IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Barton, 2013 NSPC 35

Date: 20130506
Docket: 2489799
2489800/2489801
Registry: Amherst

Between:

Her Majesty the Queen

v.

Christopher Damon Barton

Judge:	The Honourable Judge Paul B. Scovil
Heard:	6 May 2013 in Amherst, Nova Scotia
Written decision:	22 May 2013
Charges:	THAT HE on or about the 6th day of July A.D. 2012 at, or near Amherst, Nova Scotia, did knowingly utter a threat to Katherine Estabrooks to cause death to Katherine Estabrooks contrary to section 264.1(1)(a) of the Criminal Code; AND FURTHERMORE on or about the 6th day of July, 2012 at, or near Amherst, Nova Scotia did commit an assault on Katherine Estabrooks contrary to section 266 of the Criminal Code; AND FURTHERMORE on or about the 6th day of July, 2012 at, or near Amherst, Nova Scotia did have in his possession a weapon, to wit a knife, for

the purpose of committing an offence of uttering threats, contrary to section 88(2) of the Criminal Code.

Counsel: Mr. Charles Ellis, for the crown
Mr. Robert Gregan, for the defence

By the Court:

[1] This is the sentencing of Christopher Barton in relation to three counts that:

> On or about the 6th day of July 2012 at, or near Amherst, Nova Scotia, did knowingly utter a threat to Katherine Estabrooks to cause death to Katherine Estabrooks, contrary to section 264.1(1)(a) of the Criminal Code;
>
> AND FURTHERMORE on or about the 6th day of July, 2012 at, or near Amherst, Nova Scotia did commit an assault on Katherine Estabrooks contrary to section 266 of the Criminal Code;
>
> AND FURTHERMORE on or about the 6th day of July, 2012 at, or near Amherst, Nova Scotia did have in his possession a weapon, to wit a knife, for the purpose of committing an offence of uttering threats, contrary to section 88(2) of the Criminal Code.

[2] The facts surrounding the offences committed by Mr. Barton are not largely in dispute. In relation to the assault, this occurred when, during the course of the altercation between himself and his domestic partner, the accused attempted to swing at the victim and that she blocked it with her hands. In relation to the threats and the possession of the weapon for the purpose of making those threats, this occurred when, during the course of an argument with the victim, the accused was asked to leave the victim's home. The accused advised Ms. Estabrooks that he was not going to leave, and at that point she was going to go outside for a cigarette. There was a knife on the table which was open, or he opened it. It was an exacto type knife. He placed it back on the table. During the course of the verbal arguments, he made threats to the victim, including he was going to kill her. In reference to this, he indicated he would put her in a bag and throw her in a dumpster. He then put all of the items that he had of his belongings, or at least I understood that's what happened, in a bag, took the knife at the table and said he was going to confront a neighbour, because his neighbour had, some years back, called him a name. The victim grabbed her cigarettes and her purse, went out the back door and called the police.

[3] The crown in this matter is seeking a custodial sentence of 12 months in custody. While Mr. Barton concedes that a conditional sentence order would be in order, he is arguing he should be able to serve that pursuant to section 742.1. The crown argues that under the provisions of 742.1, at the time of the offence, the accused would not be able to do so, as he is not eligible for a conditional sentence, as this offence should be considered a serious personal injury offence under section 752 of the *Criminal Code*.

[4] I will first address the question as to whether the fact situation before me falls within the provisions of "a serious personal injury offence". I will do that prior to considering the question of totality of sentence in relation to this accused.

[5] Section 742.1 of the *Criminal Code* states that:

> If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in section 718 to 718.2, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3.

[6] I just add, at this present point in time, should these offences occur, this would not even be arguable. Parliament has taken out those provisions and has mandated a different regime. For this sentence I will follow the provisions of section 742 that were in place at the time of the offence.

