IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Orders,*
2014 BCSC 771

Date: 20140211
Docket: 60231-2
Registry: Chilliwack

Regina

v.

William Jonathan Orders

Before: The Honourable Mr. Justice Joyce

Oral Reasons for Sentence

Counsel for the Crown:	C.M. Kramer
Counsel for the Accused:	J.T.J. Campbell T. Paisana
Place and Date of Hearing:	Chilliwack, B.C. February 7, 2014
Place and Date of Sentence:	Chilliwack, B.C. February 11, 2014

Introduction

[1] On April 28, 2012, Ms. Lenami Godinez-Avila embarked on what was supposed to be an exciting but safe experience. She was to take a tandem ride on a hang glider in the care of Mr. Orders, an experienced hang glider pilot and instructor. Sadly, seconds into the flight the event turned in what would be the most tragic of outcomes.

[2] The harness that Ms. Godinez-Avila was wearing had not been attached to the hang glider by Mr. Orders. After trying desperately for about 90 seconds to hang on to Mr. Orders and the control bar of the hang glider, Ms. Godinez-Avila lost her grip and fell to her death.

[3] Ms. Godinez-Avila's death was not merely a tragic accident; it was the result of a criminal act on the part of Mr. Orders. He has pleaded guilty to criminal negligence causing the death of Ms. Godinez-Avila.

[4] It is now my task to impose a fit and proper sentence for this offence.

[5] Crown counsel and defence counsel have made a joint submission as to what they say would be an appropriate sentence. They submit a custodial sentence of five months to be followed by three years' probation would be appropriate in all the circumstances.

[6] My duty is not simply to adopt that submission without consideration of the legal principles that apply to the determination of every sentence. I must consider these principles and decide whether the sentence proposed is a fit sentence and if not, determine what would be a fit sentence. I must consider the nature and circumstances of the offence; the circumstances of the offender; and the purpose and principles of sentencing as set out in the *Criminal Code*, R.S.C. 1985, c. C-46 and established by the legal authorities.

[7] I propose to set out the reasons for my decision in eight parts:

1. First, I must review to some extent the heart-wrenching circumstances surrounding the offence.

2. Second, I will review the circumstances of the offender.

3. Third, I will discuss the offence of criminal negligence causing death and the essential elements that constitute the offence which by his guilty plea Mr. Orders admits are established in this case.

4. Fourth, I will discuss generally the purpose and principles of sentencing.

5. Fifth, I will discuss the principles that relate to joint submissions.

6. Sixth, I will discuss the impact that this event has had on the victims, the family and friends of Ms. Godinez-Avila who have to bear this terrible loss.

7. Seventh, I will provide my conclusion and the reasons for it.

8. Finally, I will impose the sentence I have decided upon and deal with other ancillary orders.

The Circumstances of the Offence

[8] Ms. Godinez-Avila was 28 years old at the time of her death. She was a citizen of Mexico, but had been living in Canada for 10 years and was a permanent resident of this country. Ms. Godinez-Avila and Mr. David Barrie lived together in a common-law relationship.

[9] On March 1, 2012, Mr. Godinez-Avila and Mr. Barrie purchased two tandem hang gliding trips with Vancouver Hang Gliding, a business that was owned and operated by Mr. Orders. They arranged for the flights to be on April 28, 2012. It was to be an outing to celebrate their anniversary.

[10] On Saturday, April 28, 2012, Ms. Godinez-Avila and Mr. Barrie met up with Mr. Orders and his assistant, Mr. Shaun Wallace, in Harrison Mills and then travelled to the launch site which was located on Mount Woodside near Agassiz, British Columbia. Mr. Orders and Mr. Wallace unpacked their hang gliding equipment and assembled two hang gliders. The plan was that Ms. Godinez-Avila would fly with Mr. Orders and Mr. Barrie would follow in a tandem flight with Mr. Wallace.

