IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Dupuis, 2007 NSSC 136

Date: 20070419
Docket: CR. Am. 274661
Registry: Amherst

Between:

Carrie Lee Dupuis
and
Crystal Mary Anne Schipper

Appellants

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice J.E. Scanlan
Heard:	19 April 2007, in Amherst, Nova Scotia
Written Decision:	26 April 2007
Counsel:	Mr. Douglas B. Shatford, Q.C., for the appellants Ms. Michelle James, for the respondent

By the Court:

[1] This is an appeal by two individuals who were convicted in relation to a breach of a no contact order included in a probation order. The matter was heard by Judge Beaton. At the beginning of her decision she noted that the burden falls to the crown to establish the elements of the offence to a standard of proof beyond a reasonable doubt. She referred to the presumption of innocence attaching to each of the accused, and that it remained there until the court has an opportunity to listen to, consider and assess all of the evidence, taken as a whole.

[2] I am satisfied the learned trial judge did in fact, as I review the decision, give the appellants the benefit of the doubt throughout the trial. The issue before the court is not so much on the factual situation, but at law as to whether or not there was any error made by the trial judge in determining that the offence had been made out.

[3] There was a probation order which prohibited "contact", and the trial judge noted, at page 5 of her decision that:

> The word "contact" is different from the word "communication", but contact should never, in my view, be interpreted so broadly as to mean that parties can't go about their usual and ordinary business.

Mr. Shatford, during his submissions at trial, made a valid point; in a small town like Amherst you can't expect that people will not have incidental contact. They will run into one another in various places throughout the town. It's almost unavoidable if you live in a small town like Amherst.

[4] The question, however, in this case was not whether there was incidental contact, where they happened to see one another in this small town. On November the 12th, 2005, as Judge Beaton found, there was more than a simple matter of them being at the same place at the same time. She said that Ms. Dupuis and Ms. Schipper...and I'm referring to page 5 of her decision again:

> Ms. Dupuis and Ms. Schipper delivered their smirk, a negative gesture, and Ms. Schipper delivered the finger, another negative gesture. So although there were no

> words spoken, it most certainly was a form of contact and a form of communication both.

[5] The judge referred to situations where there was not a requirement for physical contact, but there would be contact without verbal communication. She referred to, by way of illustration, a situation where somebody might draw their finger across their neck from left to right. That didn't happen here, but I think it is an appropriate analogy. In other words, you can communicate, you can have contact if there is the incidental placement of the people at the same place at the same time, accompanied by physical gestures.

[6] In terms of the trial judge, the trial judge said that Crystal Schipper was the one who made the finger gesture, and in relation to the finger gesture the trial judge noted, at page 4 and 5 of the decision, she said:

> I'm left in no doubt, by the whole of the evidence, that Ms. Schipper accompanied her smirk with a gesture where her middle finger was extended while her other fingers were not. The gesture is commonly known as "the finger". It might mean different things to different people, but I think the reasonable, objective person would say that "the finger" has never been a positive gesture. There's nothing friendly or positive about it, regardless of whether one's interpretation is, as Ms. Bragg's was, that "somebody should fuck off".

[7] Objectively, I suppose if you were looking at two people on a golf course or someplace else and having fun and carrying on in terms of a golf game as suggested by appellant counsel, you might not have negative connotations surrounding such a gesture. In the context of a person who has a no contact order in relation to another person, and they decide they're going to go by and gesture with the middle finger, objectively I think anybody that viewed that situation would say there's nothing positive about it. I don't know that I'd go so far as the trial judge and say it could never be positive. Sometimes it's just in fun, and it means nothing. In other situations, the situation that you have here, it wasn't in fun, she shouldn't have been doing it, there was a no contact order.

[8] The trial judge was right in her determination that the word contact should not be interpreted so as to prevent people from going about their ordinary business. In the context of having a no contact order, they can go about their ordinary business, but they can't go around giving the finger to the individuals that they're not supposed to be contacting. That's a form of communication. It's not positive. When you do it, you do it in the face of an order which prevents or prohibits contact. I am satisfied that the case as determined as against Ms. Schipper, that there was no error.

[9] The difficulty I have with the trial judge's decision relates to the conviction of Ms. Dupuis for the smirk. The crown referred, at page 7 of its brief, to the *Oxford English Dictionary* definition of smirk "to smile in an irritatingly smug or silly way". The crown suggested initially that the normal route of egress is to go out in some other direction than that was taken by the two appellants in this case. The complainant herself says she did the U-turn, so I'm not sure what the normal route of egress is in terms of the parking lot. The trial judge didn't make a specific finding as to what the normal route is, and I don't know if she necessarily could.

[10] I have some difficulty, when I look at the evidence and apply the law. I refer to the *Legere* case. Like the *Legere* case, the appellant in this case exited the Tim Horton's in a way that was used by at least one other individual. Exiting that way was not prohibited. She smiled "in an irritatingly smug or silly way", if you use the *Oxford English Dictionary* definition. If you use the judge's description of it, she said at page 4 of the decision:

> There was no suggestion in the evidence of Ms. MacKay who, in my view, at the time that the smirk was delivered, would have been in a position to be objective and without any bias about what was happening at that moment, that the smirk was instead a grin or a smile or an acknowledgement that was in any way positive.

[11] At law, I'm concerned that you have convictions in a situation where it's really not clear what's intended by a person's facial gestures, or their facial expressions. A person who has a no contact order who has incidental contact, I'm sure would be at a loss as to whether or not they smile, they don't smile, they frown, whatever. To have a conviction based on a smirk, I think puts an accused person, or person that is the subject of a no contact order in an almost impossible

situation, whereby incidental contact combined with almost any facial expression could lead to a conviction. That is certainly not what's intended here.

[12] In terms of the situation with Ms. Dupuis, as compared to the situation with Ms. Schipper, there was no accompaniment of whatever the facial expression was; positive, negative or non-expression, there was no accompaniment with the hand gesture. I'm satisfied that in terms of the conviction by Judge Beaton, if she had applied the test of proof beyond a reasonable doubt correctly, there would be a question in her mind as to whether or not the facial expression amounted to contact, as opposed to simply part of the incidental, running into one another in the parking lot. I'm satisfied that it would be an error in law for the trial judge to convict Ms. Dupuis, but that there was no error in law in the conviction of Ms. Schipper.

J.