PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Aucoin*, 2021 NSPC 26

Date: 20210621
Docket: 8397805
Registry: Sydney

Between:

Her Majesty the Queen

v.

Kyle William Aucoin

Judge:	The Honourable Judge A. Peter Ross
Heard:	April 9, 2021, in Sydney, Nova Scotia
Decision	June 21, 2021
Charge:	s.264.1(1)(c) Criminal Code of Canada
Counsel:	Darcy MacPherson, PPS, for the Crown Alison Aho, NSLA, for the Accused

Court summary

Facts: During a heated argument in which the accused threatened and assaulted the complainant, he also threatened to throw his young cat out the window of the apartment they all shared. The accused owned the cat. The complainant, who had been living with the accused in his apartment for a number of months, had helped care for it and had developed an attachment to it.

Issue: Did the words constitute a threat to injure an animal under s.264.1(1)(c) of the *Criminal Code*? Is it an offence where the animal was the exclusive property of the accused?

Result: The accused was found guilty. The wording of the section includes an animal owned by the accused. Such utterances may constitute a threat provided other required aspects of a s.264.1 offence are made out.

Reasons for Decision

[1] At issue here is whether a person should be convicted of uttering a threat to injure their own pet where the threat is made to another person who has developed an affection for the animal. The person is charged under s.264.1(1)(c) of the *Criminal Code*.

background

[2] Cape Breton Regional Police laid a series of charges against Kyle Aucoin after an incident on October 9, 2019 involving him, the complainant Rebecca Penney and their cat. These came to trial on April 9, 2021. Just prior to the hearing Mr. Aucoin pled guilty to uttering a threat to harm Ms. Penney. At the conclusion of the trial I found him guilty of an assault on Ms. Penney (by pushing) but not guilty on a second such charge (by spitting). The charge under s.264.1(1)(c) was adjourned for decision to June 9th. I entered a finding of guilty at that time, with reasons to follow, as appear here. I will discuss only the evidence pertinent to this charge, placed in context with the others.

[3] The charge in question initially alleged that the accused "did utter a threat to Rebecca Penney to kill an animal of Rebecca Penney." The evidence heard at trial is summarized below. Pursuant to s.601 of the *Criminal Code* I am amending the wording of the charge to conform to that evidence. I will return to the reasons for doing so at par.12.

[4] The charge for decision, as amended, thus reads:

> That Kyle William Aucoin, on or about the 9th day of October, 2019, did knowingly utter a threat to Rebecca Penney to injure an animal of Kyle Aucoin, to wit, a kitten, contrary to section 264.1(1)(c) of the *Criminal Code* of Canada

The evidence

[5] The complainant Rebecca Penney and the accused Kyle Aucoin were boyfriend / girlfriend for a number of years. In 2019 the accused took possession of an apartment in Reserve Mines. Some time between April (according to the complainant) and June (according to the accused) they began to cohabit there. The accused was attending Glace Bay High School. The apartment was a subsidized unit, rented to the accused, whose name was on the lease. They shared their space with two cats – Patches and Turbo.

[6] The morning of October 9, 2019 got off to a bad start. The accused awoke to find that Turbo had urinated on the clothes he intended to wear that day, which were in a bag on the floor of the bedroom. Discovering this, the accused went in search of Turbo who, it appears, was wisely hiding somewhere other than under the bed. In the course of an angry rant he said "where the fuck is it?", "I'm going

to throw it out the window", "that's a good place to throw it" and "I'm going to get rid of the cat right now". The accused admitted at trial "I did threaten to fire it out the window but saying it and doing it are two different things." He said he "wasn't really going to hurt the kitten, just let it go." It is not clear to me that such a distinction can be drawn.

[7] I digress to note (without inference) that Patches, some time after the incident of October 9, 2019 "escaped out the window" and hasn't been heard from since.

[8] The complainant captured some of the events on video with her cell phone. Her tone of voice, and his, are more telling than the images. He was loud and irate. She was upset and crying. Mr. Aucoin's anger infused his words and actions. This, coupled with the fact that he later tossed some of Ms. Penney's belongings out the window, indicate that she was justified in taking the threat seriously. The words engendered real fear. In strict terms this is not a legal requirement for conviction, but it is a relevant consideration.

Property interest in Turbo

[9] The complainant said "Turbo was our kitten," thus claiming a proprietary interest in the animal. However, the accused acquired Turbo from a friend in June. The friend's cat had had a litter. Mr. Aucoin said "I picked up the kitten without her (Ms. Penney) . . . when she showed up she said 'you got a new cat!'" He said "I paid for all the food." It was his position that he "owned the cat." He said at one point "we looked at it as our cat, we both took care of him" but despite this statement I do not see that he gifted the cat to Ms. Penney. At the date of trial

Turbo was living with the accused's mother. It was Mr. Aucoin who likewise acquired the other cat, Patches, earlier that spring.

[10] Legally, an animal can be "owned"; it can be an item of property of one or more persons. Offences concerning animals are contained in Part XI of the *Criminal Code* entitled "Wilful and Forbidden Acts In Respect Of Certain Property." However, animals are treated as a distinct form of property subject to special considerations.