[11] Ms. Godinez-Avila and Mr. Barrie were given instructions on flight procedure, and suited with harnesses and helmets. As I understood the evidence, including the photographs provided at the sentencing hearing, there are straps attached to the harness that have a carabiner or large clip at one end. The carabiner is supposed to be clipped to the ropes that are located at the keel of the hang glider. The keel is a metal pole that runs down the inside of the top portion of the hang glider from the apex of the triangle of the delta wing towards the rear of the wing. The pilot is also attached to the keel of the hang glider and controls the flight of the aircraft with his hands using a control bar that is part of a triangle of metal attached to the keel of the hang glider.

[12] That day, Mr. Orders had installed a new video camera on the front of his hang glider to record the flight in order to provide a memory of the experience for his passenger.

[13] At flight time, Mr. Orders and Ms. Godinez-Avila ran down the launch area and began to lift off. Seconds into the flight, those on the ground observing the flight realized something was drastically wrong. Instead of being in a prone position parallel to Mr. Orders and to the hang glider, Ms. Godinez-Avila was hanging vertically. She was not fastened to the hang glider by the carabiner as she should have been. For the next 90 seconds or so Ms. Godinez-Avila tried to hold on to Mr. Orders and the control bar. Mr. Orders tried to hold on to her with his hands and feet and tried to reach her carabiner while attempting to steer the hang glider to a location on the mountainside that had been cleared by logging. Eventually,

Ms. Godinez-Avila was no longer able to hold on and she fell to the ground from a distance that was estimated to be between 1,000 and 1,800 feet and perished.

[14] Mr. Orders landed the hang glider at the designated landing zone about two minutes later.

[15] The police attended the landing zone at 12:04 p.m. Mr. Orders told them he had lost his passenger somewhere in the clearing on the mountainside. Mr. Orders assisted the police and the search and rescue personnel trying to find Ms. Godinez-Avila, but they were unable to do so for some time. They eventually found her body in the clearing at about 7:30 p.m. that evening.

[16] Meanwhile, at about 3:05 p.m. Mr. Orders returned to the landing area. The police had learned that pilots often use GPS devices and video cameras and an officer asked Mr. Orders if he had a GPS device or camera. Mr. Orders said he did not have a GPS device but he did have a video camera and that Mr. Wallace who had gathered up the gear and taken it away was returning it. At 3:24 p.m. when Mr. Wallace returned with the gear, the police seized the camera.

[17] Mr. Orders had spoken with a safety officer for the Hang Gliding and Paragliding Association of Canada some two hours earlier and informed him that he panicked and swallowed the memory card from the video camera. At about 3:30 p.m., Mr. Orders informed the police that he had swallowed the memory card. He told the police that he did not know why he had done this and that he regretted his actions as soon as he had done it.

[18] Mr. Orders was taken to the police station where he appeared remorseful for his action and began to cry stating that he could not believe what he had done but had panicked.

[19] Defence submits that when Mr. Orders swallowed the memory card he was in a state of intense anxiety, panic and shock. The psychological assessment of Mr. Orders done by Dr. Robert Ley suggests that Mr. Orders' planning and decision making were grossly impaired under the extreme emotional and psychological

circumstances then existing. The Crown accepts that this was the case, which is why the Crown elected not to proceed with a charge of obstruction of justice.

[20] Mr. Orders cooperated with the police and was taken to the hospital where an x-ray confirmed the presence of the memory card in his body. Mr. Orders remained in police custody by consent and took medication to assist in expelling the memory card. The card was eventually expelled on May 3, 2012.

[21] Mr. Orders was granted bail on May 4, 2012. He perfected his bail on May 7, 2012 and was released from custody on a number of conditions. Mr. Orders has remained on bail subject to those conditions and there is no evidence that he breached any of his conditions.

[22] The data on the memory card was not lost as a result of it passing through Mr. Orders' intestinal tract and it apparently depicts the events from the take-off through the fateful fall. Counsel deemed it not necessary to play the video in court and thereby saved Ms. Godinez-Avila's family and friends the anguish that they would have had to experience watching the event. Crown counsel summarized what the video depicted which I have briefly summarized earlier.

