SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Young*, 2013 NSSC 441

Date: 20130308
Docket: CR SAT 411674
Registry: Antigonish

Between:

Her Majesty the Queen

v.

Francis Mark Young

DECISION

Judge:	The Honourable Justice Peter Rosinski
Heard:	March 8, 2013, in Antigonish, Nova Scotia
Oral Decision	March 8, 2013
Written Decision:	March 4, 2014
Counsel:	Andrew O'Blenis, for the Crown Eugene Tan, for the Defendant

By the Court:

[1] This is the matter of the decision in *Her Majesty the Queen v. Francis Mark Young*, CR-Antigonish 411674. Mr. Young is before the Court on an Indictment of four (4) counts to which he has pled not guilty today.

[2] The first one of those is in relation to the offence under section 264.1(1)(a) of the *Criminal Code*, a threat to cause death to Florence Kirk, all these offences alleged on October 25, 2012. There is no dispute that there were incidents on that date.

[3] The second count is a count under section 139(2) of the *Criminal Code*, a 'wilfully attempt to obstruct the course of justice' in a judicial proceeding by uttering a threat to Florence Kirk.

[4] The third count is an allegation of a breach of a recognizance entered into, and that he failed without lawful excuse to comply with that by failing to not contact or communicate with or attempt to contact or communicate with directly or indirectly Florence Kirk among others, contrary to section 145 of the *Criminal Code*.

[5] The last count is of the same recognizance being in violation thereof, failing without lawful excuse to comply with that condition thereof – that is to keep the peace and be of good behaviour, contrary to section 145(3).

[6] In this trial, I heard from a number of different witnesses. The primary witnesses in many respects or the greater number were deputy sheriffs who were present and/or had contact with Mr. Young on October 25, 2012. At that time, Mr. Young was in custody and he was appearing before Judge Laurie Halfpenny-MacQuarrie of the Provincial Court in relation to the undertakings which he was allegedly in breach of.

[7] There were, at that time at least, outstanding Informations alleging offences on October 9, 2012 regarding an assault on Florence Kirk having occurred that day, and also a breach of an undertaking, fail to keep the peace and be of good behaviour, section 145(3) of the *Criminal Code*.

[8] Similarly, there was an allegation on October 11, 2012 that he had …. and it is attached as Appendix "A", and there are six counts in relation to that Appendix. And those matters formed the basis in part for the bail hearing that had been scheduled for that day before Judge Halfpenny-MacQuarrie, and which would have

seen him have the reverse onus to show why he should be released in the circumstances.

[9] We have the exhibit of the Court proceeding here today, and it is also reduced in part here to a transcript which is in this case, Exhibit 5. I have listened to not only the disk here, but have gone back to listen to the original recording from Court as well, which is the source recording from which the disk was made.

[10] Before I address that, I will just note that I heard from the sheriff deputies here, and I do not think their evidence was very much in dispute really. I found them to be certainly honest in their giving of their testimony and generally definitely reliable in what they saw and heard which was buttressed by the Court recording that is available as an exhibit here too.

[11] As to Ms. Florence Kirk, the civilian witness, she testified. I found her evidence generally to be candid. She was not testifying with an axe to grind, it did not appear. And generally, I found her to be credible in relation to her testimony.

[12] It does not appear there is much dispute about the proof of the date, time, or place, the identity of Mr. Young, that he was here in Court, the fact that there was this recognizance in place which we have here in this case, Exhibit 1, which bound him on that date it was effective with the conditions as shown. As well, we of

course have the exhibits which are the two Informations I referred to, the October 9th and 11th allegations, Exhibits 2 and 3. So that is, if you will, the basis of the evidence that I had before me today.

[13] Turning then to the specific counts here, count number 1 specifically reads:

> THAT on or about the 25th of October 2012, at or near Antigonish, Nova Scotia, did by spoken word knowingly utter a threat to Florence Kirk to cause death to Florence Kirk, contrary to section 264.1(1)(a) of the *Criminal Code*.

