PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v. MacEvoy*, 2023 NSPC 59

Date: 20230912
Docket: 8453776
Registry: Wagmatcook

Between:

His Majesty the King

v.

Ernest James MacEvoy

Judge: The Honourable Judge Peter Ross

Heard: March 8 and 9, April 27, May 5, August 25, 2023, in Wagmatcook, Nova Scotia

Decision: September 12, 2023

Charge: Section 268 and Section 264.1, Criminal Code

Counsel: Keaven Finnerty, for the Crown
Kevin Patriquin, for the Defendant

By the Court:

Charges

[1] Ernest MacEvoy is before the court for sentencing for two offences – an aggravated assault committed on June 21, 2020 and a death threat uttered on or about March 20, 2023. On May 5, 2023 he was found guilty of the former charge, after trial. He subsequently pled guilty to the latter. I heard sentence submissions on August 25, 2023. These are brief reasons for decision on the sentence to be imposed.

Facts

(i) Aggravated assault

[2] The facts of the s.268 offence are detailed in the judgement at 2023 NSPC 20. Briefly stated, the victim dropped by his mother's house for a visit. His brother, the accused, was living there as well. The brothers were on bad terms. Ernest left the house to mow the lawn while the accused visited and managed to spray the victim's motorcycle with grass clippings. The victim became very upset when he saw this and approached the accused in a somewhat threatening manner, accusing him of being lazy and living off their mother. The accused retreated to a shed, picked up a shotgun which was kept there, loaded it, and fired one shot into the victim's leg. The accused and victim both left the area. The victim received medical attention shortly after, while the accused reported his actions to police. He later acknowledged firing the gun and did a re-enactment of the events. He pleaded self-defence, unsuccessfully, at trial.

(ii) Uttering threats

[3] The s.264.1 offence was committed when Mr. MacEvoy was in the Cape Breton Regional Hospital's mental health unit. He had been on a Release Order for nearly three years awaiting trial for the aggravated assault. The trial began on March 8, 2023. At the completion of the evidence the trial was adjourned for final submissions. In this interregnum, Mr. MacEvoy, feeling depressed and suicidal, voluntarily sought and obtained admission to hospital. While receiving care he told his attending psychiatrist that he had thoughts about killing his former partner, Heather MacEvoy, and her children, after which he would kill himself. When

asked by the doctor what he would do if released from hospital, Mr. MacEvoy said that he would drive to Antigonish and kill them. The doctor was sufficiently concerned that he reported the threat to local police who arrested the accused and notified Heather MacEvoy. Adding to the concern was a "poem" written by Mr. MacEvoy while on the mental health unit in which he voiced distain and hostility toward Heather MacEvoy and said that some day he would see her rest in peace.

[4] Mr. MacEvoy, through his counsel, and in a statement to the court, claims no memory of the specific conversation with Dr. Roxborough. However he accepts that he made the threats, as documented on his medical record. He acknowledges authoring the "poem". He says that the medications he was given caused him to hallucinate and become paranoid. He says he punctured his arm with pencils. He says he thought that Heather MacEvoy was preparing his meals and attempting to poison him. He says he thought he was going to be executed when he next appeared in court. He says he would never have carried out the threat.

[5] There is no medical evidence of his mental condition at the relevant time. He is presumed to have possessed the capacity to appreciate the wrongfulness of his actions. It also appears, as Mr. MacEvoy himself asserts, that he did not expect the threats to be communicated to anyone beyond his caregivers. Seemingly his doctor did not consider the threats to be a product of mental disease. Rather, he concluded that they were real and actionable and gave rise to an exception to doctor-patient confidentiality. One assumes that the doctor was aware of the outstanding charges, believed the accused presented a clear risk to Heather MacEvoy, believed that the accused could well act on his threats upon release from hospital, and hence concluded that the statements must be reported to police.

[6] As a result of the threat charge Mr. MacEvoy has been kept in custody, for a brief time at the hospital and then at a provincial jail, until today's sentencing.

The accused's background

[7] The presentence report for Mr. MacEvoy provides little context for the accused's actions. He is one of five siblings of happily married parents who provided for all the family's needs. He enjoyed good relations with his brothers and sisters although he was "a bit of a loner" when younger. There was no abuse of any kind. No other family member has been involved in the criminal justice system.

[8] The accused struggled in school, going only as far as Grade 10. He has a spotty work history and has spent many years subsisting on social assistance. There is no history of any volunteer work or community involvement.

[9] Mr. MacEvoy's physical health is good, but his mental health is not. He is 63 years old. He suffers from depression and says he was diagnosed with a "personality disorder" in 2003. There is no medical record to support this. It is not clear how this might have affected his behaviour in 2020 and 2023. There is no indication of recreational drug use or alcohol consumption, no abuse of prescribed medications.

[10] He divulged that a family member committed suicide but did not elaborate further.