[23] The police also seized Mr. Barrie's cell phone which he used to film the take-off. It shows that prior to take-off the carabiner was clipped to the right shoulder of Ms. Godinez-Avila's harness, not the rope rigging of the hang glider.

[24] An expert from the hang Gliding and Paragliding Association of Canada investigated the incident and examined Mr. Orders' equipment. The equipment was found to be in good to excellent condition and well suited for tandem hang gliding.

[25] The procedure that is to be followed by a pilot in conducting a tandem flight includes the following:

- The passenger is to be connected to the hang glider first, followed by a visual check of the connection.

- The pilot is then connected to the hang glider and the connection is checked visually.

- Then the pilot is to do what is called a "hang check" in which a third person holds up the keel of the hang glider and the pilot and passenger are both suspended in the air, hanging from their straps which are connected to the keel of the hang glider. The pilot is in a lower prone position with his passenger prone and on top of the pilot.

[26] It is accepted by Mr. Orders that he failed to complete these necessary steps. He failed to attach to Ms. Godinez-Avila to the hang glider. He failed to visually check to make sure she was connected before connecting himself and he failed to undergo the hang check. If he had carried out these fundamental and necessary pre-flight steps, he would have detected that Ms. Godinez-Avila was not connected to the hang glider and this tragedy would have been averted.

[27] Defence counsel suggests that there were a number of circumstances which may have played a role in Mr. Orders neglecting to attach Ms. Godinez-Avila to the hang glider, namely:

(a) he was coordinating two launches at the same time;

(b) he and Mr. Wallace had argued earlier that morning;

(c) he was anxious about a family law court application involving his daughter;

(d) he was operating a new remote video camera system; and

(e) the launch procedure was interrupted while he re-instructed Ms. Godinez-Avila on launching.

[28] Mr. Orders puts these factors forward as circumstances that may have affected him at the time, but he in no way suggests that they provide any legal excuse for his conduct which conduct meets the test of criminal negligence.

[29] Mr. Orders was a well-trained and experienced pilot who is expected to work through these kinds of distractions. Connecting Ms. Godinez-Avila was a fundamental step in the procedure not a minor step that should be overlooked because of these kinds of distractions.

Circumstances Relating to Mr. Orders

[30] Mr. Orders is 51 years old. He was born and raised in New Zealand where he earned a trade certificate in welding. Mr. Orders has worked as a welder all his life at various sites in a number of countries. In 1999, Mr. Orders married a Canadian citizen. They have one daughter who was born in 1999 in Australia, but now lives in Canada. Mr. Orders and his wife and child moved to Canada shortly after the daughter's birth. They separated in 2001 and Mr. Orders remained in Canada so that he could be close to his daughter. Mr. Orders has joint custody and guardianship of his daughter. His daughter lives with him on a half-time basis. Mr. Orders has a close relationship with his daughter and he financially supports her by making monthly child support payments. Mr. Orders continues to work as a welder at various locations in Western Canada.

[31] Mr. Orders has no prior criminal record.

[32] Mr. Orders is currently cohabitating with his girlfriend, a chartered accountant, whom he has known for just over one year.

[33] Prior to this incident, Mr. Orders had submitted an application for citizenship. His application was suspended when he was charged. Due to the conviction, Mr. Orders will be deemed inadmissible to Canada pursuant to s. 36 of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27. If he receives a sentence of less than six months in custody, he may make an application to remain in Canada notwithstanding the conviction on humanitarian and compassionate grounds pursuant to ss. 63 and 63 of that *Act*.

[34] Prior to the offence, Mr. Orders had been involved in hang gliding for 18 years. He competed in national and international competitions. He represented

Canada internationally, competing in the world championships in 2007. Mr. Orders was actively involved in the hang gliding community for many years. He was appointed to the Board of Directors for the West Coast Soaring Club, a local organization for hang gliders and paragliders.

