IN THE PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR
JUDICIAL CENTRE OF CORNER BROOK

Citation: *R. v. Lyver*, 2011 PCNL 1310A00102
Date: September 7, 2011

HER MAJESTY THE QUEEN
V.
JERARD LYVER

Before: The Honourable Judge Wayne Gorman

Place of Hearing: Corner Brook, NL.
Hearing Date: September 6, 2011,

Summary: A suspended sentence and 12 months probation was imposed upon the offender for breaches of sections 145(5), 264.1(1)(a) and 264.1(1)(c) of the *Criminal Code of Canada*, RSC 1985.

Appearances:
Mr. V. Khaladkar for Her Majesty the Queen.
Mr. S. Burden on behalf of Mr. Lyver.

CASES CONSIDERED: ***R. v. Muthoka***, 2011 MBCA 40, ***R. v. Briand***, [2010] N.J. No. 339 (C.A.), ***R. v. Naugle***, 2011 NSCA 33, ***R. v. B.S.M.,*** 2011 ABCA 105, ***R. v. Elsharawy*** (1997), 119 C.C.C. (3d) 565 (N.L.C.A.), ***R. v. Burke***, [1996] N.J. No. 179 (C.A.), ***R. v. Morgan***, [2003] N.J. No. 341 (S.C.), ***R. v. L.H.B.***, [2006] N.J. No. 149 (S.C.), ***R. v. Koc***, [2008] N.J. No. 161 (S.C.), ***R. v. Carrigan***, [2009] N.J. No. 305 (P.C.), ***R. v. Batt***, [2010] N.J. No. 137 (P.C.), ***R. v. Fong***, [2011] N.J. No. 66 (P.C.), ***R. v. Lavallee***, [2011] N.J. No. 54 (P.C.), ***R. v. Bottineau***, 2011 ONCA 194, ***R. v. Crocker***, (1991), 93 Nfld. & P.E.I.R. 222 (N.L.C.A.), ***R. v. Rowe*** (1995), 133 Nfld. & P.E.I.R. 20 (N.L.S.C.), ***R. v. Philpott***, [2011] N.J. No. 71 (S.C.), ***R. v. Johnston***, 2011 NLCA 56, ***R. v. Giovanninni***, [2005] N.J. No. 94 (P.C.), ***R. v. O'Keefe***, [2006] N.J. No. 290 (P.C.), ***R. v. Pardy***, [2009] N.J. No. 321 (P.C.), ***R. v. Whiteway***, [2010] N.J. No. 141 (P.C.) and ***R. v. Dunn***, 2011 NBCA 19.

STATUTES CONSIDERED: The *Criminal Code of Canada*, RSC 1985.

JUDGMENT OF GORMAN, P.C. J.
(SENTENCE)

INTRODUCTION:

[1] Mr. Lyver has been convicted of the offences of uttering a threat to kill Mr. Martell Pennell and his dog, contrary to sections 264.1(1)(a) and (c) of the *Criminal Code of Canada*, RSC 1985 (the *Criminal Code*). In addition, he pleaded guilty to having failed to appear for the purposes of the *Identification of Criminals Act*, contrary to section 145(5) of the *Criminal Code*. The Crown proceeded by way of summary conviction in relation to all counts. The sole issue for determination is the imposition of an appropriate sentence for these offences. For the reasons that will follow herein, I have concluded that this is an appropriate case for sentence to be suspended and for a period of 12 months probation to be imposed. Let me explain my reasons for this conclusion by commencing with a review of the evidence presented at the trial.

THE EVIDENCE PRESENTED AT THE TRIAL

[2] In my reasons for convicting Mr. Lyver of the two offences contrary to sections 264.1(1)(a) and (c) of the *Criminal Cod*e ([2011] N.J. No. 262 (P.C.)), I concluded as follows:

> I am satisfied that in early October, 2009, out of frustration caused by dogs defecating on his mother's lawn and Mr. Pennell's words and

> actions, Mr. Lyver threatened to kill Mr. Pennell and his dog. I am satisfied that he intended for these threats to be taken seriously and to intimidate Mr. Pennell.

