held that, without more, alcohol consumption is evidence of an offender's irresponsibility: ***Lacasse***, at para 84; ***R v Nahnybida***, 2018 SKCA 72, at paras 106, 153; ***R v Roberts***, 2005 ABCA 11, at para 57.

These cases aside, certain authorities relied on by the Crown are cases in which sentencing judges have made concrete findings regarding the contribution of alcohol consumption short of legal impairment. For example, in ***R v Konkolus*** 1988 ABCA 127,

at para 9, the trial judge found on the evidence that alcohol was "a factor"; in ***R v Grenke***, 2012 ABQB 198 at para 25, the sentencing judge found, on the evidence, that "it was clear that many hours after the collision Mr. Grenke still had alcohol in his blood stream…" and, importantly, that alcohol "influenced [the] outcome of Mr. Grenke's dangerous driving"; and in ***R v Gratton***, 2003 ABQB 882 at para 15, the sentencing judge found Mr. Gratton was impaired by the consumption of alcohol, given the evidence of symptoms, conduct and remarks made, to amongst others, police officers.

With these specific cases in mind, and again not to ignore the tenor in the cases that however inexact, 'alcohol always matters', still it is important not to lose sight of the limited evidence in Mr. Benjumea's case regarding his consumption of alcohol and its contribution to his dangerous driving.

Taken at its strongest, the evidence is that Mr. Benjumea consumed six ounces of spirits between earlier in the evening on July 2, 2020 – at some point after the hours of 7:30-8:00 pm – and between 2:09-2:11 am on July 3, 2020, when he paid his share of the bar tab. Granted, on their joint bar tab at the Whyte Avenue club Mr. Benjumea and Mr. Yousef paid for 20 single-ounce shots of tequila and two double-ounce Old Fashioned mixed drinks. However, there is again no evidence that Mr. Benjumea himself consumed more than six ounces of spirits at any material time. Similarly, the only direct evidence of the impact of alcohol on him is from the server at the Whyte Avenue club, who told police that she did not believe Mr. Benjumea was "over the limit" based on their conversations and observations. Circumstantially it may be that alcohol consumption short of legal impairment disinhibited or otherwise affected Mr. Benjumea and thus contributed to his dangerous driving. However, it must be noted that there is no direct evidence in this regard. It is certainly possible that Mr. Benjumea drove dangerously on July 3, 2020 without regard for the impact, if any, of his earlier alcohol consumption.

h. I am not persuaded that it is aggravating that Mr. Benjumea allowed some of his passengers not to be seat belted.

i. Nor am I persuaded that the Crown has proven the aggravating factor that Mr. Benjumea drove his van a short distance later in the day of July 3, 2020. Even with adequate proof of that driving, it would be a minor aggravating factor at best.

j. Finally, I am not persuaded that it is more than secondarily aggravating that Mr. Benjumea left the scene of the collision without inquiring about or making any effort to assist the victims. Mr. Benjumea has pleaded guilty for leaving the scene of the collision. He is being sentenced separately for that offence. What's more, before Mr. Benjumea walked away, another individual was already on 911 with police and/or EMS. So yes, Mr. Benjumea's conduct in leaving was morally reprehensible and showed callous disregard for his passengers – not only in driving dangerously but in failing to remain. But there is no evidence that any more immediate assistance could have helped the victims, or even provided comfort to them.

Mitigating factors

[54] I find the following mitigating factors:

a. Mr. Benjumea entered guilty pleas to the four offences before the court. For reasons which follow I accord the pleas considerable, if not "significant" weight, as that term

is used in ***R v Roberts***, 2020 ABCA 434. As in ***Roberts***, by all indications the case against Mr. Benjumea was strong, and at one point in time he faced charges of criminal negligence causing death but with the Crown's consent he pleaded guilty to the included offences of dangerous driving causing death.