[35] In approximately 2009, Mr. Orders opened Vancouver Hang Gliding, offering tandem hang gliding flights to the public. He completed a training program for instructors in 2009. He operated the Vancouver Hang Gliding business in his spare time as he continued to work full-time as a welder. He started the business for his love of the sport and he enjoyed introducing others to hang gliding.

[36] I have been provided with letters from members of the hang gliding community attesting to Mr. Orders' reputation in that community for being an accomplished pilot who was conscientious about pilot safety. He was the Safety Director for the West Coast Soaring Club for a number of years and organized a number of safety workshops for pilots.

[37] Following this incident, Mr. Orders' certificate from the Hang Gliding and Paragliding Association of Canada which is the organization that regulates instruction in the sport, was suspended.

[38] Mr. Orders has abandoned his business and any involvement in the sport. He has no intention of ever returning to it because the thought of being involved in hang gliding again causes him great psychological stress.

[39] I have also been provided with a number of letters from friends of Mr. Orders who speak of his qualities as a caring father and a compassionate and responsible person.

[40] I was also provided with a letter from Mr. Orders' daughter in which she speaks of their love and of her father's support and guidance. She speaks of how the incident has affected her father and how he has become withdrawn and depressed.

[41] Mr. Orders' remorse for what he did is patent and has been so from the outset. On May 14, 2012, he made a public apology through a CBC news broadcast to Ms. Godinez-Avila's family and friends, to the hang gliding community, to the police, and the public. Mr. Orders renewed his apology in court following the submissions of counsel. I am satisfied his remorse is genuine and deeply felt.

[42] I have read the report of Dr. Robert Ley which concerns Mr. Orders' mental state immediately following the incident and the effect that it has had on him. Dr. Ley reports that Mr. Orders told him that he has played the event over and over in his mind countless times and considered what else he could have done once he realized in flight that Ms. Godinez-Avila was not connected to the hang glider, including trying to crash land earlier or deploying his parachute even though Ms. Godinez-Avila did not have a parachute. Mr. Orders told Dr. Ley that none of these possibilities consciously occurred to him. At that time, his intention was to keep flying and hold on to Ms. Godinez-Avila.

[43] In his report at p. 11, Dr. Ley states:

> Throughout all of my contacts and appointments with Mr. Orders each of our interviews were highly emotional ones. He showed tremendous emotional distress, which has been chronic for the last 21 months. He is intensely anxious and worried. He is very depressed and shows a wide range of intense symptoms of depression that have been persistent since the offence occurred. He is very sleep disturbed. His appetite has diminished. He is very tense and unhappy. He is extremely self-critical.

[44] Dr. Ley opines that Mr. Orders is experiencing acute clinical levels of anxiety and depression and shows numerous signs and symptoms of post-traumatic stress disorder. He reports that "His self-criticism verges on self-loathing in regard to this error in failing to secure Ms. Godinez-Avila to his hang glider". Dr. Ley perceives Mr. Orders to be deeply and genuinely remorseful as well as empathic in regard to the loss suffered by Ms. Godinez-Avila's family and friends. Dr. Ley opines that this incident has had a devastating psychological impact on Mr. Orders.

Offence of Criminal Negligence

[45] The offence of criminal negligence causing death is defined by ss. 219 and 220 of the *Criminal Code*, the material parts of which read as follows:

> 219.(1) Every one is criminally negligent who
>
> (a) in doing anything, or
>
> …
>
> shows wanton or reckless disregard for the lives or safety of other persons.
>
> 220. Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable
>
> …
>
> (b) ... to imprisonment for life.

[46] In *R. v. Kerr*, 2013 BCCA 506, the Court set out the essential elements that comprise the offence of criminal negligence causing death. First, there must be an act or omission that shows wanton or reckless disregard for the lives and safety of others and causes the death of another person. Second, the offence requires proof of a necessary fault element. The fault element does not have to be found in evidence of the accused's subjective state of mind. It may be established objectively by proving that his conduct constituted a marked and substantial departure from the conduct of a reasonably prudent person.