[11] The social worker who dealt with the accused at the Cape Breton Correctional Facility says that Mr. MacEvoy reached out to her for help. He acknowledged his struggle with suicidal thoughts and going to hospital this past spring to get help for such. The social worker opined that this showed a measure of self-awareness which, coupled with on-going therapy, bodes well for the possibility of his living safely in the community, "including being safe around others."

[12] In his interview with the probation officer, he expressed remorse for his actions and accepted responsibility. He is now totally estranged from all his family members. It seems his sisters are fearful that he might return to the community of Cape North.

Criminal history

[13] The accused's criminal record is comprised of a series of offences on March 17, 2003. This is almost certainly what led to the diagnosis of personality disorder the accused alludes to. He received a 2.5 year sentence for assault with a weapon, uttering threats, and endangering animals. The offences are dated, but very similar to those before the court. Crown had no information about the victims or manner of commission, but the length of sentence suggests the matter was serious.

Behaviour while on interim release

[14] Until the events of March 2023, the accused complied with all his conditions of release, a period approaching three years.

Impacts on the victims

[15] Allister MacEvoy chose not to file a formal victim impact statement. He wanted to attend the sentence hearing; indeed, Crown requested that sentence be adjourned so that he might attend his daughter's wedding in Alberta. (The request was denied; a link was provided to allow him to listen in). Crown advises that *en route*, passing through airport security, the lead in his leg set off an alarm, prompting a search. Some of the impact of the shooting was described in Allister's trial testimony. From this I heard that pellets from the shot are still embedded in his lower leg, that he suffers from stiffness and soreness in the knee, and that he must monitor lead levels in his blood regularly.

[16] Heather MacEvoy filed an impact statement on her own behalf and on behalf of her two children, aged 15 and 18. The threat engendered a deep and genuine fear for their lives. Upon learning what the accused said while in treatment, they left their house to stay in a motel for a week until they were sure the accused would be held in custody. She changed the locks on her doors and her phone number. One of the boys has nightmares that the accused will come to their home and kill his mother. They describe feeling physically ill with worry. The boys missed time from school. They are left with the constant worry that 'some day' the accused will carry out his threat. Heather MacEvoy recognizes the need for therapy to help her two sons deal with the effects.

Discussion – s.264.1 offence

[17] Theoretically, if a person in the middle of a forest utters a death threat which nobody hears, a criminal offence is committed. So long as a reasonable person, apprised of the circumstances, would perceive the words to be a threat, it is not necessary that an accused intended the words to be conveyed to the subject of the threat. The subject of a threat may never be aware that it was uttered. Nor does it matter whether the accused intended to carry out the threat. The words themselves, if uttered seriously, constitute the crime. It has been termed a "verbal act".

[18] While the facts do support the plea of guilty, the circumstances of the offence pose a challenge in assessing the moral blameworthiness of the offender. How might one compare the gravity of this conduct to similar words uttered casually to a stranger at a gas station? Mr. MacEvoy was seeking help for mental distress. He recognized that his suicidal ideations and other thoughts were not normal. He was being frank and open with his doctor. While ignorance of the legal

parameters of doctor-patient confidentiality is not an excuse, the parties agree that when the accused uttered the words and penned the "poem", he believed they would be treated as private communications and never brought to Heather MacEvoy's attention. That said, the doctor's disclosure to police demonstrates his view of the danger the words presented.

[19] There are indications that the accused has problems with impulse control – his actions towards his brother on June 21, 2020 speak to this - but Heather MacEvoy confirms that he did not display any physical aggression towards her or her two children while they all lived together. In his statement to the court, the accused said "I would never hurt Heather or the children."

Caselaw – s.268

[20] A number of reported cases were submitted for consideration by Crown and Defence. I will refer only to those which I find most helpful.

[21] ***R. v. Robinson,*** 2021 NSPC 20 has features in common with the instant case, a dispute between two brothers with a history of animosity which boiled up into an aggravated assault. The accused stabbed the victim in the abdomen resulting in a small laceration to the liver. He likely would have done more damage had not a third brother intervened. the The accused admitted to the stabbing right afterwards, although the matter did proceed to trial. The victim had a slow recovery and suffered from psychological effects. The accused had a limited education and employment history and had been living with his mother. He had been released on a court undertaking yet sought out the victim the very next day. Further, he had a history of violent offences including simple assaults, and aggravated assault, assault with a weapon and assaulting a peace officer. Gladue factors were raised but were nebulous and of little effect. At par. 47 et seq the judge considers the moral blameworthiness of the accused vis-à-vis other offenders and canvasses the case law. The resulting sentence was 4 years incarceration, plus ancillary orders.

[22] In ***R. v. Leroy,*** 2023 NSSC 37 the accused was sentenced on two counts of aggravated assault, a break and enter and other offences, all from the same date. The accused entered a dwelling armed with a shotgun and fired at two individuals, one of whom was struck on the leg, narrowly missing the femoral artery, the other being struck in the elbow. The parties had argued earlier in the evening. Both victims were left with scarring and pellets embedded in the surrounding tissue. The

accused had some work history. He had been a heavy drug user and had previously committed drug offences, two assaults, uttering threats and mischief. The Supreme Court justice determined 5 years incarceration to be fit and appropriate for each of the aggravated assaults. After consideration of the other offences, concurrency and totality, the judge imposed a global sentence of 10 years.