[14] The law in relation to that, and counsel have referred to some cases on the offence of threats. I do note there is a more recent case of January 17, 2013 from the Supreme Court of Canada, *Her Majesty the Queen v. O'Brien*, 2013 SCC 2, specifically at paragraphs 5, 7 and 11 of that decision which sets out the law. This was, of course an appeal from a trial judge. This is Justice Fish for himself, Justice Cromwell, Justice Moldaverm, and Justice Wagner. At paragraph 5 he says:

> [5] In her brief reasons for judgment, delivered orally, the trial judge held — correctly, in my view — that the *actus reus* of the offence created by s. 264.1(1)(*a*) is "the actual speaking or uttering of the threats of death or serious bodily harm". And, again correctly, the trial judge held that the *mens rea* "is that the words are meant [to convey] a threat. In other words they are meant to intimidate".

He goes on to say at paragraph 7:

> [7] Speaking for the Court in *R. v. Clemente*, [1994] 2 S.C.R. 758, at p. 763, Cory J. stated:

> Under the present section the *actus reus* of the offence is the uttering of threats of death or serious bodily harm. The *mens rea* is that the words be spoken or written as a threat to cause death or serious bodily harm; that is, they were meant to intimidate or to be taken seriously. [Emphasis deleted.] See, to the same effect, *R. v. McCraw*, [1991] 3 S.C.R. 72, at p. 82.

And then at paragraph 11 in this case, Justice Fish quotes Justice Cory. He says:

> [11] As Cory J. explained in *Clemente*, at p. 762:
>
> . . . the question of whether the accused had the intent to intimidate, or that his words were meant to be taken seriously will, in the absence of any explanation by the accused, usually be determined by the words used, the context in which they were spoken, and the person to whom they were directed.

I might note as well in paragraph 13 that Justice Fish says:

> [13] I agree with the Crown that it is not an essential element of the offence under s. 264.1(1)(*a*) that the recipient of the threats uttered by the accused feel intimidated by them or be shown to have taken them seriously. All that needs to be proven is that they were *intended by the accused to have that effect*.

[15] So that is the Majority decision in that case and the law. Now in this case, I listened to the tape. And I listened to the tape specifically to hear the context of the comments that are captured on the transcript on page 32, specifically at line 10 after Mr. Young has made some comments. And then he says, "I'll hang you" – the transcript says. "I'll call and make fucking dot-dot-dot (…)" – and there was some confusion what that was. So I tried to listen on the disk that was provided in Court, and it was very unclear.

[16] However, when you go to listen to the tape, the original recording from which that tape is made, I distinctly heard the following "I'll hang you. I call and make fucking complaints dot-dot-dot (…)" and then it's cut off. Now on its face, I find as a fact that is what was said.

[17] On its face, "I'll hang you" could be a threat to cause death. But although Ms. Kirk and the police took it as a threat, the question to the Court is: Would a reasonable observer also conclude it as a threat to cause death, and is it so proved beyond a reasonable doubt?

[18] Using an objective standard, that of a reasonable person, I conclude that to a reasonable person, those words in the circumstances, while they contain overtones of violence given Mr. Young's angry state, the motivation to direct his anger specifically at Ms. Kirk at that time as she was the complainant and witness in the charges against him and her reaction to those words, those words are, however, nevertheless not a threat to cause death proved beyond a reasonable doubt by the Crown.

[19] I have a reasonable doubt specifically in relation to the question of whether Mr. Young had the intention to intimidate in a fashion that was not legitimate in all those circumstances at that time by uttering words that he did.

[20] And there is always some issue as well about whether the words – specifically "I'll hang you", were perhaps a metaphor for something else. Nevertheless, in the end though, I am left in a reasonable doubt about whether the elements of the offence have been proved for count number 1, and I find Mr. Young not guilty on that count.

[21] Regarding count number 2, the obstruction count, it is not directly on-point, but there is a Supreme Court of Canada case recently, *Her Majesty the Queen v. Barros*, 2001 SCC 51 which is a police-informer situation and the investigation of that. But they also discuss obstruction, and they specifically refer back to *Her Majesty the Queen v. Beaudry*, 2007 SCC 5 at paragraph 52.