[47] By pleading guilty to the offence, Mr. Orders accepts that his failure to perform the required procedures of which he was aware and about which he had been trained, showed reckless disregard for the life of Ms. Godinez-Avila and accepts that his actions constituted a marked departure from the conduct of a reasonably prudent pilot and instructor.

Applicable Sentencing Principles

[48] The general purpose and principles of sentencing in Canada have been codified in ss. 718 to 718.2 of the *Criminal Code*. Section 718 sets out the fundamental purpose of sentencing as follows:

> 718. The fundamental purpose of sentencing is 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;
>
> (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 and to the community.

[49] Section 718.1 sets out the following principle which is fundamental to sentencing. It reads:

> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[50] Other principles of sentencing are set out in s. 718.2 of the *Criminal Code* including the following principles that have application here:

> 718.2 ...
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender ...
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.

[51] In *R. v. Nasogaluak*, [2010] 1 S.C.R. 206 at para. 43, Mr. Justice LeBel commented on the purpose and principles of sentencing as follows:

> [43] The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it

> falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case.

[52] In *R. v. Pham*, 2013 SCC 15, Mr. Justice Wagner made the following comments at paras. 7 and 8:

> [7] LeBel J. explained proportionality as follows in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37:
>
> > Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system... . Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.
>
> [8] In addition to proportionality, the principle of parity and the correctional imperative of sentence individualization also inform the sentencing process. This Court has repeatedly emphasized the value of individualization in sentencing: *Ipeelee*, at para. 39; *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 21; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92. Consequently, in determining what a fit sentence is, the sentencing judge should take into account any relevant aggravating or mitigating circumstances (s. 718.2(a) of the *Criminal Code*), as well as objective and subjective factors related to the offender's personal circumstances.

[53] Justice Wagner held that the collateral consequences of a sentence, that is, its impact on the offender, may be taken into account in sentencing. With regard to the effect of a sentence on an offender's immigration status, Justice Wagner said at paras. 13 and 14:

> [13] Therefore, collateral consequences related to immigration may be relevant in tailoring the sentence, but their significance depends on and has to be determined in accordance with the facts of the particular case.
>
> [14] The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.

[54] Retribution has a proper place in sentencing but it is a concept that must be distinguished from vengeance. This was made clear by the Supreme Court of Canada in *R. v. C.A.M.*, [1996] 1 S.C.R. 500, where at para. 77 Chief Justice Lamer said:

> [77] It has been recognized by this Court that retribution is an accepted, and indeed important, principle of sentencing in our criminal law.

[55] The Chief Justice went on at para. 80 to describe what is meant by retribution as contrasted with vengeance. He said:

> [80] ... Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.

[56] Retribution, as it is properly considered, is different from denunciation as explained by the Chief Justice at para. 81:

> [81] ... Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.

[57] It is also accepted as a principle of our criminal law that when dealing with a first-time offender, if imprisonment is required, the term should be as short as possible and tailored to the individual circumstances of the accused. I refer in particular to the case of *R. v. Priest*, [1996] O.J. No. 3369 (Ont. C.A.) at para. 23, for that proposition.

[58] It has also been accepted by our Court of Appeal that the principles of denunciation and deterrence may be advanced by the stigma that society imposes on persons who have a criminal record. In *R. v. D.E.S.M.,* [1993] B.C.J. No. 702 (C.A.), the Court said this at para. 20:

> [20] Quite recently, the Supreme Court of Canada has expressed itself quite strongly on the importance of stigma as a consequence of criminal proceedings. The Court has been saying what most lawyers and criminologists have known all along, that a public charge, trial and conviction for a serious offence brands a person for life, constitutes serious punishment, and is an important part of the way society brings offenders to account for their misconduct.

