IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

Cite as: R. v. Upshaw, 2013 NSPC 1

Between

Her Majesty the Queen and T.(B.)

IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST JERRICHO UPSHAW

Date: January 4, 2013

Docket: 2388561 - 2388565

Registry: Halifax

DECISION ON SENTENCE FOR CONTEMPT OF COURT

JUDGE: The Honourable Anne S. Derrick

HEARD: December 19, 2012

DECISION: January 4, 2013

COUNSEL: Brian Church, Q.C., and Ian Gray, articling clerk, for Jerricho Upshaw

Ronald Lacey, for the Crown

By the Court:

Introduction

[1] On October 12, 2012, after a three-week trial, I convicted a young person, T.(B.), of manslaughter in the shooting death of Glenn Oakley on November 19, 2011. The Crown had prosecuted T.(B.) for first degree murder, but submitted at the close of their case that I should find him guilty of second degree murder.

[2] Also charged in Mr. Oakley's homicide were Jerricho Upshaw and Christopher Picco. Mr. Upshaw is charged with second degree murder and is scheduled for a trial by a judge and jury in April 2013. Mr. Picco is charged as an accessory after the fact and has June trial dates in the Supreme Court.

[3] Both Mr. Picco and Mr. Upshaw were subpoenaed by the Crown to testify at T.(B.)'s trial. On September 13, 2012, Mr. Upshaw made an application before me to quash his subpoena to testify. On September 14, 2012, I concluded, on the basis of the jurisprudence of the Supreme Court of Canada, *R. v. Jobin, [1995] S.C.J. No. 31* in particular, that I did not have jurisdiction to determine the issue. Mr. Upshaw then made an application to the Nova Scotia Supreme Court which was heard and decided by Justice Kevin Coady on September 19. Justice Coady declined, in an oral decision, to quash Mr. Upshaw's subpoena. He also refused to impose a ban on the publication of Mr. Upshaw's testimony at T.(B.)'s trial.

Mr. Upshaw Refuses to Testify

[4] The next day, September 20, T.(B.)'s trial resumed and Mr. Upshaw attended before me as a witness, with his counsel. He was affirmed and responded to the Crown's opening question about where he had lived prior to November 19, 2011. At that point he declined to answer any further questions.

[5] I provided Mr. Upshaw with several opportunities, which he took, to consult with his counsel. After these recesses I queried him about his willingness to testify. He politely but firmly maintained his position that he was not going to answer any questions. In our exchanges he did not show the slightest hint of equivocation.

[6] I put Mr. Upshaw on notice that I was citing him for contempt and providing him with the opportunity to show cause as to why I should not make a contempt finding.

[7] On September 21, 2012, Mr. Upshaw advised through counsel that he wished to show cause. The hearing was set for November 23, 2012. My oral decision on the procedure for a contempt proceeding in a criminal case is reported as *R. v. B.T. (In the Matter of Contempt Proceedings against Jerricho Upshaw), 2012 NSPC 112*.

The Waiver of the Show Cause Hearing

[8] On November 23, 2012, Mr. Upshaw waived his right to show cause. Consequently, I made a finding that Mr. Upshaw was in contempt of court. An updated Pre-sentence Report was ordered and Mr. Upshaw's sentencing hearing was scheduled for December 19.

Mr. Upshaw's Reasons for Refusing to Testify

[9] Mr. Upshaw chose not to show cause as to why he should not be held in contempt and did not otherwise indicate why he was refusing to testify. He did however provide an explanation in the interview for his pre-sentence report. The report notes the following: "…the offender stated he takes responsibility for his actions and regrets his charge but stated he is not a "rat". I believe I can take judicial notice of the notorious fact that testifying against a co-accused is regarded, in the criminal culture, as "ratting."