[7] As indicated, I must first consider whether this is a serious personal offence, under section 752 of the *Code*. 752 of the *Code* reads as follows:

> "serious personal offence" means
>
> (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more,

[8] In relation to the counts under section 264.1 and 266, the crown proceeded by way of indictment. The maximum penalty for each of those offences at the time that the accused was charged was a maximum of five years. Those offences therefore are eligible for a conditional sentence, as it has to be ten years or more before the provisions under 752 apply. Under section 88 of the *Code* the maximum period of imprisonment at the time that this occurred was a term of imprisonment not exceeding ten years. This therefore triggers the consideration by this court as to whether the charge under section 88 involves the use or attempted use of violence against another person, or that it was conduct endangering or likely to endanger the life or safety of a person, or inflicting or likely to inflict severe psychological damage on another person.

[9] Our Court of Appeal dealt with the issue of what constitutes a serious personal injury offence in *R. v. Griffin* [2011] N.S.J. No. 622. There the offender, in the course of a robbery, took out a knife and tapped it on the counter of the service station she was in the process of robbing. She asked for cash, was given the same and then left. There, Justice Bryson determined that the use of a knife in

a robbery caused the robbery to be an offence, in that situation to be a serious personal injury offence. At paragraph 16 Justice Bryson stated:

> What the *Code* means by "serious personal injury offence" is a question of interpretation and therefore a matter of law (*R. v. Mahoney*, [1982] 1 S.C.R. 834, p. 12 of 15). The Court must read the word or words "...in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 at 26, quoting from Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) p. 87; *R. v. C.D., R. v. C.D.K.*, 2005 SCC 78, at 27; *MacPhee Chevrolet Buick GMC Cadillac Ltd. v. S.W.S. Fuels Ltd.*, 2011 NSCA 35, at 30).
>
> The words "serious personal injury offence" without more, focus on the effect on a victim rather than on the conduct of the offender. The word "offence" is modified by the words "serious personal injury" and "injury" is what happens to the victim. But Parliament went further and provided a definition of personal injury offence which, broadly stated, involved violence or attempted violence or conduct endangering or likely endangering the life or safety of another, including psychological or likely psychological injury. A second definition refers to sexual assaults or attempts to commit them. It is clear that the definition of serious personal injury offence broadens the natural meaning of those words, moving as it does from a focus on the effect to both effects and conduct of the offender (i.e., *attempted* use of violence: *conduct* endangering or likely to endanger). The language of "attempt" and "conduct endangering" or "likely to endanger" shows that there may be no actual adverse impact on a victim physically or psychologically and yet a serious personal injury offence has occurred.

It is noteworthy that Parliament chose to assimilate the definitions of serious personal injury offence and sexual assault. In other words, sexual assault or attempted sexual assault are in themselves so serious that they are included in the definition of serious personal injury offence. Violence is inherent in such cases. But no such assimilation occurs in the first two categories of the definition, which refer to both the offender's conduct and its effects or potential effects. Parliament could have included certain other crimes in the definition automatically - such as robbery - but did not do so.

In terms of the scheme of the legislation, it is important that the definition of a serious personal injury offence is the threshold for excluding certain sentencing consequences where a crime has been committed. This language does not define an offence under the *Code*, nor does it assist in determining guilt or innocence. It relates to sentence outcomes.

With respect to the object and scheme of the *Code* and intention of Parliament, I would endorse the comments of Epstein J.A. in *R. v. Lebar*, 2010 ONCA 220 at paras. 47, 48 and 49:

> Based on this history, I conclude that the object and scheme of the relevant provisions of the *Code*, as well as Parliament's intention in enacting them, was to reduce judicial sentencing discretion by eliminating the availability of conditional sentences for crimes of violence within a certain set of criteria. This is significant in the light of the trial judge's conclusion that the reduction of judicial discretion was an "undesired result".

> To be true to Parliament's intention, the concept of violence must be given a broad interpretation.
>
> In my view, the meaning of "violence" in this definition must be informed by the entirety of the definition of a serious personal injury offence. A serious personal injury offence is defined, in part, either as an offence involving the use, or attempted use of violence against another person, or "conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person". Taken together, and especially taking into account the far-reaching meaning of the word "safety", these two clauses point to the legislature's intention to cover a very expansive range of dangerous behaviour with the term "serious personal injury offence".