[22] And if I go to the *Beaudry* case at paragraph, essentially between that and the other governing cases of the Supreme Court of Canada is *Graham*, 1988, 1 S.C.R. 214, I come up with the following, basically essential ingredients, in order to be found guilty of this offence under section 139(2) of the *Criminal Code*: the act has to tend to defeat or obstruct the course of justice; and secondly that the question is whether the accused did in fact intend to act in a way that tended to obstruct the course of justice. I note that acting in good faith may preclude a

finding of intention to obstruct the course of justice. And that was an issue in part in *Barros*.

[23] In the particular case here, I find that Mr. Young has not been proved beyond a reasonable doubt to have intended to act in a way having the tendency to obstruct the course of justice. He in open Court and in anger was making Ms. Kirk aware of his intention to attack her credibility should the October 9th and 11th allegations go to trial. While it could be an attempt to obstruct the course of justice, in these circumstances I have a reasonable doubt, however, whether the elements of that offence have been proved. And so I also find him not guilty of that offence.

[24] In relation to counts 3 and 4, Mr. Young was clearly subject to the recognizance which had conditions that were very specific to Ms. Kirk, one in particular: He was to not contact or communicate with her, attempt to contact or communicate with directly or indirectly Florence Kirk or Robert Lace or Gordon Burns except indirect contact through a lawyer.

[25] He was clearly in open Court in violation of that recognizance when he deliberately turned to and directly looked at Florence while making comments attacking her credibility. And she testified that she had in October and November

of 2012 ongoing concerns for her safety. And when he spoke to her on October 25th she testified, "He was just angry," and, "I was just scared."

[26] Confirming that, was the evidence of Deputy Sheriff Ryan who testified that, in turning deliberately around and talking to Ms. Kirk, he was looking directly over her, therefore directly at Ms. Kirk, and his face and tone was in her words, "very, very angry." And that Ms. Kirk exhibited symptoms of being, "terrified," and that she was quite shaken, her eyes where welling-up, and whatever other factual observations she could have articulated in relation to that. But that was her conclusion, being present and looking directly at Ms. Kirk immediately around the time of that spoken context.

[27] So while Mr. Young had to be in Court, when he turned around and spoke to Florence Kirk specifically, he deliberately and flagrantly violated both of the conditions in his Probation Order, that being the condition not to have contact. Once that offence has been established, and it is so inherently closely connected to the recognizance, then I also find proof beyond a reasonable doubt of the failure to keep the peace and be of good behaviour without lawful excuse. And therefore I do find him guilty of both counts 3 and 4 of the Indictment.

SENTENCE

[28] This, then, is the matter of the sentencing in relation to Francis Mark Young for two offences. Both proceed indictably under section 145(3) of the *Criminal Code of Canada*. They are contained in the Indictment.

[29] The first one, in summary, is a failure without lawful excuse to not have contact or communication with Florence Kirk. And the last, count 4, is to keep the peace and be of good behaviour which was a condition of a recognizance under which Mr. Young was operating on October 25, 2012.

[30] I note Mr. Young's birthday appears to be December 3, 1979. And so that would suggest that Mr. Young is about 34 years of age. Whether it is exactly accurate, I have not done the math, but the transcript in Court he had made the suggestion that he had spent 23 years or at least maybe accumulated 23 years in sentences in federal institutions. Certainly the record bears out quite a number of – between the CPIC and the provincial records – does bear out quite a number of incarcerations in federal institutions.

[31] I will turn first to the facts here. Just briefly the facts in relation to this were found by me after trial. But they involved Mr. Young and Ms. Florence Kirk. They had met in, I believe, May of 2012, started dating in August 2012, and

shortly after that time period moved collectively to Antigonish sometime in September of 2012. As a result of the move, neither one of them having work initially, stress began to rear its head financially as it were which led to stress as between them in their relationship, living in the mini-home which they had occupied.

[32] There were charges, if you will, criminal charges, an Information alleging offences of October 9, 2012 and October 11, 2012. Ultimately the October 9th matter was dismissed for want of prosecution. The October 11th matter, five of those charges did proceed and were dealt with by way of sentence on December 20, 2012. The sentence was suggested to be three months. But deducting 32 days' remand, it turned out to be a two-month sentence and one year probation. And that was in relation to five breaches of section 145(3) of the *Criminal Code*.

