

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R v. Ginnish, 2008 NSSC 265

Date: 20080306

Docket: SN CRS 285725

Registry: Sydney

Between:

Her Majesty the Queen

v.

Albert Charles Ginnish

Judge: The Honourable Justice Frank Edwards

Heard: March 5 and 6, 2008, in Sydney, Nova Scotia

Written Decision: September 10, 2008

Counsel: Darcy MacPherson, for the Crown
Darlene MacRury, for the Defence

By the Court (Orally):

[1] Mr. Ginnish is charged in a six count Indictment, two counts of knowingly uttering a threat to kill Tina Paul, once in December 2005 and once on February 24, 2006; one count of assault in December 2005 and one count of assault causing bodily harm on the 24th of February, 2006, and two breaches of probation again on those respective dates.

[2] During the trial of the matter, the Accused took the witness stand. With respect to the February 24, 2006 event, he made a complete denial that he had even seen, let alone assaulted, Tina Paul on that date. He acknowledged that there was an incident in December where he had called her a rat and ordered her out of his mother's house but he denied he had pushed her or threatened to kill her.

[3] The Accused recounted his whereabouts on February 24, 2006. He says that he went to Nia Joe's on Park Street sometime in the late afternoon. He says he arrived there before dark. In other words, he was no where near Membertou he says when the assault on Tina Paul took place and, as I will explain later, I find that that happened between 8:45 p.m. and 9:15 p.m. He testified that he had no idea before coming to court, presumably he was referring to the preliminary in

September of 2007, that the assault was supposed to have taken place at his mother's residence, which I will sometimes refer to as the Kabatay residence. I do not believe him. He and his alibi witnesses testified about an encounter he had that night, that is the night of the 24th, with John Paul, Tina's brother. John Paul had come to Nia Joe's and put a beating on the Accused because of what the Accused had done to his sister. After that the Accused says he called his mother's home from a friend's house to find out what was going on. He then called his aunt's house. Given the size of the community, I find it incredible that he would not have learned where the assault had allegedly occurred long before coming to court in September of 2007.

[4] He avoided the police until April of 2006. I do not accept that that was because he was afraid of being charged with breach of probation. I am satisfied that his avoidance of police is an indication of his consciousness of guilt regarding the charges presently before the court.

[5] The Accused's record was put to him on cross-examination. The record is of little assistance in weighing credibility. I will put the offences in the written version of this decision but I will not take time to read the entries right now. Those

convictions which are not for crimes of deceit like theft or fraud, are of little assistance in assessing credibility. The same with Tina Paul. A couple of convictions for assault with a weapon were put to her and on the same token, where they are not crimes of deceit they are of little assistance in assessing credibility.

Section 733.1 CCC breach of probation sentenced 20 July 2007, 1 day custody, probation 1 year concurrent;

Section 145(3) CCC fail to comply with conditions sentenced 20 July 2007, 1 day custody, probation 1 year concurrent;

Section 145(3) CCC fail to comply with condition sentenced 09 July 2007, custody - secure 15 days concurrent;

Section 266 CCC assault sentenced 24 Oct 2005, probation 2 years;

Section 267(a) CCC assault with a weapon causing bodily harm sentenced 24 Oct 2005, 2 years probation;

Section 145(3) CCC breach undertaking sentenced 27 May 2003, probation 1 year suspended;

Section 145(3) CCC breach of undertaking sentenced 27 May 2003, probation 1 year suspended;

Section 264.1(1)(A) CCC uttering threats sentenced 31 Oct 2002, custody, probation, conditional 3 months concurrent;

Section 264.1(1)(A) CCC uttering threats sentenced 31 Oct 2002, custody, probation, conditional 3 months concurrent;

Section 264.1(1)(A) CCC uttering threats sentenced 31 Oct 2002, custody, probation, conditional 3 months concurrent;

Section 145(3) CCC breach of undertaking sentenced 27 Feb 2002,
custody secure 30 days concurrent.

[6] However, as far as Mr. Ginnish is concerned, being on probation for assault as he was at the time of these offences, he no doubt realized that he was in serious trouble after his encounter with Tina Paul. I am satisfied for reasons that I will explain that the encounter took place. I am satisfied that immediately after Tina Paul had left his residence on February 24, 2006, the Accused went to Nia Joe's and convinced those present that they should alibi him by saying he was there all evening. That explains why Nia immediately began calling Anna Paul demanding to know about Tina Paul. The first call received before 10 o'clock p.m., that is before Tina Paul had even gone to the hospital.

[7] I must say I unreservedly accept the evidence of Anna Paul. She was a truthful and straightforward witness. Nia Joe however was the exact opposite. Her denial of the call she made to Anna Paul is a graphic example of her total disregard for the truth. I also reject the evidence of Jacob Marshall, Sherry Paul, Celia Marshall. They are lying when they say the accused was with them at Park Street at the time of the assault on Tina Paul. They are misguided friends lying to help a friend.

[8] As to the whole of the evidence of the Accused, I do not believe him.

Further, even though I do not believe him, I must consider whether his evidence raises a reasonable doubt as to his guilt regarding the offences charged.

Unequivocally, it does not. I must therefore turn to the evidence which I do accept to determine whether the Crown has proven its case beyond a reasonable doubt.