Principles Applicable to Joint Submissions

[59] As I noted at the outset, in this case Crown and defence have made a joint submission as to what they say would be a fit and proper sentence. There has been some divergence of opinion in the Court of Appeal of this province as to the correct test to apply in considering a joint submission. What may be described as a more stringent approach which is found in some of the cases, specifically, *R. v. T.M.N.*, 2002 BCCA 468; and *R. v. Peters,* 2008 BCCA 446, follows the approach set out by the Ontario Court of Appeal in *R. v. Dorsey* (1999), 123 O.A.C. 342, in which the Court said at para. 11:

> [11] It is well established that a trial judge is not bound by a joint submission. The trial judge must, of course, give serious consideration and respect to a joint submission. The submission should be departed from only where the trial judge considers the joint submission to be contrary to the public interest and a submission which, if accepted, would bring the administration of justice into disrepute.

[60] A somewhat more relaxed test is found in *R. v. Bezdan*, 2001 BCCA 215, where the Court said at para. 15:

> [15] ... It is apparent that the administration of criminal justice requires cooperation between counsel and that the court should not be too quick to look behind a plea-bargain struck between competent counsel unless there is good reason to do so. In those instances in which the sentencing judge is not prepared to give effect to the proposal, I also agree that it would be appropriate for that judge to give his or her reasons for departing from the "bargain." I would not go so far as to say that a sentencing judge can only depart from the sentence suggested in the joint submission if he or she is satisfied that the proposal is contrary to the public interest, or that the sentence proposed would bring the administration of justice into disrepute. It is not clear to me that these two circumstances cover all situations in which a sentencing judge might conclude that the sentence proposed was "unfit".

[61] This divergence of opinion was noted but not resolved in the recent case of *R. v. Roadhouse,* 2012 BCCA 495*,* where Madam Justice Ryan held at para. 53:

> [53] ... [E]ven if ... the criteria governing acceptance of joint submissions in this province are the criteria set out in *Dorsey*, it cannot be said in this case that the judge erred in his application of them. In my view, he properly took into consideration whether acceptance of the joint submission would fail to serve the public interest or would bring the administration into disrepute. He did not err in saying that it would.

Victim Impact

[62] Crown counsel filed and read victim impact statements from Ms. Godinez-Avila's mother, father, and two sisters, and from Mr. Barrie. They are heart-wrenching and poignant. It is clear that Ms. Godinez-Avila was greatly loved and will be missed terribly by her family and by her partner. She was a person of whom they were truly proud. Her traumatic death inflicted serious emotional pain on all of them and likely seriously affected her father's physical health as well. The family has been trying to cope with the assistance of psychological and psychiatric assistance but it is clear that it has been terribly difficult for them.

[63] Hopefully the pain will ease with the passage of time, but I am sure it will never be completely gone. The void that the loss of their child, sister, and partner has left is of course irreparable.

[64] It appears to me that to their very great credit, Ms. Godinez-Avila's family wants this incident as much as possible to reinforce in all persons who engage in this sport, and any sport like it that has inherent risks, the need always to be focussed, always to be professional, and always to be vigilant so as to minimize to the greatest extent possible those risks. Persons who are casual participants in the sport and seek out a thrilling adventure do not themselves have the knowledge, training, and experience to ensure their own safety. They can do no more than put their lives in the hands of those who hold themselves out as trained professionals, trusting that the professionals will bring their skill and experience to the task to make them safe. Ms. Godinez-Avila did not receive that level of professionalism on this occasion.

[65] I do not mean to suggest that there is a lax attitude among those who engage in the sport in British Columbia or elsewhere. I am confident there is not, but I am sure this tragic incident will serve as a very sharp reminder to the hang gliding community of the need always to be careful.

Appropriateness of Proposed Sentence

[66] With this factual information and these legal principles in mind, I turn to the essential question facing me. Is the sentence proposed by Crown and defence a fit sentence in all the circumstances?

[67] For the reasons that follow, I have concluded that I should accept the joint submission. I am satisfied that the sentence that is proposed is not contrary to the public interest and would not bring the administration of justice into disrepute. In my view, it is a fit sentence in all of the circumstances of this case.