[10] At Mr. Upshaw's sentencing hearing on December 19, Mr. Church explained his client's position. Mr. Upshaw is presently on remand at the Central Nova Scotia Correctional Facility. He has been there since he was arrested for Mr. Oakley's murder on November 21, 2011. If Mr. Upshaw is convicted following his trial, he faces a lengthy term of incarceration. Mr. Church acknowledged that the cases do not accept concerns about being labeled a "rat" as a justification for refusing to testify but, in his submissions on Mr. Upshaw's behalf, he pointed out that this "code of conduct" is a reality in his client's present, and potentially future, context.

[11] Mr. Upshaw subscribed to the code of not being a "rat" before being remanded into custody. Following his arrest, while being questioned at the police station on November 22, 2011 by Cst. Bobby Clyke, a police officer he knew, Mr. Upshaw was explicit about his assessment of the risks of talking. When Cst. Clyke suggested that he could have told people that same night about Mr. Oakley being shot, Mr. Upshaw responded by saying: "…do you know how dead I'd end up if I was to tell people?" (*Transcript of Mr. Upshaw's Police Interview, page 354, lines 11 and 12*)

Mr. Upshaw's Statement to Police

[12] I have been provided with no evidence about whether Mr. Upshaw anticipated additional risks to himself if he were to testify at T.(B.)'s trial. His comment in the pre-sentence report and Mr. Church's submissions reveal only that he does not want to be regarded as a "rat." Mr. Upshaw gave a statement to police, after a protracted interrogation during which he put up considerable resistance to the investigators trying to extract information from him. I do not have any evidence to assist me in understanding why Mr. Upshaw saw testifying at T.(B.)'s trial as significantly different from talking to police investigators. Judging by Mr. Upshaw having sought a ban on publication before he took the witness stand, it is reasonable to infer that he viewed the trial as having a heightened likelihood of publicity. And it is readily apparent from Mr. Upshaw's lengthy interrogation that he was determined not to talk. Police investigators employed strategies that eventually broke through his resistance. Testimony is not obtained in the same way.

[13] Mr. Upshaw's police statement was admitted into evidence at T.(B.)'s trial (*R. v. B.T., [2012] N.S.J. No. 540*) and taken into account in my assessment of the Crown's case. (*R. v. B.T., [2012] N.S.J. No. 541, see, for example, paragraphs 113 and 114*)

A Calculated Choice

[14] I have no doubt that Mr. Upshaw understood very well what he was doing when he refused to testify at T.(B.)'s trial. In my decision admitting Mr. Upshaw's police statement into evidence, I described him as possessing "a remarkably agile

mind." (*R. v. T.(B.), [2012] N.S.J. No. 540, paragraph 26*) Interviewed for a November 2011 pre-sentence report, Mr. Upshaw's mother said she believed her son to be "smart." I formed the same impression of Mr. Upshaw from watching his police interview. Mr. Upshaw is no fool. I find that in refusing to testify Mr. Upshaw made a clearly thought-out, deliberate decision to face what the court might mete out to him as punishment for refusing to testify.

[15] I note that no evidence has been led by Mr. Upshaw of any attempt by anyone to seriously harm or kill him, or even any threat of doing so, were he to have testified at T.(B.)'s trial. I do not have evidence that Mr. Upshaw was acting under duress when he refused to testify. The Manitoba Court of Queen's Bench has held that duress is a defence to contempt. (*R. v. B.(C.M.), [2010] M.J. No. 366 (Q.B.), paragraph 31 – 33*)

Mr. Upshaw's Awareness of the Potential Penalty

[16] On September 20, Mr. Upshaw re-affirmed his decision not to testify even in the face of being told the potential penalty for contempt both by his counsel, Brian Church, and by me. I put it to Mr. Upshaw in these terms: "…I have the power to hold you in contempt…and the penalty for being in contempt in these circumstances can and probably will be a penitentiary term…I have the power to send you to prison to serve a sentence for refusing to answer questions when you're under subpoena." These words had no effect. Mr. Upshaw remained steadfast.

