PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v. Boutilier*, 2022 NSPC 8

Date: 20220307
Docket: 8343684,8374772
8374774
Registry: Kentville

Between:

R.

v.

Dean Edward Boutilier

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	January 10, 2022, in Windsor, Nova Scotia
Decision	March 8, 2022
Charge:	s. 264.1(1)(a) x 2 *Criminal Code* s.145(3) *Criminal Code*
Counsel:	William Fergusson for the Crown Kyle Williams, for the Defence

By the Court:

Introduction

[1] Justice must not just be done, it must be seen to be done. Courts are open to the public and judges should provide reasons sufficient for the public to understand why a decision was taken. To that I would add, sometimes it is necessary a defendant see the face of justice in the community and hear, in person, the decision.

[2] Over the course of the pandemic many sentencing hearings have been conducted virtually by telephone as it is expedient and addresses public health concerns. Doing so has been necessary and appropriate, and legal scholars will no doubt write about the benefits and deficits of virtual justice. This case is not about those concerns, rather it is about Mr. Boutilier whose sentencing hearing started on the telephone, but must conclude in person, in the courtroom.

[3] The reason for doing so relates to both the nature of the case and because it is necessary Mr. Boutilier see justice in the form of a non-white judge. Society also benefits from knowing justice was done and why the Court, despite misgivings, accepted a joint sentence recommendation.

[4] Mr. Boutilier pled guilty to three charges on two Informations: (1) uttering a threat to Ms. M. on May 16, 2019, and (2) breaching a condition of release and uttering a threat to burn her home on August 3, 2019. The Crown proceeded summarily on both Informations.

[5] On January 10, 2022, following a brief sentencing hearing, the Court was asked to suspend the passing of sentence and place Mr. Boutilier on probation for one year, presumably concurrent one to the other on each count, with conditions that included, *inter alia*, no contact with named victims and take anger management and/or other counselling as recommended by Probation Services.

[6] After hearing the submissions and asking questions, the Court reserved decision. The jointly recommended sentence appeared inordinately low for one who has a criminal record and, according to the presentence report, does not appear to appreciate the impact his racist, misogynist threats and intimidating behaviours have had on the victims and their rural neighbours. In addition, the events occurred

on separate dates months apart with the second incident involved breaching a release condition arising from the first incident, and it was not clear the recommended sentence took that into consideration.

Decision:

[7] Despite misgivings and concerns, the Court concludes it is legally bound to accept the joint submission because application of the public interest test does not permit its rejection. These are my reasons for reaching this conclusion.

The Law:

[8] The Supreme Court of Canada, in *R. v. Anthony Cook*, 2016 SCC 43 provided guidance to trial judges troubled by a joint sentencing submission and inclined to depart from it. As a starting point, the procedures are meant to apply "only to those cases where the joint submission is contentious and raises concerns with the trial judge" (paragraph 50).

[9] The public interest test compels the Court not to depart unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. This in recognition that counsel advancing joint submissions require a high degree of confidence they will be accepted, and the many benefits joint submissions bring to the criminal justice system, i.e., certainty for an accused and closure for the victims.

[10] Sentencing courts are advised to approach joint submissions on an "as is" basis, even when a recommended sentence appears less than adequate. The Court must conclude the parties have considered and rejected such things as, in this case, a short period of incarceration, a different and increased outcome for the second in time matter, a community service order, or a longer period of probation and a resulting lengthier no contact provision.

[11] Seeking from counsel additional information about the circumstances leading to the joint submission is recommended by the SCC because "[t]he greater the benefit to the Crown, and the more submissions made by the accused, the more likely it is that the trial judge will accept the joint submission, even though it may appear to be unduly lenient" (*Anthony Cook*, para. 53).

[12] A "full account of the circumstances of the offender, the offence, and the joint submission without waiting for a specific request from the trial judge", was

described by the SCC as a "corollary obligation upon counsel to ensure that they amply justify their position on the facts of the case as presented in open court". As a result, the lawyers "must provide the trial judge not only the proposed sentence, but …a full description of the facts relevant to the offender and the offence, in order to give the judge a proper basis upon which to determine whether the joint submission should be accepted". (*Anthony Cook*, at para. 54)

[13] The SCC also warns counsel that without a proper accounting they "run the risk that the Court will reject the submission". The Court can also enquire about the particular "benefits obtained by the Crown or concessions made by the accused". (*Anthony Cook*, at para. 55)

[14] The test requires the Court "not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest" and the SCC helpfully referenced two Newfoundland and Labrador Court of Appeal decisions to demonstrate what would bring the administration of justice into disrepute or be contrary to the public interest- "if, despite the public interest considerations that support imposing it, it is so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the criminal justice system" (at para. 32 and 33 referencing *R. v. BO2*, 2010 NLCA 19). As such, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".