These considerations aside, a guilty plea always has some value: ***R v SLW***, 2018 ABCA 235 at paras 33-35. It is for the sentencing judge to determine the value, in all of the circumstances. Here, whatever the strength of the case against him, it cannot be lost that in pleading guilty Mr. Benjumea waived his constitutional right to have his guilt proven by the Crown beyond a reasonable doubt. No preliminary inquiry or trial was ever scheduled. The parties agreed that four weeks would have been required for the trial, the guilty pleas resulting therefore in a consideration savings of court and Crown resources. Mr. Benjumea also signalled his intention to resolve the case against him months before his actual pleas were accepted in May, 2021.

b. Mr. Benjumea is genuinely remorseful for the harms he has caused. That he is remorseful is evident from his early decision to plead guilty. It is also evident from the record before me, including the nine reference letters already noted, and including Mr. Benjumea's reaction to the many victim impact statements heard by the court, and by what I accept were his genuine comments to the Court in the presence of many victims.

c. Mr. Benjumea is, now at 27 years old and 25 at the date of the offences, a relatively youthful offender. As such – and together with his other circumstances – he presents as a good candidate for rehabilitation during and after his sentence of incarceration. With regard to this factor, I have considered the evidence of Mr. Benjumea's background, including that he has never before been sentenced to incarceration, his relevant but still limited criminal history, his achievements in the community before the July 3, 2020 offences, and his efforts to better himself while in remand since his arrest soon after.

7. Time in Remand

[55] Exhibited was Mr. Benjumea's affidavit filed November 15, 2021 and a supplementary Agreed Statement of Facts regarding the time Mr. Benjumea spent in remand both at the Edmonton Remand Centre (ERC) and Fort Saskatchewan Correctional Centre (FSCC).

[56] Mr. Benjumea was arrested on July 3, 2020 and has been in remand since, a total of 561 actual days. The parties agree that pursuant to s 719(3.1) of the *Criminal Code* and in the circumstances affecting Mr. Benjumea, the maximum credit of 1.5 to 1 should be given to him. The result is credit of 841.5 days, or about 2.3 years.

[57] The parties also agree that pursuant to ***R v Byron***, 2021 ABQB 883 and like cases (most particularly, ***R v Gordey***, 2020 ABQB 425), Mr. Benjumea is entitled to further *mitigating factor* credit, notionally along the lines of 2:1 credit (net of the earlier 1.5:1) for all periods during which he faced 22-hours of lock-up. In a letter to the court of January 12, 2022 the Crown confirmed that since argument in early December, 2021, Mr. Benjumea has continued to receive no more than about two hours per day out of cells.

[58] The parties' agreement on further mitigating credit based on 2:1 is subject to this court's determination of a 138-day period about which there is no agreement. Those days are as follows:

- August 25-September 15, & May 17-June 30, 2020: lock-up 18-19 hours/day
- September 16-October 28, 2020: lock-up 14-hours/day
- October 29, 2020 to May 17, 2021: was in Bootcamp and resided in an open-layout environment as distinct from a 11-plus hour lock-up

[59] With regard to the August 25-September 15 & May 17-June 30, 2020 periods, I accept that increased Covid-related lock-ups during these periods should translate into further mitigating credit at the equivalent of 2:1.

[60] With regard to the September 16-October 28, 2020 period, I agree with the Crown's submission that Mr. Benjumea's additional confinement was not such that he is entitled to further mitigating credit.

[61] With regard to the October 29, 2020 to May 17, 2021 period, I agree with the Crown's submission that owing to the boot camp environment, Mr. Benjumea is entitled to no additional mitigating credit.

[62] At the end of the day, in addition to the 841.5 days' credit based on 1.5:1, on a Covid-19 lockdown basis I find that Mr. Benjumea is entitled to additional mitigating credit of 101.5 days. That figure is a combination of the additional mitigating credit the parties have agreed to (68 days) together with the additional mitigating credit which I have now decided (33.5 days).

8. Parity

[63] Section 718.2(b) requires the court to consider a sentence which is similar to sentences imposed on similar offenders who have committed similar offences in similar circumstances. In considering the concept of parity it is frequently helpful to consider sentencing decisions of other courts in relation to similar offences. However, while these decisions may provide some guidance in fixing an appropriate sentence, the facts and the circumstances of the offenders in other cases are rarely identical, and thus, other sentencing decisions may be of limited value as precedent, except as to principles and, where applicable, starting points: ***R v BSM***, 2011 ABCA 105 at para 7. This is particularly the case for sentences in criminal driving cases: ***R v Mbachu***, 2016 ABCA 270, at para 19.