Protecting the Integrity of the Administration of Justice

[17] It is clear that contempt of court by refusing to testify is a very serious offence against the administration of justice. It strikes at the heart of the justice system: if witnesses can refuse to testify with impunity, the ability of the criminal justice system to function according to the rule of law will collapse. What can be prosecuted and what evidence can be considered by the court will be dictated by a code of the street that prohibits engagement with the authorities. The code of silence - the code that determines that testifying as a witness is "ratting" – will govern the operation of the criminal justice system. In *R. v. Cinous,* Binnie, J., concurring with the majority of the Supreme Court of Canada in a case where at

trial evidence had been given about the criminal code of conduct, remarked that a criminal justice system operated according to the rules of a "criminal subculture, is the antithesis of public order." (*R. v. Cinous, [2002] S.C.J. No. 28, paragraph 129*)

[18] The contempt power of the court is central to the court's ability,

> …to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court. (*United Nurses of Alberta v. Alberta (Attorney General), [1992] S.C.J. No. 37, paragraph 50*)

[19] The duty of a witness to testify in accordance with his or her subpoena is a duty owed, not only to the court, but also to society as a whole, "and is essential to the proper administration of justice." (*R. v. Abdullah, [2010] M.J. No. 270 (C.A.), paragraph 34*)

Sentencing for Contempt of Court

[20] There are no reported decisions in this region on sentencing for contempt of court in criminal proceedings. Counsel have referred me to cases from other jurisdictions where the applicable principles have been discussed.

[21] As noted by the British Columbia Court of Appeal in *R. v. Neuburger, [1995] B.C.J. No. 2793* general deterrence is:

> … the most important single factor in sentencing for contempt in the face of the court…the refusal of a witness to testify in a criminal proceeding undermines the ability of the courts to deal effectively with the administration of criminal justice. It is not the prerogative of witnesses to criminal events to decide whether or not they will testify. They are bound to testify if called upon to do so, for it is only in this way that those guilty

> of crimes can be brought to justice and the public be protected. (*Neuburger, paragraph 9*)

[22] In *R. v. R.E.M., [2011] B.C.J. No. 2144*, the British Columbia Supreme Court emphasized that the courts dealing with contempt for refusing to testify cannot be sending "an implicit message" that it is worth the risk. Witnesses cannot choose to follow their own standards of conduct over their legally-mandated obligations to comply with a subpoena. This will lead to "anarchy." (*R.E.M., paragraph 31*)

[23] Older cases have expressed these same sentiments. In *R. v. Dasilva,* the Ontario Supreme Court, High Court of Justice (*1986 CarswellOnt 3603*) commented on the purpose of a sentence of imprisonment for contempt of court. The purpose is to protect the integrity of the administration of justice.

> …It is in the interest of every member of society that the law should be respected and that it should be properly administered in a dignified and orderly way. In this case individual punishment and deterrence is important, but a sentence of imprisonment will also send a message to the community about the seriousness of a breach of every citizen's social duty in assisting in the administration of justice. (*Dasilva, paragraph 6*)

[24] The message that the community needs to receive is that the penalty for refusing to testify under subpoena will be significant.

[25] The emphasis on deterrence for contempt of court by refusing to testify has, in most cases, led to the imposition of a penitentiary term. The sentence in the *Dasilva* case I just mentioned was two years for refusal by a key witness to answer questions in a first degree murder trial. This was described by the Ontario Court of Appeal, now over 25 years ago, as being "at the high end of the scale" but not inappropriate. (*R. v. Dasilva, [1986] O.J. No. 1344*)

[26] In *R. v. Abu-Sharife, 2006 BCSC 1981,* the British Columbia Supreme Court imposed a two-year prison sentence on B.W.V.B. who refused to be sworn and give evidence at Abu-Sharife's murder trial. B.W.V.B., a young person

charged in the same murder, did not show cause. Abu-Sharife was acquitted when the circumstantial case against him was not sufficient to establish proof of his guilt beyond a reasonable doubt.