[15] Finally, "rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down", an "undeniably high threshold". (*Anthony Cook*, at para. 34)

[16] Applying the test requires consideration of the facts.

The Facts:

[17] Mr. Boutilier lives on a lake property and Ms. M. and her husband live across the water within sight of his property. On May 16, 2019, Ms. M. returned from work to hear Mr. Boutilier yelling from his property, "I'm going to get you guys". He also said he was coming across to her property and did so. On her

property he interacted with Ms. M. and her uncle in a volatile, angry, and aggressive manner that included calling Ms. M. a bitch and other derogatory terms.

[18] He returned to his property and shouted at her, “You better sleep with one eye open you bitch!”.

[19] He was charged and released on an undertaking with no contact provisions.

[20] Just over two months later, on August 3, 2019, Ms. M. and her husband, who is Black, were away from home when a neighbour contacted them to report Mr. Boutilier, accompanied by his wife, was rowing a boat back and forth in front of their house and yelling that he was “gonna burn the n-word’s house down!”. Other neighbours heard this as well.

[21] The facts read by the Crown were accepted by defence counsel, but the Court had a few questions. What was the context or reason behind these actions on two separate days and in particular, why were these particular neighbours the target of Mr. Boutilier’s criminal acts?

[22] Defence counsel explained that a year prior to May 2019, a dispute regarding his animals and ATV use started and there was tension and some back and forth between him and his neighbours. Mr. Boutilier could not manage his behaviour after believing authorities had been contacted about his ducks.

[23] The answer not being quite satisfactory, the Court asked about his specific targeting of the black family. Counsel says they are part of the group of neighbours who are upset about his animals.

[24] The presentence report sheds some light, reporting Mr. Boutilier resents his neighbours who he described as “a lot of city that want to bring the city to the country”. That comment offers no real insight except to lead the Court to wonder if Mr. Boutilier thinks black people and their families do not belong in the country. Anyone familiar with Nova Scotian history would surely know black people have been in this province since before Confederation and since at least the 1700’s- no doubt city and country. If the comment is meant to suggest people who are not primarily resident in the country do not appreciate animals and ATV’s, I can expect by extension neither country nor city people appreciate threats directed at them by their neighbours.

[25] Defence counsel notes Mr. Boutilier does not exhibit this kind of behaviour in his regular life, the actions were unacceptable. More answers can be found in the presentence report.

The Presentence Report:

[26] Mr. Boutilier is 43 years old, has a grade ten education, is employed full time and the employer describes him as irreplaceable. He resides with his partner and her children, and she says he keeps to himself and is not emotionally unstable. She was, however, with him in the boat during commission of the last two offences.

[27] Mr. Boutilier is a hard-working man. He left home in his mid teens and started earning his own living and has been financially independent ever since.

[28] The report suggests he does not appear to have much understanding of the impact his actions have had on the community. The Crown questioned if he really appreciates what he did is a criminal offence.

[29] The report recommends anger management.

Criminal record:

[30] The Court was advised that Mr. Boutilier has a dated criminal record. Ten offences were addressed at a sentence consolidation hearing in 2007 that included robbery for which he received 12 months custody.

[31] In 2003 he was fined for three counts of failing to attend court. In 2001 he was also fined for the same offence.

Allocution:

[32] Mr. Boutilier took the opportunity to allocute and says he regrets and apologizes for his actions that he cannot take back.

Position of the Parties:

The Crown:

[33] The Crown says if the facts included something more, something physical, this would have been a “race-based offence”. The Court is not sure what that means.

[34] With Covid-19 in the background, and while the Crown was close to seeking incarceration, custody was not sought, instead probation with counselling for anger management and no contact provisions. The Crown remains concerned Mr. Boutilier does not have insight into the effects of his actions on the intended victim.

Position of the Defence:

[35] Defence agrees the PSR author says Mr. Boutilier did not understand the impact his actions had on the community, explaining he did not have a focus on the community. He could stand to gain from counselling, has only a grade ten education and left home at fourteen years of age. Counsel explains that the “situation got to him, and he did these things”.

[36] Defence says Mr. Boutilier understands his actions were unacceptable and thinks he could benefit from some enlightenment and counselling.

[37] The Court was told Mr. Boutilier benefited from counselling in the past, while incarcerated, resulting in beating a drug addiction and obtaining his grade ten.

[38] After a year long dispute about his animals and his ATV, he was driven to a point where he could not control his frustration in a socially acceptable manner. He believed these particular neighbours were part of a larger group of neighbours who complained about his animals. The Court was told things are better now since the cool down period after charges were laid.

[39] The second incident was not a reaction to a specific trigger, but a build up and boil over.

The aggravating and mitigating factors:

[40] Aggravating factors include racist language used and focused on a Black householder; twice targeting the family, the second time while bound by no contact conditions; a ramping up of the threats; no real understanding of the impact his

actions have on rest of the community; and prior convictions for failing to comply with court orders.