To similar effect is the Alberta Court of Appeal in *R. v. Arcand*, 2010 ABCA 363, at paras. 42 and 43:

> Then, in 2007, Parliament again stepped in and amended the *Code*, removing from the courts any power to grant a conditional sentence of imprisonment for any sexual assault and for a number of other serious offences. Minister of Justice Vic Toews linked this amendment directly to what was considered to be the inappropriate use of conditional sentences in certain circumstances, particularly for crimes of

violence. During second reading of what was then Bill C-9, Minister Toews stated:

> ...[w]hen the previous government introduced the sentencing option [for conditional sentences], it gave assurances that it would not be used for serious or violent offences.
>
> These relatively lenient sanctions, especially when compared to incarceration, have been extended to serious and violent offenders. This has caused a great deal of concern in the communities where the offenders have ended up serving their sentences. [Words in brackets added.]

As the Bill proceeded through Parliament, various options to restrict the availability of conditional sentences were considered, as were opposing presentations. In the end, Parliament decided to exclude from the conditional sentencing regime any offence defined as a "serious personal injury offence" (which includes all sexual assaults) and certain other offences. Although a number of options were considered, the point is that once again, Parliament's concerns about erosion of public confidence led to legislative reform and further limits on conditional sentences. ...

> Violence itself is not defined in the *Criminal Code* but has been the beneficiary of argument in many cases (for example: *R. v. C.D.; R. v. C.D.K.,* 2005 SCC 78, paras. 26-33). In this case, the trial judge has purported to make a finding of fact that violence was not used in the commission of the offence. He relies on *Lebar* at para. 50. With respect, *Lebar* does not support this conclusion. Amongst other things, *Lebar* involves an extensive review of what violence means in the contextual setting of the *Code*. In my view, *Lebar* preserves the well known distinction between a legal definition or concept and its existence in a particular set of circumstances. The former is a legal question, the latter a factual one. This is obvious from a comparison of paras. 49 and 50 of *Lebar*. Paragraph 49 begins with a discussion of the meaning of violence arising from the definition of a serious personal injury offence. Paragraph 50 states the obvious that "A finding that violence was used remains a matter of factual determination for the trial judge". The distinction between concept and reality - between law and fact - is clearly preserved in *Lebar*.

[10] Going on, as cited by defence counsel, in *R. v. Hensbee* [2009] N.S.J. No. 466, Judge Tufts of the Nova Scotia Provincial Court determined, after an extensive review of the authorities, that in that case where the accused had a knife when robbing a convenience store, the facts did not create a serious personal injury offence.

[11] Here, and one thing that has to be considered as well, in reviewing all these matters, Parliament determined to add the words "serious personal injury offence" to segregate those from other injury offences. Simple assaults always contain acts of violence, but they are open to conditional sentence orders. So again, a great deal relies on a question of the facts.

[12] Here, the possession of the knife, looking at all the facts surrounding it, did not constitute a serious personal injury offence.

[13] It still remains to conduct an analysis to determine what sentence would be appropriate here. And I will deviate from what I had, because we want to still discuss what would be a fit and appropriate sentence, but I go on to say that obviously counsel from both sides agree that less than two years would be appropriate, so it's not triggered there. And I also make a finding that the community, in all these circumstances, would not be endangered if a conditional sentence was applied.

[14] However, having said that, we still have to determine what a fit and proper sentence would be. Ms. Nurse has argued that 12 months straight time...I don't know if you want to add anything to that?

MR. ELLIS: No I don't. That's in her written submission, and I did speak to her, and that was still her position.

THE COURT: Certainly. And you wanted to make further representations?

MR. GREGAN: Yes, Your Honour. I just, I wanted to bring the court up to speed. In speaking to my client, since our last day in sentencing, our last day adjourning sentence, my client advised me that he has now returned to work full time. In the pre-sentencing report it talked about him being part-time and his hours being increased as it went along, so I wanted the court to be aware of that. And also the fact that he has received a promotion. He is now running the warehouse, so I wanted the court to be aware of that as well.