The impact of Bill C-46 and *R v Friesen*

[64] The Crown notes that in December, 2018 Parliament increased the maximum punishment for dangerous driving causing death from 14 years incarceration to imprisonment for life. Without question this is a factor going to the seriousness of the offence. It is relevant to sentencing in Mr. Benjumea's case. Relevant too are the comments in ***Friesen*** – and pointedly also in ***R v Lacasse***, 2015 SCC 64, at para 7, and in many other cases – to the same effect.

[65] The Crown relies on the following comments in ***Friesen*** at paras 100 and 108:

> [100] To respect Parliament's decision to increase maximum sentences, courts should generally impose higher sentences than the sentences imposed in cases that preceded the increases in maximum sentences. As Kasirer J.A. recognized in *Rayo* in the context of the offence of child luring, Parliament's view of the increased gravity of the

> offence as reflected in the increase in maximum sentences should be reflected in [TRANSLATION] "toughened sanctions" (para. 175; see also *Woodward*, at para. 58). Sentencing judges and appellate courts need to give effect to Parliament's clear and repeated signals to increase sentences imposed for these offences.
>
> …
>
> [108] Courts can and sometimes need to depart from prior precedents and sentencing ranges in order to impose a proportionate sentence. Sentencing ranges are not "straitjackets" but are instead "historical portraits" (*Lacasse*, at para. 57). Accordingly, as this Court recognized in *Lacasse*, sentences can and should depart from prior sentencing ranges when Parliament raises the maximum sentence for an offence and when society's understanding of the severity of the harm arising from that offence increases (paras. 62-64 and 74).

[66] Counsel for Mr. Benjumea suggests in argument that ***Friesen*** requires not only evidence of an increased maximum sentence but also of a change in "society's understanding of the severity of the harm arising from that offence". Whatever other evidence may or may not exist in that regard, it seems to me that Parliament's decision to increase to life imprisonment the maximum sentence for dangerous driving causing death is proof itself of society's increased understanding of the severity of harm of that offence.

[67] If I question the outcome in ***Friesen*** at all, it is with regard to the mandatory-sounding comment at para 108 that sentencing courts not only can but "should depart" from prior sentencing ranges in certain circumstances. The court refers to paras 62-64, and 74 of ***Lacasse*** for this proposition. On my reading of those paragraphs, nothing is said that supports the mandatory-sounding language in para 108 of ***Friesen***. This is not however to understate the importance of an increased maximum penalty as a consideration of what is a proportional sentence in the circumstances of the case. I agree with the Crown's submission that Bill C-46 signals the higher objective gravity of criminal driving causing death, including dangerous driving. I agree that courts should take that signal very much into account when sentencing for such offences.

The impaired driving/criminal negligence/flight authorities

[68] A great number of the sentencing authorities argued before me arise from cases involving convictions materially different from those to which Mr. Benjumea pleaded guilty. These are the cases dealing with criminally-negligent driving causing death, impaired driving causing death, and the former offence of dangerous driving while in flight from police.

[69] The distinguishing features throughout are some *actus reus* distinctions but also, fundamentally, different levels of moral blameworthiness.

[70] No one doubts – in relation to the dangerous driving causing death offences to which Mr. Benjumea pleaded guilty, that there will be degrees of moral blameworthiness arising from the circumstances of those offences. In my view it is not wrong but still unnecessary to invoke ***Lacasse*** in support of the conclusion, for example, that in the context of dangerous driving causing death moral culpability is heightened when the likelihood of injury moves from a risk to a virtual certainty. In their written submission, at para 17, the defence puts is this way: "The degree of responsibility will be greater where greater harm was intended, or [where] there was a greater degree of recklessness or wilful blindness".

[71] Where the Crown and Defence part company is in the attempt to characterize the worst kind of dangerous driving as, essentially, *criminally negligent* dangerous driving. They part company too in the attempt to equate the aggravating factors in Mr. Benjumea's case of prior alcohol consumption, or of his egregiously-dangerous driving pattern, with the actual offences of impaired driving causing death, or criminal flight causing death.