[33] Specifically on October 25, 2012, Mr. Young was in Court in relation to a reverse-onus bail hearing situation. He was unrepresented at the time, having dismissed or discharged his lawyer, Mr. MacDonald. The transcript was made available to me, and I understand the circumstances.

[34] Also in Court that day, and virtually the only other people in the body of the Court, were a Victim Services person and Ms. Florence Kirk who had an interest, she testified, in seeing the outcome of the bail hearing.

[35] Mr. Young I found, and there was not much dispute actually, in custody and shackles and handcuffs turned towards the end of that proceeding and specifically looked directly at Ms. Florence Kirk and made comments to her, apart from comments he had perhaps already made earlier about her potential credibility problems in an upcoming trial. Having done so, he of course deliberately violated the no-contact order. It was in my view certainly a serious violation of that order because, although it was in open Court, one could say, Mr. Young was not trying to hide anything. But on the other hand, if you want to look at it differently, it is the level of disregard, if you will, for the Court's authority, that being under the recognizance or just the Court itself in open Court, is remarkable.

[36] I will say, although I found that there was not a threat to cause death as charged, that the type of behaviour in those circumstances, where Ms. Kirk was a complainant and witness in a domestic assault situation, regardless of the outcome, which was slated for trial at some point later after October 25, 2012, is also a very serious matter.

[37] Although the threat was not found to have been proved beyond a reasonable doubt, unspoken words, the tone of voice, just the turning, the audacity to actually speak directly to a witness with whom one is not to have any contact of any kind – in fact, supposed to stay 1000 meters away from their place of residence – can and often does have a significant effect on that type of witness and victim of domestic abuse. And I use the term "victim" in the sense of the allegation.

[38] In my view, it was flagrant behaviour in the Court. I understand Mr. Tan's submission that Mr. Young was frustrated. But nevertheless, the conduct was flagrant, and it was particularly flagrant as well because of the reality that Mr. Young had on so many previous occasions violated Court orders. So I do consider the offence here – and the fail to keep the peace and be of good behaviour just flows from that and reiterates that.

[39] But it is very serious, I think, this offence from the point of view of the facts, from the point of view of the prior record of Mr. Young which I have before me and there are, as pointed out by the Crown, in total now 40 convictions under section 145, the bail condition breach, or section, and section 733 breach of probation, the previous section on his record.

[40] That is in addition to Mr. Young's record. I am not going to re-sentence Mr. Young on his record. But I do note that his record starts according to the information I have, where the sentencings start in 1996 as per the copy I have under the Bail Report, the JEIN Person ID Report, tendered as Exhibit 6. And Exhibit 7 shows that actually the record starts in 1993. And if you look at it collectively, I do not think you will likely find a year in the calendar that was missed where Mr. Young did not have conviction, and some them for really serious offences. We certainly have break-and-enters and thefts, a great number of those. We have more than once, robbery, assaulting a police officer. And I realize some these are Correctional Officers, but they are no less entitled to protection. Assault police officer, possession of weapon. Again, I realize some of these were pointed out to be in an institution. Carrying concealed weapons, the many breaches, and most recently in Springhill. A conviction as well in Miramichi in December 2010, 90 days consecutive for assault with a weapon. And then of course we do have that expanded upon by the provincial recitation of offences which, as I say, are pretty significant when they are all taken together. So that is also an aggravating factor in sentencing here.

[41] The other aspect that is aggravating here is that there are very recent offences here too. Although, sometimes you might have a gap in record where it

may be apparent that a person was headed in a better direction, and then had a bad break and things fell apart and they got into more trouble. But Mr. Young, you have pretty well continued relatively steadily to accumulate a criminal record, and that does not give the Court great confidence that your rehabilitation is going to be coming soon. It is really in your own hands, of course. But, it is a matter of law, an aggravating factor at a sentencing.

[42] Now I will say there is one other statutory aggravating fact in my opinion here as well. And under s. 718.2 of the *Criminal Code* which states as follows:

> A court that imposes a sentence shall also take into consideration the following principles
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> …
> (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner.