THE GUILTY PLEA

[3] Mr. Lyver pleaded guilty to having breached section 145(5) of the *Criminal Code*. Mr. Lyver was released on a promise to appear in relation to the section 264.1(1)(a) and (c) offences. It required him to appear on January 25, 2010 at the Royal Newfoundland Constabulary for the purposes of the *Identification of Criminals Act*, RSC 1985. Mr. Lyver failed to appear on that date, but did subsequently do so.

THE CIRCUMSTANCES OF THE OFFENDER

[4] Mr. Lyver is 45 years of age. He was convicted in 1984 of causing a disturbance. Mr. Lyver completed the Correctional Officer Training Program at the College of the North Atlantic campus at Stephenville, in 2000. The pre-sentence report notes that Mr. Lyver "has worked within all the adult correctional institutions in the Province and most recently at the West Coast Correctional Centre at Stephenville, NL and HMP Lock-up at Corner Brook, NL. Mr. Lyver is currently under suspension without pay." Mr. Lyver told the author of the pre-sentence report that he "did not anticipate a favourable review from his supervisors. He related that he does not have a good history of working with Adult Corrections. Mr. Lyver related that he is more trusting

of the detained persons than he is of the staff\ management. He has stated that whatever the outcome of his grievance, he will not return to work as a correctional officer. He is researching available positions in other governmental departments."

[5] The pre-sentence report indicates that given the nature of Mr. Lyver's offences and "feedback from some of the sources contacted for this report, an anger management assessment would be appropriate."

THE POSITIONS OF THE PARTIES

THE CROWN:

[6] Mr. Khaladkar submits that a suspended sentence should be imposed for the two uttering threats offences and a fine for the failure to appear for the purposes of the *Identification of Criminals Ac*t offence. The Crown did not seek the issuing of any ancillary orders.

MR. LYVER:

[7] Mr. Burden submits that this is an appropriate case for the granting of a discharge.

THE CRIMINAL CODE OF CANADA'S SENTENCING PROVISIONS

[8] Section 718 of the *Criminal Code* states that the fundamental purpose of sentencing "is to contribute…to respect for the law and the maintenance of a just, peaceful, and safe society." This is to be achieved by imposing

sentences which have, among others, the objectives of separating offenders from society, where necessary; denouncing unlawful conduct; general and specific deterrence; rehabilitation; and the promoting of a "sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community."

[9] Section 718.2(d) states that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" and section 718.2(e) states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."

[10] Section 718.1 of the *Criminal Code* states that any sentence imposed must be "proportionate to the gravity of the offence and the degree of responsibility of the offender." In ***R. v. Muthoka***, 2011 MBCA 40, the Manitoba Court of Appeal considered section 718.1 and indicated that it "requires an examination of the accused's degree of guilt or moral blameworthiness with respect to the offence committed and the harm done to the victim to ensure that the sentence is in line with her 'moral culpability, and not greater than it...'" In ***R. v. Dunn***, 2011 NBCA 19, at paragraph 17, the New Brunswick Court of indicated that "...where denunciation and

general deterrence are predominant objectives in the sentencing process and where the offence is very serious and the moral blameworthiness of the offender very high, the removal of conditional sentences from the array of punishment possibilities significantly points the sentencing judge in the direction of a custodial sentence. “

[11] Section 718.2(a) of the *Criminal Code* indicates that a “sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.” In ***R. v. Briand***, [2010] N.J. No. 339 (C.A.), the Court of Appeal stressed the importance of considering an offender’s personal circumstances in applying section 718.2(a) of the *Criminal Code*.

[12] Section 718.2(c) indicates that “where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.” In ***R. v. Naugle***, 2011 NSCA 33, it was pointed out that there “are no specific provisions in the *Criminal Code* to guide a sentencing judge on when to select a consecutive as opposed to a concurrent sentence.” The Nova Scotia Court of Appeal concluded that “where multiple offences arise out of the same transaction, the Court must ensure that the selection of consecutive, as opposed to concurrent sentences, does not give rise to a sentence out of

proportion to the overall gravity of the conduct, or otherwise create a sentence that is unduly long or harsh."