[72] In Mr. Benjumea's case, the dangerousness of his driving indeed approaches the highest imaginable moral blameworthiness.

[73] That said, this high level of moral blameworthiness exists for an offence the *mens rea* of which is defined in the cases as requiring proof of conduct amounting to a "marked departure" from the standard of care a reasonable person would observe in the accused's circumstances.

[74] This compares to the *mens rea* required for criminal negligent driving, which requires proof that the accused's conduct constituted a "marked and substantial departure" from the conduct of a reasonably prudent person.

[75] Similarly, Parliament and the courts have long signalled the high moral blameworthiness that accompanies a conviction for impaired driving causing death, including that in the year 2000 – 16 years before Bill C-46 – the maximum penalty for impaired driving causing death was elevated to life. As noted earlier in these reasons, I have found only equivocal evidence that Mr. Benjumea's alcohol consumption actually contributed to the dangerousness of his driving.

[76] Turning then to the cases of criminal flight causing death – and granted that dangerous driving is an element of that offence under then-s 249.1(3) of the *Criminal Code* – but another critical element of the offence is dangerous driving while being pursued by a peace officer. There is of course no evidence of such flight in Mr. Benjumea's case. The court in ***R v Roberts***, 2005 ABCA 11 at para 93, noted the significance of flight in the moral blameworthiness of the offence, commenting that the "moral turpitude is great, greater than that for dangerous driving because of the deliberateness and contumacy required".

[77] The Crown cites ***Lacasse*** as a case setting the lower end of the range for Mr. Benjumea's sentencing. I do not agree. The case is not irrelevant but it is readily distinguishable in that Mr. Lacasse was convicted of impaired driving causing the death of two persons. He plead guilty and was ultimately sentenced to six and a half years. He faced a maximum sentence already set at life imprisonment. There were many other distinguishing factors: Mr. Lacasse was 18 with no criminal record or driving prohibition; his speed was less than twice the limit; and his misconduct resulted in two, rather than three, fatalities.

[78] The Crown also relies on numerous other impaired driving cases which I find similarly of limited value to its cause of a 12-year sentence for dangerous driving causing death:

- ***R v Muzzo***, 2016 ONSC 2068 - ***Muzzo*** is another impaired driving causing death case. Mr. Muzzo, 29 at the time of sentencing, pleaded guilty and received 10 years' imprisonment for causing the deaths of four persons and injuring two others. He was impaired at three times the legal limit and had a relevant provincial driving record.
- ***R v Pratt***, 2014 ABQB 529 - ***Pratt*** is a manslaughter/impaired driving causing death case in which Mr. Pratt was sentenced after trial to eight years incarceration for causing the deaths of three persons while driving nearly three times the posted limit with a blood alcohol concentration of at least 200 milligrams percent. Mr. Pratt, 31 at the time of

sentencing, had no criminal or driving record. He presented with a positive *Gladue* report and had taken concrete steps to rehabilitate himself while in the community pending trial.

- ***R v Kummer*** 2011 ONCA 39 – ***Kummer*** is a case of dangerous driving and impaired driving causing death of three individuals, and injuring two others. Mr. Kummer pleaded guilty and was sentenced to eight years. In relation to the impaired driving, he was double the legal limit and had a relevant provincial driving record albeit not a criminal record.
- ***R v Simms*** 2021 OCJ 374 – ***Simms*** is a case of impaired driving causing death and impaired driving causing harm. After pleading guilty Mr. Simms was sentenced to nine and a half years in circumstances where he drove three times the posted limit, was at .190 milligrams/percent of alcohol, and had a related record for three prior impaired driving convictions.
- ***R v Lewis***, 2021 ONCA 597- ***Lewis*** is a case of a conviction at trial and sentence of a total of eight years' incarceration for impaired driving causing death, criminal negligence causing death and breach of probation. The facts were of a street race in rush hour with speed of 130 kph in a 50 kph zone. Blood alcohol was between 83-113 milligrams percent. Mr. Lewis also had a related 2014 record for dangerous driving while fleeing police and a provincial record with seven speeding convictions.
- The Crown referred to the cases of ***R v Yellowknee***, 2008 ABPC 168 and ***R v Gamble***, 2017 ONCA 610, involving sentences for impaired driving causing death offences of 17 years and 12 years respectively. These cases were doubtless decided on their own facts, are far outside the range argued for by the parties before me, and of limited usefulness.