[43] I do not know if this specifically might fall under that section. But I do think the fact that this was an allegation, and I appreciate the outcome, what happened in the end. But at the time it was an allegation of domestic violence, and that in my view is an aggravating factor regardless of the outcome.

[44] Now mitigating factors, Mr. Tan was candid that in the sense that Courts are presented with them, there are not really any strong identifiable mitigating factors. Mr. Young, you are still a relatively young man at 34 years of age. So it is not like this has to become and remain in your life, but whether it will is up to you.

[45] I will turn then to then to the principles of sentencing here which I have to consider. And the principles are set out in the *Criminal Code* in section 718, and it says:

> **718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (*a*) to denounce unlawful conduct;
>
> (*b*) to deter the offender and other persons from committing offences;
>
> (*c*) to separate offenders from society, where necessary;
>
> (*d*) to assist in rehabilitating offenders;
>
> (*e*) to provide reparations for harm done to victims or to the community; and
>
> (*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

And that in some ways is also applicable here.

[46] Section 718.1 states:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Clearly here, Mr. Young was entirely responsible for the matter. It was only he that was involved.

[47] As to the gravity of the offence, as I have pointed out, I think it is a pretty serious offence for someone in an open Court to turn to the person who is a complainant and victim alleged in a domestic violence situation and basically make commentary to them in a heated tone such that it is perceived to be angry in tone and in gesture, if you will.

[48] So having said that, I will move on, then, to the recommendations here. The Crown suggests that there is a two-year maximum here for these two offences each. The Crown is suggesting a period of custody of one year and a period of one year to 18 months' probation to follow with conditions.

[49] The Defence, Mr. Tan, says that this was an unpremeditated outburst essentially in Court. Mr. Young was pushed by circumstances and because he does have as I read it, have some difficulty in restraining his anger at times that just finally he kind of lost it, and that is how the Court ended, and his outburst happened in relation to Ms. Kirk. He suggests that a period of custody of 1 to 3 months plus 12 to 18 months' probation is appropriate.

[50] We have assessed the remand time at 40 days, and the Crown says it should be the one-to-one credit. And the defence says it should be one and a half days to one day of remand time because of the double-bunking situation, not being available, or programming not being available and the travel to and from Antigonish from Burnside.

[51] In relation to these offences, I have concluded in relation to count number 3 which is the more serious count here that, given that there is a two-year maximum for any one breach under that one section, and I bear in mind the Supreme Court of Canada's comments in *Her Majesty the Queen v. L.M.*, 2008 SCC 31 about maximum penalties and how we should examine whether those are appropriate or not. Given those comments as well and the circumstances here of the significant previous record, as I say the disregard for Court orders, and then then that behaviour in Court, I do find that this is a significantly serious offence and one that does require a high level of deterrence.

[52] Having said that, I conclude that of the two-year maximum, I find that a period of one year custody is appropriate here, to be followed by 18 months' probation. And I will get to the conditions for that.

[53] In relation to the one-year custody, I do find that the remand time should be credited at one and a half days for the 40 days which works out to approximately 60 days or two months, so that the sentence as of today will be 10 months' custody to be followed by 18 months' probation on count number 3.

[54] On count number 4, the sentence will be 6 months' custody concurrent plus the 18 months' probation. So the complete total sentence will be 10 months' custody plus 18 months' probation.

[55] I will turn to the conditions of the Probation Order. They will be statutory conditions:

- To keep the peace and be of good behaviour;
- Appear before the Court when required to do so by the Court;
- Notify the Court or probation officer in advance of any change of name or address, and promptly notify the Court or the probation officer of any change of employment or occupation.

[56] As to the other conditions, now there are conditions here to Antigonish. I know files can be transferred so I think what I will do is order it to Antigonish. And then if the location of Mr. Young's residence is elsewhere, that can be done. So initially it will be to:

- Report to the probation officer in Antigonish within ten days of the date of expiration of the sentence of imprisonment and thereafter when required and in the manner directed by the probation officer;

- Remain in the Province of Nova Scotia unless written permission to leave the province has been obtained from your probation officer in advance;

- Undergo and successfully complete any counselling or program in relation to anger issues as directed by your probation officer, and any other counselling or program directed by your probation officer that is found to be appropriate.

Rosinski, J.