The other thing is, he's been on a very strict undertaking since these matters arose, basically house arrest, and so he has in essence been on a conditional sentence as part of his undertaking. He advises me that...and he's also has not been able to have contact with any of the family members obviously, because of the undertaking, and one of the children has had a fair amount of medical requirements, and so he's been contributing financially, because he's not able to have, have contact.

So those were the additional facts he wanted me to make aware.

The, I was going to, but in light of Your Honour's ruling, I did have the *Perrin* case I was going to refer to, a recent decision of the Nova Scotia Court of Appeal regarding blended sentences, but I'm not going to refer to that.

But in my submission, Your Honour, a conditional sentence would be appropriate. I would leave the amount that Your Honour thinks would be appropriate to put in place. As I say, I would ask the court to consider that he has been basically on house arrest, with work exceptions and others, since this matter has been put in place, and to put that...and I'm, we're certainly aware, under the *Proulx* decision, that the court has wide authority to impose whatever period you think would be appropriate, in terms of his supervision in the community.

And other than that, Your Honour, like I say he's doing extremely well. There's the letter of references, which I won't go into, I referred to last day. I note Mr. St. Onge is here. He's mentioned in the pre-sentencing report. And I, I presume, I didn't speak to him, I don't know if he's here in support of Mr. Barton. I assume he is. But those would be my submissions.

THE COURT: Anything else arising out of that, Mr. Ellis?

MR. ELLIS: No, Your Honour.

THE COURT: Anything you want to add, Mr. Barton, before I continue with my sentence?

MR. BARTON: I'd just like to say that I'm sorry for my actions, and I hope to have a positive future.

[15] In considering the type of sentence, and whether it's possible to serve it in the community, and what that sentence might be, I note from page seven of the pre-sentence report that the clinical therapist with Addiction Services in Amherst spoke with the writer on March 4th. She advised that:

> ...she had opened up a file with Chris Barton on July 20, 2013 (sic) and saw him five times prior to the file's closure on February 13, 2013. She advised that Mr. Barton sought services following the index offence. She

> reported that the offender took responsibility for his behaviour and made no attempt to minimize his actions. She stated that he was engaged and motivated during sessions. She advised that he had insight into his risk factors and acknowledged that alcohol has been a contributing factor to previous offences as well. Ms. Rousselle reported that the offender appeared remorseful for his actions and was very upset by his limited contact with his children. Ms. Rousselle indicated that Mr. Barton spoke often of wanting to make a better life for him and his family. She reported that he maintained full time employment and showed pride in his accomplishments. Ms. Rousselle stated that given the offender's history, it is likely in his best interest to abstain from alcohol consumption and can contact Addictions Services in the future if he feels he would benefit from their services.

[16] The victim reported, at page seven and eight of the pre-sentence report, in relation to her view of the accused, she indicted the offender is a hard worker. I think that's echoed today by the comments of his counsel. She stated that:

> ...she does not want to see his job jeopardized by incarceration. She stated that she would like the court to prohibit Mr. Barton from drinking and she feels he will follow any conditions to which he is directed under community supervision. She further stated that she feels if there is no alcohol in the picture, there will be no problems.

[17] In relation to his record, the accused was last sentenced in May of 2008 in relation to an assault charge, for which he received three months custody. It was served on an intermittent basis. In further reviewing his record, he has several threats charges, has assaults with a weapon. It appears all these have a root of alcohol as a cause for him coming into contact with the law.

[18] In taking all these factors into account, I am satisfied that he could serve the sentence in the community.

[19] Then I have to determine whether the sentence in the community would be consistent with the factors and fundamental principles and purposes set out in 718 to 718.2. 718 indicates that:

> 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.

It states, 718.1 states that:

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

718.2 states that:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender and, without limiting the generality of the foregoing,
> >
> > > (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

Which is an aggravating feature which is present here. It also says that:

> > (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[20] I have taken into account the very low level of violence. And that's not to say violence wasn't inherent in this, but it is lower than other instances of things that could occur. Together with the pre-sentence report, the wishes of the victim, the circumstances of the accused, and all other factors, this matter, I agree with the crown that a 12 month period of custody would be in order. As I have indicated, that can be served in the community. I think it would be appropriate on all circumstances, and I'm prepared to do that.