[23] ***R. v. Copp,*** 2007 NBQB 271 concerned a domestic conflict which escalated into a shooting of one victim and pointing a firearm at another. The accused cut the plumbing in his girlfriend's home, and later drove to a gravel pit where he believed his girlfriend would be, carrying a loaded rifle. Several shots were fired. The victim who was hit was left with "chronic pain in my leg due to bone fractures and metal fragments." He was on crutches for two months, unable to work and became dependant upon his parents. The accused had a good upbringing and supportive family. He was considered a reliable employee and supplied many letters of reference to the court. He was assessed a 4 year jail sentence for the aggravated assault. An additional jail term for the pointing firearm offence was reduced on account of remand time.

[24] In ***R. v. MacNeil,*** 2021 NSOC 4 the accused was charged with discharging a firearm with intent to wound, although facts seemingly would have supported a charge of aggravated assault. He armed himself with a .22 calibre rifle and went next door to confront a young man who he believed had demolished his niece's car. He first fired shots into victim's car then entered the house, enraged. He ordered victim outside, struck him with butt of rifle and shot him once in the thigh, actions described as "persistently cruel". The victim required major surgery – a rod was inserted in his leg – and was expected to suffer lifelong effects. The accused was 51 years old with advanced cancer. He had a long work history, had suffered from depression after loss of a son, had been in an opiate recovery program, and had a prior record which included possession of a weapon for a dangerous purpose, uttering threats and dated convictions for careless use of a firearm and assault. The case involved consideration of the mandatory minimum penalty in light of the offender's health, but the MMP of 4 years was imposed for the s.244(1) offence. Additional jail time on other offences was reduced by remand credit.

[25] In ***R. v. Jama,*** 2021 ONSC 4871 the accused was convicted after trial of one count of recklessly discharging a restricted weapon. Three shots were fired from a handgun into a car with two occupants, who fled and were never identified. It was not known if any injuries were suffered. The accused was a young adult from an impoverished background who had been impacted by violence in Somalia.

Heightened concern about the use of handguns was voiced at par.41 et seq. The accused had committed a prior robbery but had not been convicted at the time of sentence. He received a 5 year jail sentence, less remand credit.

[26] In ***R. v. Wilson,*** 2023 ONCA 410 the court upheld a 6 year sentence for an accused who went to a house in a dispute about money, drew a handgun, and shot one of the occupants in the leg, producing a non-life-threatening injury. At the time, the accused was under a firearms prohibition and had a significant record for weapons offences. His indigenous heritage and efforts at rehabilitation were appropriately considered by the trial judge.

Discussion – s.268 offence

[27] The use of a firearm against another person is an extreme form of violence which is justified only in extreme circumstances. As serious as the injuries were in this case, the shot could have done even greater damage. Society is rightly concerned about the use of firearms to settle disputes or advance criminal objectives. Although the accused did not use a restricted weapon such as a handgun, a factor which has given rise to increased concern in some other cases, the hunting rifle used here (and in R. v. Leroy) had the potential to inflict life-threatening injury.

[28] Unlike some cases noted above, Ernest MacEvoy displayed no prior violence towards the victim. His actions were not part of a course on conduct. There was no planning. He was not exacting retribution. He did not seek out the confrontation. The argument arose quickly and unexpectedly. He was under some degree of duress from the aggressive posture adopted by the victim. He was under no weapons prohibition or any other form of court order at the relevant time.

[29] The accused did go to trial to argue self-defence, but also gave a full and frank acknowledgement of his actions to police. In a statement to the court he expressed remorse for shooting his brother, as he did to the probation officer during preparation of the PSR. He apologized for his actions and said “looking back on it, there were other ways to get out of the situation.”

Disposition

[30] Having regard to the principles of sentence and to the aggravating and mitigating factors noted above, the accused is sentenced to 4 years incarceration for the aggravated assault, s.268. A consecutive sentence of 8 months is warranted

for uttering the threats, s.264.1, however some reduction is also warranted, under the totality principle, given the accused's age and fragile mental health. Consequently the sentence on the s.264.1 is reduced to 4 months, consecutive, for a global sentence of 4 years and 4 months, being 52 months. Mr. MacEvoy is entitled to a credit for time spent on remand which equates to roughly 9 months. In the result, he is committed to a federal penitentiary for a period of 43 months from today's date.

[31] A DNA order is made, as a primary designated offence, under s.487.051. A lifetime ban on the possession a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance is imposed under s.109. An order that the accused have no contact with any of the victims – Allister MacEvoy, Heather MacEvoy, Dawson Kirk, Ashton Kirk - while in custody is made under s.743.21. The firearm and ammunition seized by police are forfeited.

Ross, A. Peter, JPC