[27] The evidence at Abu-Sharife's trial established that he and B.W.V.B. were associates in the drug trade. The only reasonable inference to be drawn from the trial evidence was that B.W.V.B. had shot and killed the victim. The murder investigation established that B.W.V.B. had material evidence concerning his dealings with Abu-Sharife in connection with the murder.

[28] B.W.V.B.'s two year prison sentence was described in *Abu-Sharife* as "the high water mark on sentence", with reference to the Ontario Court of Appeal decision in *R. v. Johnston, [1976] O.J. No. 1144,* where, on appeal a two-year sentence was substituted for a ten year sentence.

[29] The Manitoba Court of Appeal in *R. v. Jacob, [2008] M.J. No. 24*, referencing the Ontario Court of Appeal's decision in *Johnston* and other authorities, also found two years' imprisonment to be a fit and appropriate sentence for Jacob's refusal to testify in a murder trial. Two years was described as "not a light sentence." (*Jacob, paragraphs 39 and 37*) Jacob's counsel had indicated that his client refused to testify out of concerns for the safety of himself and his family. (*Jacob, paragraph 11*)

[30] The murder trial at which Jacob refused to testify was also to have heard from Corey Amyotte and Gharib Abdullah. They too refused to testify. (*Jacob, paragraph 14; R. v. Amyotte, [2008] M.J. No. 147 (C.A.), paragraph 10*) All their videotaped statements were admitted into evidence by the trial judge on the basis of the principled exception to the hearsay rule. (*Jacob, paragraph 14*) The accused in the murder trial was convicted. (*Jacob, paragraph 15*; *Amyotte, paragraph 12*)

[31] Amyotte and Abdullah received sentences for contempt of three years on appeal. Their original sentences of 48 and 42 months respectively was determined to be "simply too long." (*Amyotte, paragraph 32*) Amyotte and Abdullah were distinguished from Jacob by the fact that they were eyewitnesses and "hence of much greater significance to the Crown's case." They had also refused to testify at

an earlier, related trial. (*Amyotte, paragraphs 34 and 36*) The three year sentences were described as "at or near the highest end of the scale." (*Amyotte, paragraph 38*)

[32] A three year sentence was upheld by the Ontario Court of Appeal in *R. v. Yegin, [2010] O.J. No. 1266*. Yegin, described as "a long-time member of the criminal underworld" had refused to testify at a murder trial. The three year sentence was seen as "a strong message" from the justice system "to those who prefer to remain aligned with their criminal cohorts rather than do their duty as citizens", about the "serious consequences" to be expected. (*Yegin, paragraphs 2 and 3*)

[33] Somewhat lesser sentences were imposed in cases where other considerations came into play. In *R.E.M.*, the British Columbia Supreme Court imposed an 18 month sentence, to be served consecutively to "a very lengthy sentence" R.E.M. was currently serving. The Court was concerned that the resulting sentence, once the contempt sentence was added to R.E.M.'s existing sentence, should not be so onerous as to delay access to correctional programs and erode R.E.M.'s motivation to engage in them and further his rehabilitation. (*R.E.M., paragraphs 33 and 35*)

[34] It is interesting to note that the Court in *R.E.M.* did not give any weight to the fact that R.E.M.'s refusal to testify was due to his fears of being harmed by the accused who had been charged for perpetrating extreme violence against him. R.E.M. had been the subject of retaliation that included beating his knees with a framing hammer, cutting off the front of his left ear using an exacto knife, and slicing off the small finger of his right hand with a pair of garden shears. (*R.E.M., paragraph 4*) As a result of there being no evidence from R.E.M., the charges against the two men who had tortured him were dismissed. The Court had the following to say about R.E.M.'s status as the victim:

> …the only relevance…is that, despite having had his finger and part of his ear cut off in this terrifying ordeal, he has, through a very ill-advised series of decisions, taken a position which has meant that the people who did this to him will never be held accountable…(*R.E.M., paragraph 30*)

[35] *R. v. Neuburger*, an older decision from the British Columbia Court of Appeal, which I quoted from in paragraph 21 of these reasons, also produced a sentence of less than two years. Called by the Crown to give eyewitness evidence of a murder, Neuburger refused to be sworn or to testify. Remands into custody did nothing to change his position. He was found to be in contempt of court and, despite the Crown seeking a two year term, was sentenced to three years in prison. This was reduced on appeal to 15 months, the equivalent period of the time that he had already served.