[21] Mr. Barton, would you stand up? Sir, I'm going to sentence you to a period of imprisonment of 12 months in custody, but I am satisfied that your serving that sentence in the community will not endanger its safety. You shall serve this sentence in the community under the following conditions: You are to keep the peace and be of good behaviour. You are to appear before the court when required to do so by the court. You are to report to a supervisor at 26-28 Prince Arthur Street, Amherst, Nova Scotia on or before 4:00 p.m. today, and thereafter as

required and in the manner directed by your supervisor or someone acting in his or her stead. You are to reside within the province of Nova Scotia unless you receive written permission to reside outside the province, that is obtained from the court or the supervisor. And you are to notify promptly the supervisor in advance of any change of name, address or telephone number, and promptly notify your supervisor of any change of employment or occupation.

[22] You are not to possess or consume alcohol or any other intoxicating substances. You are not to possess or consume a controlled substance as defined in the *Controlled Drugs and Substances Act*, except in accordance with a physician's prescription for you, or with legal authorization. You are not to enter into or be in the premises where alcohol is the primary product of sale including liquor stores, taverns, pubs, beverage rooms, night clubs and licensed pool halls.

[23] You are not to own, possess or carry any weapons, firearms, cross-bows, prohibited weapons, restricted weapons, prohibited devices, ammunition or explosive substances as those items are defined in the *Criminal Code*.

[24] You are to attend for, participate in and successfully complete any and all counseling, assessment, treatment or program as directed by your supervisor, including but not limited to substance abuse, urinalysis or other alcohol or controlled substance screening, anger management, and violence intervention and prevention programs, particularly in relation to spousal/partner violence.

[25] You are to have no contact, direct or indirect, or communication with Katherine Estabrooks, without her expressed consent received in advance in writing. So that she can, she can indicate that you can be around, but if she says, "No, I want you out", just get out. Whether it's right, wrong or indifferent, you gotta leave, okay. You understand that?

MR. BARTON: Yes sir.

[26] You are to comply with any electronic monitoring as directed by your supervisor. For the first eight months of this period you will be on house arrest. For the purposes of this order, house arrest, your residence is defined as...what's your dwelling?

MR. BARTON: 153 East Pleasant.

THE COURT: And is it an apartment or is it a house?

MR. BARTON: It's a house.

[27] Okay. So it would be defined as 153 East Pleasant Street, Amherst, Nova Scotia. The only exceptions to the house arrest are at regularly scheduled employment, which your supervisor is aware of in advance; when dealing with medical emergencies or medical appointments involving you or a member of your household, traveling to and from by the most direct route; when attending scheduled appointments with your lawyer or supervisor, traveling to and from those appointments by the most direct route; when attending court at a scheduled appearance or under subpoena, traveling to and from court by the most direct route; when attending a counseling appointment or treatment program, or a meeting of Alcoholics Anonymous or Narcotics Anonymous, at the direction of or with the permission of your supervisor, traveling to and from that appointment, program or meeting by the most direct route; with written approval of your supervisor, given beforehand; and for a period of three consecutive hours each week, approved of in advance by your supervisor for the purposes of running errands and attending to your personal needs.

[28] The final four months of this order will be served with a curfew from 10:00 p.m. until 6:00 a.m. the following day, with the exceptions to mirror those with the house arrest where appropriate.

[29] In relation to this I am going to waive victim fine surcharge on these three items. I think that...is there a 109 order as well, I think?

MR. ELLIS: Probably should be.

[30] And prove compliance with the curfew and house arrest condition by presenting yourself at the entrance of your residence or answering the telephone, should your supervisor or a peace officer or other authorized personnel attend at your residence or call you on the phone.

[31] I will also grant the section 109 order for a period to begin immediately and end ten years from the date of expiration of your custodial sentence.

PCJ