[13] In ***R. v. B.S.M.,*** 2011 ABCA 105, the Alberta Court of Appeal concluded that "all one can ordinarily produce is a Frankenstein's monster, by trying to graft two or more precedents together":

> ...In theory, trying to set some outer limits for a sentence range by examining precedents has some utility, but in practice it is often unsatisfactory. Typically the outer limits are too far apart to be meaningful, and the facts are all over the map. Few if any cases really match on their facts; so all one can ordinarily produce is a Frankenstein's monster, by trying to graft two or more precedents together. Use of precedent for factual questions, especially for numbers for sentences or damages, is not usually a useful exercise: ***R. v. Arcand***, 2010 ABCA 363 (para. 216) and ***R. v. Hennessey***, 2010 ABCA 274, 260 C.C.C. (3d) 499 (para. 80). Both are reserved judgments. Cf. ***Bagby v. Gustavson Int. Drilling*** (1980) 24 A.R. 181 (C.A.) (para. 20). Instead, the value of sentencing precedent lies in its principles and (where given) its starting points.

[14] In ***R. v. Johnston***, 2011 NLCA 56, the Court of Appeal indicated that "while the range of sentence referred to in an appellate judgment, whether used in the descriptive or prescriptive sense, may be departed from in appropriate subsequent cases, there is a difference as to when the deviation can occur. Where the phrase is used as a descriptive term, the usage is based on a distillation of previous precedents cited to or analyzed by the court – the raw data, so to speak – to determine what has been done in the past. While a prescriptive sentencing range will tend to be fixed until it is varied

by the appellate court, a descriptive range (even when identified by the appellate court) will evolve as sentencing decisions accumulate, especially should new trends manifest themselves. The 12-24 month range used in *R. v. W.E.* should be seen in this latter light."

THE *CRIMINAL CODE'S* DISCHARGE PROVISION

[15] The Court's authority to grant an offender a discharge is found in section 730(1) of the *Criminal Code*. It states as follows:

> Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

[16] Thus, this provision allows the Court to refrain from entering a conviction, despite proof that an offence has been committed, if satisfied two prerequisites exist. The Court must be satisfied that a discharge is (1) in the best interests of the offender; and (2) not contrary to the public interest. In ***R. v. Elsharawy*** (1997), 119 C.C.C. (3d) 565 (N.L.C.A.), the Court of Appeal, at paragraph 3 indicated that the "first condition presupposes that the accused is a person of good character, usually without previous conviction or discharge, that he does not require personal deterrence or

rehabilitation and that a criminal conviction may have significant adverse repercussions."

SENTENCING PRECEDENTS-DISCHARGES

[17] In ***R. v. Burke***, [1996] N.J. No. 179 (C.A.), the accused, a former Christian Brother, was convicted of assault causing bodily harm in relation to a child at the Mount Cashel Orphanage in 1975 and sentenced to a period of one month imprisonment by the trial judge. On appeal, an absolute discharge was substituted.

[18] In ***R. v. Morgan***, [2003] N.J. No. 341 (S.C.), the offender assaulted his spouse by dragging her across the floor of their residence. He had no previous convictions. The trial judge accepted a joint submission and imposed a conditional discharge. However, in ***Johnston*** the Court of Appeal indicated that "that sentences resulting from an accepted joint submission are considered to have little or no precedential value."

[19] In ***R. v. L.H.B.***, [2006] N.J. No. 149 (S.C.), the accused was convicted of the offences of uttering threats and attempting to obstruct the course of justice. A conditional discharge was granted.