[41] Mitigating factors include the guilty plea, that he is employed, has a supportive family, and has benefited from counselling in the past.

Comparable cases:

[42] The Court was not provided case law in support of the sentence recommendation, but the *Criminal Code* does allow for everything from an absolute discharge to six months in custody.

[43] In this case the Court is asked not to consider the matter as a crime motivated by prejudice or hate based on race as an aggravating circumstance (Section 718.2 CC) which can result in a longer or more restrictive sentence. (See comments of then Judge Campbell in *R. v. AB,* 2014 NSPC 63)

[44] The Court reviewed a few cases including *R. v. Feltmate*, 2012 NSSC 319 wherein Mr. Feltmate was incarcerated for 60 days for harassment and 1 day for assaulting a stranger to whom he leveled racist language. The Court found, "the racial overtones in this case are extremely aggravating circumstances."

[45] The Court also reviewed the recent helpful decision of Justice Brothers, *R. v. Foley*, 2022 NSSC 47 at para. 54:

> [54] As previously noted, there is no exception carved out under s. 730(1) for racially motivated offences, notwithstanding the obvious need to denounce such heinous acts. Moreover, if Parliament intended for courts to give primary consideration to the objectives of denunciation and deterrence in every case involving racially motivated offences, it could easily have drafted the sentencing provisions of the Criminal Code to achieve that objective, just as it has done for certain other offences (ss. 718.01-718.04). Instead, Parliament directs courts to treat evidence that an offence is racially motivated as an aggravating factor. It is to be considered alongside all the other factors, aggravating and mitigating, in determining an appropriate sentence. The sentencing judge must carefully balance the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence to arrive at a proportionate sentence, which is what the judge did in this case.

The Victim Impact Statements:

[46] I have the benefit of victim impact statements from two victims. It is clear the family have experienced a significant impact as a result of Mr. Boutilier's actions. The neighbours who heard and reported the threats are also victims affected by this serious racist threat to burn personal property. The community at large is equally offended because this type of behaviour sullies our area, not unlike the cross-burning incident some time ago that was covered in the international news. This behaviour is repulsive to right minded people everywhere and has no place in our community.

[47] The victim impact statements appeared carefully crafted to assist Mr. Boutilier's understanding of (1) the impact his actions have had on the family and their ability to enjoy their property with friends and family members, (2) the financial costs to make their property more secure despite owning and building their house 20 years ago and never having to go to these lengths to protect themselves, and (3) the ongoing fear the female victim has for personal safety.

[48] Despite the fact Mr. Boutilier says he "skimmed the reports", I trust their words meant something to him as the Court read them into the record. They clearly wish to have no contact with Mr. Boutilier in the future.

Conclusion

[49] Having regularly imposed periods of probation for threats charges, I cannot say this sentence is outside the range. I have also regularly imposed probation for breach of court orders although, when accompanied by repeating the same offence that led to the imposition of the conditions in the first place, am more inclined to impose a period of incarceration for a breach. All is of course informed by whether the sentencing hearing is contested or the product of a joint submission.

[50] There is no doubt benefits flow to an accused person when the Crown recommends a sentence that the accused is prepared to accept. That recommendation is likely to be more lenient than the accused could expect after a trial or contested sentencing hearing. It reduces the stress and legal costs associated with trials, provides some sense of certainty, and, arguably, allows for prompt responsibility taking and the opportunity to make amends with victims. Such can offer comfort for both parties. (*Anthony Cook*, at para 36)

[51] I cannot say the recommendation is outside the range and, other than the racist undertones, the facts are not particularly uncommon. I simply cannot find the recommendation is unhinged and contrary to the public interest.

[52] A significant period of time has passed, there has been no repetition of this criminal behaviour. Presumably a trial would inconvenience the witnesses and serve to rehash incidents from 2019. I say a trial because if I did not accept the joint submission, I must permit Mr. Boutilier to withdraw his guilty pleas. The Court will not do that, instead certainty and resolution must prevail in the public interest.

[53] Mr. Boutilier, I suspend the passing of sentence and place you on concurrent one-year periods of probation with the following conditions:

Keep the peace and be of good behaviour;

Report to and be under the supervision of a probation officer and report to the probation office at 176 water street, Windsor, NS (798-3309) today and thereafter as directed and follow their direction;

Have no contact or communication, directly or indirectly with Ms. M. and [four others];

Take any assessment, treatment, counselling, treatment for any issues of anger management as may be recommended/directed by your probation officer;

Provide your probation officer with the authorization necessary to allow them to communicate with any counsellor, psychiatrist or program coordinator you are seeing for the purpose of supervising your compliance with this probation order.

Ronda van der Hoek, JPC