[36] At his sentencing hearing, Neuburger, through counsel, indicated that his refusal to testify was based on his fear of ostracism by his peers and also a concern that he might be subject to some form of retaliation. (*Neuburger, paragraph 4*) The British Columbia Court of Appeal found that a three year sentence was excessive. The Court held that such a long sentence was not required "to bring home to Mr. Neuburger, and to others of like mind, that the courts will not tolerate those who place their own interests or concerns above the law." (*Neuburger, paragraph 10*) Neuburger's age (20) and his lengthy work history (regular employment in the construction industry since leaving school in Grade 9) were factors that should have been given more weight. Neuburger had a criminal record but had never served more than 30 days in jail.

[37] The Court of Appeal also took into account the outcome in the murder trial. They found it "…significant that [Neuburger's] failure to testify did not result in the acquittal of Mr. Deas, a factor which would have called for a very severe penalty." (*Neuburger, paragraph 17*)

[38] I will comment below on the issue of whether the outcome of a trial should be a factor in determining the length of a sentence for contempt of court, but first I am going to address the mitigating and aggravating factors in Mr. Upshaw's case.

Mitigating Factors

[39] There are really no mitigating factors in this case. The Crown pointed out that Mr. Upshaw did not oppose the contempt finding and has accepted responsibility for his actions. However, the fact that a show cause did not proceed imparted little benefit to anyone. This situation cannot be equated to a guilty plea

in advance of a trial, where the commonly identified benefits are that witnesses are spared from testifying and the Crown is not put to the full proof of its case. Here no witnesses were scheduled to testify and the case against Mr. Upshaw on the contempt issue can only be described as overwhelming. These features of this case, and the absence of any expression of remorse by Mr. Upshaw, mean that there is nothing that represents any real mitigation of Mr. Upshaw's contempt.

Aggravating Factors - The Charges and Mr. Upshaw's Significance as an Eyewitness

[40] Any refusal to testify by a properly subpoenaed witness is a serious affront to the justice system. The proceedings affected by Mr. Upshaw's refusal are particularly significant. At the time Mr. Upshaw was called to the witness box, the Crown was prosecuting a first degree murder charge. And Mr. Upshaw was called as an eyewitness, indeed the only eyewitness, to the shooting of Mr. Oakley by T.(B.).

[41] As I noted earlier in these reasons, the Manitoba Court of Appeal in *Amyotte* remarked on the fact that Amyotte and Abdullah were eyewitnesses to the murder, unlike Jacob, a fact that amplified their significance to the Crown's case. (*Amyotte, paragraph 34*) It also contributed to their first-instance sentences being greater, 48 months for Amyotte and 42 months for Abdullah, as compared to 24 months for Jacob, who was also given the benefit of certain mitigating factors.

The Pre-sentence Report and Mr. Upshaw's Prior Record

[42] Mr. Upshaw turned 19 in October and is being sentenced for the first time as an adult. He has a Youth Justice Court record. He committed an assault on September 23, 2010, and the theft of a handgun and jewelry from his grandfather between October 9 and 15, 2011. He was sentenced for these offences on February 6, 2012 and received 9 months' probation. For an assault committed on May 15, 2011, Mr. Upshaw was sentenced on March 19, 2012 to 12 months' probation.

[43] A pre-sentence report prepared in November 2011 noted concerns with Mr. Upshaw's anger and substance abuse issues. Anger and substance abuse are not features of his contempt of court. They are therefore irrelevant to this sentencing.

[44] I note that Mr. Upshaw has never been subject to a custodial sentence. He was on remand charged with Mr. Oakley's murder when he was sentenced in February and March 2012.