[20] In ***R. v. Koc***, [2008] N.J. No. 161 (S.C.), the accused was convicted of the offence of assault and sentenced to a 14 day conditional period of imprisonment. He appealed from the sentence imposed and sought to have a

discharge granted. The appeal was allowed and a discharge was granted. The appeal court judge concluded:

> In this case, the trial judge erred in his assertion that the different circumstances of the Appellant, that is, the immigration status of the Appellant, could not or should not be considered by the court in its determination of the sentence. This error resulted in a relevant factor being ignored or at the very least, underemphasized, which led to a demonstrably unfit sentence being imposed. The sentence resulted in excessive consequences for the Appellant who is now ordered deported from Canada. His spouse and young child, who are Canadian citizens, face either the break-up of the family and loss of the Appellant's financial support or relocation to Turkey with the Appellant.

[21] In ***R. v. Carrigan***, [2009] N.J. No. 305 (P.C.), the accused, a correctional officer, was convicted of the offence of assault causing bodily harm in relation to an inmate. In rejecting the request for a discharge to be granted, Pike, C.J.P.C., indicated "that given the circumstances not only of the individual offender and his criminal record but also the serious breach of public trust and the need to emphasize the principles of deterrence and denunciation that a discharge in these circumstances would be contrary to the public interest and therefore inappropriate." [my emphaisi]

[22] In ***R. v. Batt***, [2010] N.J. No. 137 (P.C.), the offender pleaded guilty to assaulting his spouse by pushing her as she was tying her shoe. I accepted a joint submission and imposed a conditional discharge.

[23] In ***R. v. Fong***, [2011] N.J. No. 66 (P.C.), the offender pleaded guilty to assaulting his spouse by striking her in the face with the back of his hand. I endorsed a joint submission that had requested that an absolute discharge being granted.

[24] In ***R. v. Lavallee***, [2011] N.J. No. 54 (P.C.), the offender pleaded guilty to obstructing a peace officer. I imposed an absolute discharge.

[25] In ***R. v. Pottle***, 2009 NLTD 192, the accused was convicted of the offence of assault with a weapon. She had raised an axe in her daughter's presence. She appealed from both conviction and sentence, in the latter instance seeking the imposition of a discharge. Both appeals were dismissed. As regards the appeal from sentence, the appeal court judge concluded (at paragraph 25):

> The sentence imposed is at the low end of the range for this crime. It is rare that a conditional discharge is given for assault with a weapon. The trial judge was alive to the serious consequences of the sentence that he chose (resulting in loss of employment) but felt that in the circumstances it was warranted. It is speculation on my part, but it seems likely that the trial judge focused on the need for deterrence and denunciation because a weapon was involved. That would not be unreasonable...

[26] In ***R. v. Bottineau***, 2011 ONCA 194, it was held that sentencing "is a fact-sensitive process. Imposing a sentence depends very much on the facts of a particular case and the circumstances and culpability of the particular offender. That said, the sentence imposed must be similar to sentences

imposed on similar offenders for similar offences committed in similar circumstances."

SENTENCING PRECEDENTS-FAILURE TO APPEAR FOR THE IDENTIFICATION OF CRIMINALS ACT

[27] In ***R. v. Giovanninni***, [2005] N.J. No. 94 (P.C.), a period of sixty days imprisonment was imposed upon the offender for failing to appear for the purposes of the *Identification of Criminals Act.*

[28] In ***R. v. O'Keefe***, [2006] N.J. No. 290 (P.C.), the offender pleaded guilty to the offences of mischief and failure to appear for the purposes of the *Identification of Criminals Act.* I accepted a joint submission requesting that a conditional discharge be imposed.

[29] In ***R. v. Pardy***, [2009] N.J. No. 321 (P.C.), I noted that the "purpose of the *Identification of Criminals Act* is to identify through fingerprints and photographs those charged with offences. This is an objective which has a significant societal benefit; which is achieved through very non-intrusive measures; and which is authorized by sections 501(3) and 509(5) of the *Criminal Code*. In sentencing for this offence, the Court is attempting to encourage compliance with a valid legislative goal." In ***Pardy***, I imposed a period of one month imprisonment.