[79] The Crown refers to a number of sentencing cases involving convictions for the former offence of flight causing death. Again, owing to the materially different elements of the offence and moral blameworthiness of flight causing death, I find these authorities to have limited value:

- ***R v Grogan***, 2019 ABPC 126 – ***Grogan*** is a case in which having pleaded guilty Mr. Grogan, 34, was sentenced to nine and half years incarceration for two counts of flight causing death and one and a half years *concurrent* for leaving the scene.
  The maximum sentence for flight causing death was life imprisonment. Given the concurrent leaving the scene sentence, the net flight causing death sentence was seven years incarceration. While at a relatively low 30 kms over the posted limit, Mr. Grogan drove against traffic on a freeway and collided head-on with an oncoming vehicle, killing its occupants. He had an unrelated but significant criminal record and four *Traffic Safety Act* convictions. He had consumed methamphetamine earlier the day of the collision; it does not appear a finding was made regarding the specific contribution of drug consumption on Mr. Cyr's driving.
- ***R v Cyr***, 2006 ABCA 114 – ***Cyr*** is a sentence after a guilty plea to one count of flight causing death and another of flight causing bodily harm and was sentenced to eight and a half years incarceration. The facts were of a lengthy police chase and dangerous driving pattern. He was youthful and had an unrelated criminal record.

The dangerous driving causing death cases

[80] In addition to these impaired driving and 'flight' cases, the Crown submitted the following dangerous driving causing death cases, which of course are relevant, subject to the admonition already noted from ***BSM*** regarding the value generally of sentencing precedents.

- ***R v Grenke***, 2012 ABQB 198 - ***Grenke*** is a four and a half year sentence following trial for one count of dangerous driving causing death and one count of dangerous driving causing bodily harm. The case is distinguishable on several bases: it was decided before the Bill C-46 changes; it involved one death, not three; while not impaired, as noted elsewhere in these reasons the sentencing judge found alcohol consumption to be a significant aggravating factor; Mr. Grenke did not plead guilty; he was 36 at the time of sentencing; his driving pattern was less egregious than Mr. Benjumea's in that he reached a less excessive speed and only in the space of one block; he had no criminal convictions or prohibition but did have a relevant, provincial driving record; the court was considerably influenced by positive presentence and forensic psychiatry reports speaking to Mr. Grenke's positive attributes; no such reports were before me in Mr. Benjumea's case. But for the positive reports, the sentencing judge would have considered a sentence of six or more years.
- ***R v Gratton***, 2003 ABQB 882 – ***Gratton*** is a case of an offender convicted after trial and sentenced to seven years incarceration for five counts of dangerous driving causing death plus one year consecutive for leaving the scene of the collision. Again, as I have noted earlier in these reasons, the sentencing judge found Mr. Gratton to be impaired by alcohol. There were few other aggravating factors: there was no related criminal or other record, and the dangerousness of the driving pattern was, relative to that of Mr. Benjumea, quite minimal. Undoubtedly the absence of a mitigating guilty plea and the proven impairment, together with multiple deaths, contributed to the 7-year sentence.
- ***R v Sidhu***, 2019 SKPC 19 – ***Sidhu*** is the 'Humboldt Broncos' case in which Mr. Sidhu, after pleading guilty to dangerous driving resulting in 16 deaths and 13 injured persons, was sentenced to eight years incarceration. Mr. Sidhu was a first offender with no aggravating antecedents and aside from the tragic failure to obey a stop sign, no other aggravating driving pattern. The sentencing judge noted that cases with higher moral blameworthiness yet fewer victims, tended to attracted sentences in the range of six years' incarceration.