[9] Tina Paul described how she was assaulted by the Accused on February 24, 2006. She had entered the front door of the Kabatay residence, as I mentioned, the Accused's mother's home. The front door opens into the kitchen area of the home. She described how the Accused got up from a chair at the table, called her a rat, "Grabbed my shoulders and arms. Pulled my hair. Pushed me down and punched me in the eye." She says she was punched more than once, first in the right eye and that she started blacking out. When she came to, she crawled to the door and started running. Tina Paul then ran to Anna Paul's house a short distance from the Kabatay residence. Anna Paul was home and was looking out the window when she saw a girl fall in front of her house. She did not immediately recognize her niece. It was approximately 9:15 p.m. Carla Johnson then came in and told Anna that there was a girl on her step. Anna went outside and recognized Tina. Anna

then brought Tina inside. She said Tina was full of blood, her hair was falling out in chunks, there were cuts on Tina's head and her mouth was bleeding. Within minutes Anna noticed a police car outside. She ran out and flagged it down.

Constable Bradstreet of the RCMP Membertou Detachment entered the house and observed Tina. He immediately took photographs which are numbers 1, 2 and 3 in exhibit 2. A couple of days later he took the other photos which are in the exhibit.

Anna then convinced Tina, who initially was reluctant, to go to the hospital.

Exhibit 3 notes that Tina was seen in the emergency department at 10:29 p.m. that night.

[10] Tina was unable to say exactly when she went to the Kabatay residence. I am satisfied however that she suffered her injuries no more than a half hour, and probably much less than that, before she arrived on Anna Paul's doorstep at 9:15 p.m.

[11] Tina Paul also described an incident in December of 2005 at the Kabatay residence where the Accused had called her rat, pushed her off a chair onto the floor and threatened to kill her or have someone else do it. Her friend Frank

Marshall was there and helped her get out. She said she received a bruise on her arm and leg.

[12] I have carefully considered the evidence of Tina Paul. She admits that on February 24, 2006, she was drunk. However, to her credit, she did not try to minimize the extent of her impairment. She was forthright when she said she was a seven or eight on a scale of ten, ten being the most extreme intoxication. I have also considered how that impairment and consumption of alcohol and marijuana would affect her recollection.

[13] I have also considered her record to which I have already alluded and as I say, because it does not involve a crime of deception, it does not help me with her credibility any more than it did with the credibility of the Accused.

[14] I carefully scrutinized Tina Paul's answers in cross-examination, and in particular, those areas where she was confronted with what she had said in police statements or at the preliminary inquiry. I have subjected her evidence to an appropriate degree of skepticism given the seriousness of the matter before me. I am satisfied that what she describes happening after the first blow was struck but

before she came to and crawled out the door is more reconstruction than recollection. In other words, I doubt that she would have had the ability to recall what happened after the Accused punched her the first time in the area of the right eye. Her evidence from that point until she came to is more in the nature of a presumption that she would have fought back for example and, based on seeing the photos, that she was struck more than once. I am satisfied that no doubt she was. That is the only reasonable inference one can draw from the photographs and the medical evidence which is before me. But despite the fact that she quite understandably filled in the gaps in what she actually consciously remembers, she was not shaken on the central fact that her assailant was the Accused. I watched her carefully throughout her testimony. I have no doubt that she is telling the truth when she says she was assaulted by the Accused both in February 2006 and in December 2005, and that on each occasion he threatened to kill her. In short, I am satisfied of the guilt of the Accused beyond a reasonable doubt and I find him guilty as charged on each count on the Indictment.

J.

THE COURT: We will need a date for sentence and that will be sooner rather than later because I intend to remand the Accused in custody pending sentence. Both because of the fact that his status is now changed, he is no longer an accused person, he is a convicted offender and, given his track record, I have great concerns about his potential for violence now that he has been found guilty if I were to leave him out of custody pending sentence. I take it given the recency of his recent convictions that it shouldn't take too long to get an updated pre-sentence report. I assume that there ...

MR. MACPHERSON: I can't say that a pre-sentence report exists. He may be in a better position to answer that question.

THE COURT: Do you know, Ms. MacRury?

MS. MACRURY: To my knowledge there's no pre-sentence report ever done on Mr. Ginnish.

THE COURT: No pre-sentence report? Then we will have to order one. And of course, Ms. Paul will have the opportunity to submit if she wishes a Victim Impact Statement. Given the fact that he is going to be in custody pending sentence, perhaps we can ask the corrections people to attempt to expedite the normal time required, or to shorten the normal time required for preparation of the pre-sentence report. I checked with my schedule prior to coming in, I see I am available ... what is the date in May?

THE CLERK: May 8.

THE COURT: May 8th? Counsel available at that time?

MR. MACPHERSON: I am scheduled to be in another court on that date.

THE CLERK: May 9.

THE COURT: May 9th?

MR. MACPHERSON: Yes.

THE COURT: Ms. MacRury?

MS. MACRURY: That's fine ... that's fine, My Lord.

THE COURT: May 9 at 9:30.

MR. MACPHERSON: Thank you, My Lord.

THE COURT: That's assuming that a pre-sentence report can be had by then. Surely if they know he's in custody they can accommodate us. Okay. We'll adjourn.

COURT CLOSED

TIME: 3:48