[11] The cat was given to Mr. Aucoin and stayed in his apartment. The complainant herself said "Kyle paid for everything." The accused and complainant cohabited for a very brief period. While Ms. Penney undoubtedly helped care for the cat and had developed an attachment to it, a person does not acquire ownership by bestowing affection. On the evidence before me it has been proven that in legal terms Turbo was the accused's pet. There is nothing upon which I can conclude or presume that the complainant had a legal interest in the cat under statutory or common law.

Amending the charge in the Information – s.601

[12] The charge reads that the kitten was "an animal of Rebecca Penney." Based on information available to the police this wording was reasonable. However, the trial having concluded, I amend the charge to read "an animal of Kyle Aucoin" to conform to the evidence. This can be done without prejudice to the accused. It does not expand the scope of the accused's jeopardy or change the fundamental nature of the charge. Indeed, it opens up a possible defence which is the very subject matter of this decision. He himself has advanced the proposition; he is not misled nor taken by surprise. The Crown evidence taken by itself would have indicated

joint ownership. From a defence perspective, I do not see how examination or cross-examination would have differed. Nor do I see how it would have affected his trial strategy, for instance his decision to testify.

[13] A further amendment is made to change “kill” to “injure”. Again, this is done to conform to the evidence. Again, for the reasons stated above, this can be done without prejudice to the accused. A threat to do either constitutes the same offence. The accused acknowledges that he wanted to “get rid” of the kitten by throwing it out the window. Riddance, in this sense, would not be good. It may not result in death but would at the very least lead to distress or injury, and so the charge is amended accordingly to read as set out in par.4, above.

The law

[14] For most aspects of s.264.1, the law is well settled. The Supreme Court addressed the offence in *R. v. McCraw*, [1991] 2 S.C.R. 72, and again in *R. v. McRae,* [2013] 3 S.C.R. 931. It has taken a fairly expansive approach. For instance, “bodily harm” is taken to mean any hurt or injury, physical or psychological, which interferes in a substantial way with a person’s health or comfort and is more than fleeting or minor in nature.

[15] The question of whether words constitute a threat is a question of law to be decided on an objective standard. The trial judge is required to take the perspective of a reasonable person aware of the circumstances in which the words were uttered. It will ask what meaning a reasonable person would attach to the words viewed in the circumstances.

[16] The fault element is subjective and is made out if the accused intended the words uttered to intimidate, to be taken seriously. What matters is what the accused actually intended, which may in turn depend on inferences drawn from all the circumstances, including how the words were perceived by those hearing them. It is not necessary that the complainant was actually intimidated; the mental element of the offence is made out if the accused intended the words s/he uttered to intimidate or be taken seriously.

[17] The trial judge is to take account of the circumstances in which the words were used (here an ongoing argument which boiled up into an assault, which all arose from what the cat had done), the manner in which they were communicated (here, in anger, and repeatedly), and the nature of any relationship between the parties (here a boyfriend / girlfriend 'live-in' relationship in which they both regarded the cat as a pet, shared some responsibility for it and derived some pleasure and benefit from having its company).

discussion

[18] According to s.264.1(1) of the *Criminal Code*,

> Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat
>
> (a) to cause death or bodily harm to any person;
>
> (b) to burn, destroy or damage real or personal property; or
>
> (c) to kill, poison or injure an animal or bird that is the property of any person.

[19] Having determined that the accused had the sole proprietary interest in the cat, the question arises whether the law makes it offence to threaten to harm one's own property where that property is an animal. Subsection (c) of s.264.1 which

deals with injuring animals contains the phrase “of any person”. Subsection (b), which creates the offence of threat to damage personal property, contains no such qualification.

[20] Animals are a special form of property distinguishable from inanimate objects. However, in *R. v. Watts*, 2017 BCPC 233, at par.20 the court mused that there might be “an implicit exception to s264.1(1)(c) in relation to animals which are the sole property of the accused.” The judge did not need to decide the issue given that the accused himself acknowledged that the animal was a “family asset” thus giving the complainant a property interest in it.

s.264.1(1)(a)

[21] S. 264.1(1(a) states that it is an offence to utter a threat “to any person”. It is not the focus of this decision but given the similarity of wording I have considered whether cases interpreting that section might assist with how to read ss.(1)(c). Specifically, is it an offence to threaten to kill or injure oneself? Neither suicide nor self-harm are criminal offences *per se*. Would it be inconsistent to say that threatening self-harm is not an offence, whereas threatening to harm one’s own pet is?

[22] Counsel did not, not was asked to, supply any cases or briefs. In the time available to me I was not able to locate a decision on the specific issue in this case, nor a decision shedding much light on whether a threat of self-harm might, in some circumstances, be an offence. Hence the canvass which follows is almost certainly incomplete, and likely inadequate.