[81] Finally, the Crown referred to ***R v Didechko***, 2016 ABQB 552. Mr. Didechko was found guilty after trial and sentenced to two years incarceration for leaving the scene of a collision. His flight did not delay treatment for the victim but the sentencing court made a specific finding that Mr. Didechko's decision to flee was driven by a strategic desire to avoid an impaired driving investigation. Germain J commented that on a principled basis the offence created by Parliament was meant to emphasize general and specific deterrence, and denunciation. It was meant to disincentivize accused persons from seeking to escape appropriate criminal investigations in the public interest. It was meant to apply to accused persons who in criminal driving cases often have little or no other experience with the criminal justice system. As the sentencing judge noted, at para 23:

> The courts can, if they have the willpower to do it, create significant disincentive to flee the scene of an accident. Denunciation and deterrence must anchor a fit and proper sentence."

[82] The defence referred to the following additional authorities:

- ***R v Theriault***, 2021 NWTSC 17 – ***Theriault*** is a case of a five and a half year sentence for one count of dangerous driving causing death and four of dangerous driving causing

bodily harm. The circumstances of the offence included impairment and excessive speed. Smallwood J considered the 2019 Bill C-46 amendments that increased the maximum penalty for the offence to life imprisonment. The circumstances of the offender included a related criminal record and an active driving prohibition, but also a guilty plea and ***Gladue*** factors. With regard to the latter, Smallwood J concluded that for Mr. Theriault, 45 at the time of sentencing, ***Gladue*** factors played a part in his criminal history and played a part in him coming before the courts. The Crown sought a sentence of six years for the dangerous driving causing death offence.

- ***R v Chikie***, 2011 ABQB 420 and ***R v Marona***, 2010 ABQB 588 are cases where sentences of 10 months and two years were imposed for dangerous driving causing death offences. Those cases were doubtless decided on their own facts, are far outside the range argued for by the parties before me, and of limited usefulness.
- ***R v O'Connor***, 2014 ABPC 264 – ***O'Connor*** is a 38-month sentence for dangerous driving causing death. The facts are egregious but equally Mr. O'Connor was found to have significant ***Gladue*** factors that "likely played a part in bringing [him] before the Court" (at para 24). Critical to Mr. O'Connor's sentence too was a finding of FASD and the sentencing judge's conclusion that "...given Mr. O'Connor's personal antecedents, I find the degree of responsibility to fall at the lower end of the moral culpability scale" (at para 36).
- ***R v Abau-Jabeen***, 2019 ONSC 5399 and ***R v Morin-Leblanc***, 2014 ONSC 2056 – these are criminal negligence causing death cases involving sentences of two years less a day and three years, respectively. Again, these cases were doubtless decided on their own facts, are far outside the range argued for by the parties before me, and of limited usefulness.
- ***R v Fox***, 2001 ABCA 64 - ***Fox*** is a 2-year sentence imposed after trial for two counts of dangerous driving causing death. Again, this case was doubtless decided on its own facts, is far outside the range argued for by the parties before me, and of limited usefulness.
- ***R v Nottebrock***, 2014 ABQB 662, ***R v Montoya***, 2016 ABQB 660, and ***R v Laine***, 2015 ONCA 519 – these are impaired driving causing death decisions in which sentences were imposed of four and a half years, four and a half years, and two years less a day respectively. Again, and at the risk of repetition, these cases were doubtless decided on their own facts, are far outside the range argued for by the parties before me, and of limited usefulness.

9. Totality

[83] As noted, the parties agree that the three counts of dangerous driving should run concurrently, and the remaining leaving the scene count should be consecutive.

[84] Section 718.2(c) of the *Criminal Code* requires the court to take a 'final look' to decide if the total sentence, including the consecutive portion, is not excessive for the offender as an individual.

10. A fit and proportionate sentence

[85] It remains to determine Mr. Benjumea's sentence.