[68] I agree with counsel that denunciation, retribution, and general deterrence are of particular importance in this case.

[69] A lengthy custodial sentence is not required to act as a specific deterrent to Mr. Orders. He has no intention of engaging in the sport of hang gliding whether as an instructor or for his own pleasure; and the probation order that is sought would prevent him from doing so for three years. I am satisfied that this event and the impact that it has had on Mr. Orders' mental health, the stigma that he will forever bear in public and within his former community of hang gliders serves as a sufficient deterrent for him.

[70] There is no concern with respect to the protection of the public.

[71] As for retribution, Mr. Orders has in my view experienced significant punishment already through the very public attraction that this event has brought to him and his major failing on this occasion as a hang gliding pilot. He has experienced and continues to experience significant psychological effects as a result of his very substantial departure from the standard of care that was expected of him.

I do not want to be understood as saying that Mr. Orders is the victim in this tragedy or that he does not deserve the punishment that he has already received, but it is nonetheless very real punishment.

[72] I also agree with counsel that it is difficult or perhaps impossible to speak of a range of sentence for this kind of offence. As Madam Justice Stromberg-Stein observed recently in *R. v. Lilgert*, 2013 BCSC 1329, at para. 36:

> [36] ... [T]he offence of criminal negligence causing death can be committed in so many ... ways, it defies the rangesetting exercise. Thus the focus is on the circumstances of the offence, the circumstances of the offender, and the degree of moral culpability rather than on a general range.

[73] The circumstances of the offence in this case are very unique. Counsel were able to find only one other case involving a similar kind of incident. Ironically, that was a 2004 case in New Zealand: *R. v. Parson*, HC CHCH CRI 2003-025-004488 (4 June 2004), which involved the death of a Canadian passenger on a hang gliding flight who fell to her death when she was not connected to the hang glider. In that case, the pilot had connected the passenger and did hang checks twice but the circumstances were not favourable for a take-off. He disconnected them to wait for better flying conditions. On the third attempt the pilot did not connect his passenger and did not perform a hang check. After take-off, she was unable to hold onto the pilot and fell to her death. Mr. Parson pleaded guilty to manslaughter.

[74] New Zealand's statute law with respect to sentencing sets out similar principles to our *Criminal Code*. Mr. Parson was not given a custodial sentence but he was ordered to make reparation to the victim's family in the amount of $10,000 and to perform 400 hours of community service work.

[75] The only other case referred to by Crown counsel involving an aircraft was *R. v. Butterfield*, 2012 SKPC 11 [*Butterfield*]. In that case, Mr. Butterfield pleaded guilty to dangerous operation of an aircraft and received a sentence of nine months. Mr. Butterfield was a commercial pilot; the deceased, Mr. Bleach, was also a pilot and a lover of photography. Mr. Bleach asked Mr. Butterfield to perform a flight manoeuvre known as a "low and over" where Mr. Butterfield would fly his airplane

low to the ground past where Mr. Bleach stood so that Mr. Bleach could photograph it as it passed. As Mr. Butterfield's airplane approached Mr. Bleach, a gust of wind took it off course and a wing of the airplane struck and killed Mr. Bleach.
Mr. Butterfield had no prior criminal record and was remorseful. But the judge in *Butterfield* noted that the inherent danger in such a manoeuvre was obvious. The act in which Mr. Butterfield agreed to participate was unnecessary and inherently dangerous. It appears that the intentional risk-taking was a significant factor taken into account by the Court in assessing the moral culpability of Mr. Butterfield. In that respect, *Butterfield* is distinguishable from the present case.

[76] I accept that Mr. Orders' actions in this case were inadvertent. This is not a case like some other cases of criminal negligence where the offender perceives a risk but recklessly undertakes that risk nonetheless. It is clear that Mr. Orders did not believe that his passenger was not connected to the hang glider.