[23] In *R. v. Candelaria,* [1998] O.J. No. 3963, the court stated at par.3,

> The facts in this particular case were in the context of a matrimonial dispute, consequent to the wife announcing her intention to separate. His words were, "If I want to end it all, I can end it there and then." or "he can end it there or then." It was her perception that something harmful would happen to him, and maybe include herself. She was fearful for his safety and hers. There have been prior threats of suicides. In all the circumstances of this particular case, I am left with a reasonable doubt that he intended to threaten her as opposed to a threat to commit suicide, and there will be an acquittal on that particular charge.

[24] In *R. v. L.B.*, [2005[O,J, No 1798, the court stated at par. 63,

> The only evidence that could be considered a threat is her evidence that Mr. L.B. had called her and threatened to kill himself because he could not live without her and further told her that it was really weird that he wanted to see her dead and if he saw her dead that he would laugh over her dead body. In my opinion that is not a threat and that charge is dismissed.

[25] These decisions suggest that a threat to do self-harm is not, per se, an offence. Other cases I was able to track down involving threats of self-harm included threats to kill or harm others as well and were thus of no assistance. For example, in *R. v. Jacobs*, [2008] N.J. No. 46, Gorman, J. dealt with case where the accused indicated that he was going to kill either himself or the complainant, retrieved a rifle, threatened to kill himself, and placed the barrel in his mouth. This occurred during a series of other actions including an assault by choking. The accused was found guilty of uttering a threat. It appears the accused had not directed the threat solely to himself.

[26] in *R. v. Lyver*, [2011] N.J. No. 262, the complainant's dog defecated on the accused's mother's lawn. The accused threatened to kill both the accused and his dog. Gorman, J. found the accused guilty. The case is typical of a goodly number of reported decisions where the sins of the animal are visited on the owner, who then shares in the threatened fate of the four-legged offender.

[27] In the end I did not find much assistance in the case law on the question of whether the meaning of ss.264.1(1)(a) informs the meaning to be given to ss.(c). Perhaps the use of the preposition "to" means that the speaker and the object must be separate people, i.e. that one cannot utter a threat "to" oneself.

s.264.1(1)(b)

[28] S.430 contains the offence of actual (not threatened) property damage. S.429(3) (a) and (b) inform the interpretation of s.430. Reading all of s.429(3) one concludes that damage done to one's own property, where one has the entire interest, is *not* an offence (*unless* the damage was done with intent to defraud). And so, for example, if Mr. Aucoin had threatened to smash his personal cellphone during the altercation, this would not, in and of itself, be an offence. How then could uttering a threat to do so – "I am going to smash my cellphone" – be an offence under s.264.1?

[29] It is hard to envisage that a threat to damage one's own property could be a criminal offence. Perhaps a threat to damage an item of one's own, but an item the receiver of the threat had developed a sentimental attachment to (for example, a cherished photograph of a mutual friend) would constitute an offence? It seems to me, without having to decide, that the answer would still be no. However this points to a factor, emotional connection, which may serve to distinguish 264.1(1)(c) from 264.1(1)(b).

[30] Another distinguishing feature is the fact that an animal is a sentient creature, capable of some sort of subjective experience. Beyond the ability to cause physical damage, we possess the ability to inflict suffering upon animals. This is surely why they are given separate and special consideration in Part XI of the

Criminal Code, sections 445 to 447, where one finds offences such as "cruelty to animals". It is no defence to such a charge that the abused animal was owned by the accused.

conclusion

[31] I conclude, therefore, that while there may be an implied exception in 264.1(1)(b) to property owned exclusively by the person making the threat, there is no such exception in ss.(c). This is reinforced by the inclusion of the phrase "of any person" in ss.(c).

[32] The danger in reading 264.1(1)(c) this way is that it might cast too wide a net, that it might capture behaviors which should not be the stuff of criminal prosecutions. For instance, suppose a person says they are going to flush their goldfish down the drain, or toss their ant-farm in the fire - should these constitute a threat, subject to penal consequences? Likely the answer emerges from a consideration of the other legal requirements. The court would ask whether it would be reasonable for the complainant to view such words as a threat, to consider whether such words could constitute a form of intimidation. This would be the guardrail against overreach.

[33] The overall scheme of *Criminal Code*, the protections it affords animals, and the difference in how they are treated compared to other forms of personal property all suggest to me that *provided the other legal conditions for a threat exist*, the mere fact an animal is owned by the person who utters a threat to kill or injure it is not a defence to a charge under ss (1)(c).

[34] Mr. Aucoin knew that Ms. Penney would be upset by his threat to throw the kitten out the window. He meant to instill a state of fear and anxiety. He indulged in senseless anger and projected it upon Ms. Penney. This caused her mental harm. The thought of having to witness this act was distressing for her. She had cared for the animal and developed an attachment to it. It is reasonable that a person in such a circumstance would become fearful, and this is precisely the result Mr. Aucoin intended. He may be forgiven for being annoyed at what the kitten had done, but this affords no excuse for behaving as he did.

[35] For these reasons the accused is found guilty of the offence under s.264.1(1)(c).

Dated at Sydney, N.S. this 18th day of June, 2021

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A. Peter Ross, PCJ