[86] Denunciation and deterrence continue to be the paramount sentencing principles in this case: ***Lacasse***, at paras 5-6, 73-86. Deterrence is an objective in both the general and specific sense, given Mr. Benjumea's related driving recidivism. This is not to lose sight of the sentencing principles and purposes of restraint and rehabilitation. Counsel for Mr. Benjumea argued persuasively in favour of a sentence that is not denunciatory to a fault, and against a sentence that is unduly harsh. And of course, I agree that restorative principles and purposes very much remain in the balance in determining a fit and proportionate individualized sentence. It's just that in the case before me they do not overcome the emphasis that must remain on denunciation and deterrence.

[87] The circumstances of the dangerous driving offences in Mr. Benjumea's case include three deaths and dangerousness that approaches the most serious imaginable and accordingly attracts a high level of moral blameworthiness. As noted however, it is moral blameworthiness for dangerous driving causing death. The impaired driving causing death, flight causing death or criminal negligence causing death cases are not true comparators. On the basis of relevant case law and principles I see no path to the 12-year concurrent sentence sought by the Crown. That said, I have agreed that ***Friesen*** and long-standing similar cases are authority for some reconsideration of the dangerous driving causing death cases that pre-date Bill C-46, or that fail specifically to deal with its implications.

[88] The decision in ***Sidhu*** does not on its face deal with the implications of Bill C-46. As noted, ***Sidhu*** was a case of comparatively low moral blameworthiness, significant mitigating factors, but overwhelmingly negative consequences in terms of lives lost. It is unique and highly distinguishable. The court in ***Sidhu*** noted that dangerous driving causing death cases with higher moral blameworthiness yet fewer victims have tended to attract sentences in the range of six years' incarceration.

[89] This finding in ***Sidhu*** is generally consistent with the outcomes, in their own unique circumstances, of the pre-Bill C-46 cases in Alberta.

[90] ***Grenke*** was a case of a finding of guilt, one death, the contribution of alcohol to a comparatively limited driving pattern, and no criminal record. The four and a half years, yet it might have been six years or more but for a number of reports outlining the circumstances of the offender. Post-Bill C-46 arguably the hypothetical six-year sentence could well have approached or exceeded seven to eight years.

[91] ***Gratton*** was another case of a finding of guilt, five deaths, the contribution of alcohol, a comparatively limited driving pattern and no related criminal record. Again, post-Bill C-46, arguably Mr. Gratton's seven-year sentence could have approached or exceeded eight or nine years.

[92] In ***Theriault*** the court considered Bill C-46 and arrived at a guilty-plea sentence for one death of five and a half years. The outcome is highly distinguishable having regard for the circumstances of the offender including ***Gladue*** factors.

[93] Mindful of parity, still no one disagrees that these dangerous driving causing death cases are helpful but not determinative.

[94] I have commented on the limited usefulness of the sentencing cases arising from the offences of criminal negligence causing death, impaired driving causing death, and 'flight' causing death. It is relevant to note, however, that even in these cases which involve a different, higher level of moral blameworthiness, and life-imprisonment offences, and of course unique circumstances throughout, the range of sentences is from six and a half years (***Lacasse***) to eight years (***Pratt, Kummer, Lewis, Cyr***) to 10 years or close to it (***Muzzo, Simms***, ***Grogan***).

[95] Turning back then to Mr. Benjumea's case, I have already determined the aggravating and mitigating factors and will only highlight them here.

[96] To reiterate, Mr. Benjumea is an offender who caused three deaths as a result of a pattern of dangerous driving pattern that attracts the highest moral blameworthiness, and is worse objectively than the driving patterns in any of the comparable dangerous driving causing death cases.

[97] Highly aggravating too is the fact he drove while prohibited, and had a related and recent criminal and provincial driving record. Again, none of the comparable dangerous driving causing death cases involved prohibited driving or related criminal records.

[98] Less aggravating but still relevant is the fact Mr. Benjumea chose to drive in the face of alternatives, left the scene, and was driving after consuming alcohol.

[99] Mitigating is Mr. Benjumea's guilty plea which I have found to be a considerable if not significant – again as expressed in ***Roberts*** – mitigating factor.

[100] Mitigating is what I have found to be Mr. Benjumea's genuine remorse.

[101] Mitigating too is Mr. Benjumea's relative youthfulness – compared against to the other dangerous driving causing death offenders - and his efforts to improve himself while in remand, all of which speak positively to his prospects for rehabilitation.