[77] On the other hand, I do not accept, with respect, the suggestion made by Dr. Ley in his report that what occurred here is merely a momentary loss of attention. There is a clearly established procedure that is to be followed in conducting a tandem hang gliding flight. The pilot must connect the passenger to the hang glider using a carabiner. He must double check the connection and he is to perform a hang check to ensure that the connection is secure and will hold the passenger and himself in the hang glider while in flight. Mr. Orders failed to do all of these things.

[78] As has been noted, there were some things going on prior to and at the time that may help to explain why Mr. Orders failed to perform these fundamental tasks prior to flight. There can be no other logical explanation for his failure to perform tasks that are so fundamental and were so familiar to him. As I commented earlier, Mr. Orders does not suggest that these circumstances provide any legal excuse. He accepts responsibility completely and accepts that his conduct was criminally negligent. He will have to live for the rest of his life with the consequences of his failure to maintain the standard of care that was required of him.

[79] While the result of Mr. Orders' negligence could not have been more tragic, I accept the submission of counsel that his moral culpability is at the lower end of the spectrum. As I say, he did not knowingly engage in risk-taking that he should have foreseen and put Ms. Godinez-Avila's life in danger although he made a number of serious errors that meet the test for criminal negligence. Those errors had a fatal result.

[80] With respect to general deterrence, the stigma attached to Mr. Orders and the intense media coverage of this event in addition to a moderate term of imprisonment will, in my view, meet that principle of sentencing.

[81] I accept that Mr. Orders swallowed the video card when he was still in a state of intense shock and that he did not intend to obstruct justice. It is not something that should be taken as an aggravating factor, in my view.

[82] There are mitigating factors. Mr. Orders has pleaded guilty and has thereby spared Mr. Barrie and the family of Ms. Godinez-Avila additional pain in having to endure a trial where the video of the flight would no doubt have been played in court. He has no prior criminal record, he has wholly accepted responsibility for his actions, and he is truly remorseful.

[83] I also take into account the consequential effect that a longer custodial sentence would have on Mr. Orders' immigration status and its effect not only on him, but his daughter. However, that is only one factor to consider. It would not render fit the sentence that is proposed if I were not satisfied that it is otherwise fit.

Imposition of sentence and Ancillary Orders

[84] Mr. Orders, will you please stand.

[85] For the offence of criminal negligence causing death, I sentence you to a term of imprisonment of five months in addition to the ten days that you have spent in custody on this matter.

[86] I also sentence you to a term of probation of three years to commence on your release from custody, the terms of which are as follows:

1. You are to report to a probation officer forthwith upon your release from custody and thereafter as required by your probation officer.

2. You are to keep the peace and be of good behaviour.

3. You are to appear before the Court when required to do so by the Court.

4. You are to notify the Court or the probation officer in advance of any change of name or address and promptly notify the Court or the probation officer of any change of employment or occupation.

5. You are not to engage in the sport of hang gliding, whether solely or in any tandem flights as a pilot or passenger.

6. You are to perform 25 hours of community work service by providing instructional lectures to hang gliding or paragliding associations or other similar groups about this incident to help educate others about safety.

[87] As the offence for which Mr. Orders has been convicted is a secondary designated offence within the meaning of s. 487.04(a) of the *Criminal Code*, Crown seeks a DNA order under s. 487.051(3) of the *Code* that requires him to provide a sample of bodily substances for the purpose of forensic DNA analysis for the National DNA Databank.

[88] The Databank is a repository of DNA information that can be of assistance both in locating and convicting suspects as well as exonerating innocent people. While Mr. Orders does not have a criminal record, and the circumstances of this offence do not involve violence in the way it is normally thought of, the intrusion on Mr. Orders' privacy by taking a sample is slight and his counsel does not object to it. For those reasons, I make that order.

[89] Is there anything further, counsel?

[90] **MS. KRAMER:** No, thank you, My Lord.

[91] **MR. CAMPBELL**: No, My Lord.

[92] **THE COURT:** Thank you.

"B.M. Joyce J."