[45] The pre-sentence report prepared for this sentencing and dated December 12, 2012 did not provide much in the way of new information about Mr. Upshaw. The Classification Officer for the Central Nova Scotia Correctional Centre was interviewed. She described Mr. Upshaw as "very quiet" and never asking for anything from her. He has received discipline citations for inappropriate behaviour on remand: two levels for possession of contraband; one for smuggling; one for unauthorized movement; and one for detrimental behaviour.

A Joint Recommendation

[46] I agree with the Crown's submission that the sentencing range for a contempt in the nature of Mr. Upshaw's is a penitentiary term of 2 – 3 years. And while Mr. Church agreed that the cases indicate a sentencing range for contempt from 2 – 3 years, he argued that in Mr. Upshaw's case the sentence should be less than two years, largely on the basis of his youth and lack of an adult record.

[47] Mr. Church advised me however that Mr. Upshaw did not wish to be sentenced to time in a provincial institution and wanted to receive federal time. That, Mr. Church submitted, should be a sentence of two years, which would result in Mr. Upshaw going to a federal penitentiary.

[48] Mr. Upshaw reiterated this outlook when he was invited by me to speak, if he wished to, at the end of the sentencing hearing. I will repeat now what I said at the time: Mr. Upshaw's views, in the face of the inevitable – a custodial sentence – about what is a suitable sentence from his perspective, are wholly irrelevant. The sentence I impose must reflect the applicable law and the particular facts and circumstances of this case and this offender. Mr. Upshaw does not get to customize his sentence.

[49] Following Mr. Church's submission on behalf of Mr. Upshaw that a two year sentence should be imposed, Mr. Lacey, for the Crown, indicated he was prepared to make that a joint recommendation.

The Appropriate Sentence for Mr. Upshaw's Contempt of Court

[50] Mr. Upshaw is a youthful offender. He has a prior record but not for any offences that are directly related. He has never received a custodial sentence. That being said, it is obvious to me that Mr. Upshaw made a carefully reasoned, calculated decision when he refused to testify. He weighed his options and understood the risks. I have found there are no mitigating factors. His refusal to testify when under subpoena as an eyewitness in a first degree murder trial is contempt of the court's processes of the highest order.

[51] I will comment here about the suggestion, for example by the British Columbia Court of Appeal in *Neuburger*, that the penalty for contempt should be increased if there is an acquittal of the accused against whom the evidence was to be used. (*Neuburger, paragraph 17*) I cannot say such a consideration could never be relevant, but it is my view that according weight to such a factor is highly problematic. It presumes that the missing evidence would have been accepted by the court, it attributes the result directly to the evidence, and it asks the court to engage in an assessment of the influence of the evidence, had it been received, on the outcome. It is antithetical to the presumption of innocence that imbues a trial. And it seems to me, this issue would be even more complicated in the context of a jury trial.

[52] Not only do I have profound policy concerns with the proposition that longer sentences should be imposed for contempt where a Crown witness has refused to testify and an accused had been acquitted, I decline to even reflect on whether Mr. Upshaw's refusal to testify at T.(B.)'s trial had any effect on the result. I was not asked by the Crown to consider this and, had I been, I would have declined, as it would constitute an inappropriate and speculative exercise.

[53] Mr. Upshaw's refusal to testify at T.(B.)'s trial was a singular and grave affront to the administration of justice. I could not make him testify but I can emphasize the denunciation that his actions call for. Having read the cases and thought about the issues, even before hearing the submissions of Crown and Defence, I was inclined to think that a sentence of 24 – 30 months would be appropriate. Nothing has changed my mind about the inadequacy of a sentence of less than two years as punishment for Mr. Upshaw's contempt. In all the

circumstances, and having considered all the factors, including Mr. Upshaw's age and the fact that he has never been sentenced to custody, I am satisfied to accept the joint recommendation for a two year prison term. A two year penitentiary sentence is not a lenient sentence. It is a substantial sentence that demonstrates the court's intolerance for witnesses who take the law into their own hands.