[102] On the whole, and keeping in mind the applicable principles of sentencing as already discussed, in my view the mitigating factors are outweighed by the aggravating factors in this case.

[103] With all these things in mind, I have concluded that a fit and proportionate sentence for three counts of dangerous driving causing death, to run concurrently, is seven and a half years incarceration.

[104] As to the offence of leaving the scene, I find that while ***Didechko*** is factually distinct – as all cases will be – Mr. Benjumea's leaving the scene and evasive conduct thereafter attracts the same principled response and a significantly deterrent and denunciatory sentence. I agree with the Crown's submission that Mr. Benjumea's post-offence conduct speaks to his guilty mind. He was well aware of the calamity caused, yet he acted in furtherance of his own self-interest. I find a sentence of 18 months is a fit and proportionate sentence in its own right for the offence of leaving the scene of the collision in the circumstances of this case.

[105] The remaining question is whether, on a totality analysis, the full 18-month sentence for leaving the scene should run consecutively to the seven and a half year sentence for three counts of dangerous driving causing death. Taking one last look at the overall sentence, I find that in the circumstances an aggregate sentence of nine years would be just and appropriate and not unduly long and harsh for Mr. Benjumea as an individual. To paraphrase from ***R v M(CA)***, at para 42, I conclude that an aggregate 9-year sentence is not "substantially above the normal level

of a sentence for the most serious of the individual offences involved". Nor will it be "crushing" for Mr, Benjumea, given his record and prospects. I am not persuaded it will "extinguish [his] rehabilitative potential" (***R v Angelis***, 2016 ONCA 675 at para 51) or turn him into a "social cripple" (Ruby et al, *Sentencing* (9th Edition, 2020) at p 19). Accordingly, the sentence for leaving the scene will be 18 months incarceration, consecutive.

11. Reduction for remand time

[106] As noted, as of January 14, 2022 Mr. Benjumea has been on remand, as noted, for 561 actual days. The parties have agreed he is entitled to 1:5 to 1 credit for this entire period.

[107] The parties have also agreed that Mr. Benjumea is entitled to additional mitigating credit of 68 days owing to Covid-19 conditions, and where the parties were unable to agree, I have decided that Mr. Benjumea is entitled to a further period of mitigation credit of 33.5 days. The total Covid-19 mitigation credit is 101.5 days.

12. Ancillary orders

[108] As to a driving prohibition, the Crown seeks a 10-year prohibition whereas Mr. Benjumea argues for a 5-year prohibition. I conclude in the interests of justice, and for the protection of the public from Mr. Benjumea who of course has a prior record for breaching a driving prohibition, that he should be prohibited from operating a motor vehicle on any road, highway or public place for a period of 10 years beginning upon his release from incarceration.

[109] As to DNA, I am satisfied that if only given the conviction for leaving the scene of the collision, it is in the interests of justice in all of the circumstances and not unduly harmful to Mr. Benjumea's privacy and security of the person, that he should provide a sample of his DNA within 60 days of today's date.

[110] As to a Victim Fine Surcharge, I exercise my discretion against imposing a surcharge, on the evidence before me of Mr. Benjumea's limited ability to pay at least since he was arrested and remanded. His ability to pay will not improve during the sentence now imposed on him. To impose a Victim Fine Surcharge in the circumstances would amount to undue hardship.

13. Conclusion

[111] For the reasons given, a fit and proportionate sentence is a total of nine years – seven and a half years concurrent for three counts of dangerous driving causing death and 18 months consecutive for leaving the scene of the collision, together with the ancillary orders already mentioned. The nine year sentence is net of the credits – both statutory and Covid-19 related – to which Mr. Benjumea is entitled.

Heard on May 7, October 4-5, November 29 and December 1-2, 2021.
Dated at the City of Edmonton, Alberta this 14th day of January, 2022.

Peter Michalyshyn
J.C.Q.B.A.

Appearances:

Sony Singh Ahluwalia
Kate Andress
for the Crown

Dino Bottos QC
Jessica Swann
for Oscar Fabian Benjumea