[30] In ***R. v. Whiteway***, [2010] N.J. No. 141 (P.C.), I suspended sentence and placed the offender on probation for a period of 12 months for breaching section 145(5) of the *Criminal Code* by failing to appear for the purposes of the *Identification of Criminals Act*. These precedents do not suggest that a prescriptive range of sentence has been established.

SENTENCING PRECEDENTS-UTTERING THREATS

[31] In ***R. v. Crocker***, (1991), 93 Nfld. & P.E.I.R. 222 (N.L.C.A.), the Newfoundland and Labrador Court of Appeal indicted that sentences "for threats to cause bodily harm range up to one year although frequently it has been ordered that the sentence be served concurrently with sentences imposed for other crimes committed in conjunction with the threat."

[32] In ***R. v. Rowe*** (1995), 133 Nfld. & P.E.I.R. 20 (N.L.S.C.), the accused was convicted of a number of offences including the offence of uttering a threat. The accused became upset with the victim as a result of the victim having had a couple of dates with his former spouse. The accused went to the victim's store and, while wielding an axe, threatened to kill him. The trial judge imposed a period of four months imprisonment for this offence.

[33] In ***R. v. Sheppard***, 201I NLPC 0811A00044, the accused was convicted of assaulting and threatening to kill Gertrude Martin (see [2011]

N.J. No. 255 (P.C.)). The trial judge imposed periods of 90 days imprisonment on both offences to be served on a concurrent basis.

[34] In ***R. v. Philpott***, [2011] N.J. No. 71 (S.C.), the accused was convicted of the offences of assault with a weapon and uttering a threat to cause death or bodily harm involving his brother. The facts were described as follows:

> Gilbert Philpott, in response to his brother unplugging his stereo while he was trying to listen to it, picked up a bread knife and, in an attempt to get his brother to leave his apartment, swung the knife at him cutting both of his brother's hands. His brother was holding up his hands by his face at the time attempting to fend off any assault. The brother required stitches to his hands and had surgery for an injury to his left hand thumb. While medical treatment for injuries was required, there was minimal time spent at the hospital totaling approximately one day.

[35] Justice LeBlanc imposed a period of 15 months incarceration, which included a period of 1 month incarceration for the uttering a threat offence. Judge LeBlanc agreed with the proposition that the range of sentence for threats uttered in non-intimate relationships extended from a discharge to six months imprisonment. These precedents do not suggest that a prescriptive range of sentence has been established for the offence of uttering threats.

ANALYSIS

[36] Mr. Lyver has one previous conviction though it is dated. He pleaded guilty to breaching section 145(5) of *the Criminal Code*. His not guilty

pleas to the section 264.1(a) and (c) offences is not an aggravating factor, but for those offences he does not receive the mitigation that a guilty plea engenders.

[37] Mr. Lyver reacted violently in a situation which he easily became very upset. Mr. Lyver requires counseling in relation to anger management.

[38] I have concluded that this is not an appropriate case for resort to the discharge provisions. Mr. Lyver has been convicted of three offences and already has a criminal record. Two of his present offences involved public expressions of violence and one ignored a legal requirement to appear for identification. These identification procedures are of significant value to the administration of justice. I conclude that considering the number of offences committed by Mr. Lyver and the circumstances involved that a discharge would be contrary to the public interest. A discharge would fail to reflect the seriousness of the offences committed by Mr. Lyver.

[39] I conclude that this is an appropriate case for sentence to be suspended and for Mr. Lyver to be placed on probation for a period of 12 months in relation to each count. In addition to the statutory conditions the following additional conditions are imposed:

-Mr. Lyver must report to a probation officer in person as required;

-Mr. Lyver must attend all counseling or treatment sessions arranged by his probation officer, including any in relation to anger management, and strictly abide by all directions and arrangements as specified by his probation officer; and

-Mr. Lyver must refrain from having any contact or communication with Martell Pennell except that he must write a letter of apology to Mr. Pennell. This letter must be provided to his probation officer within 14 days of today's date.

A VICTIM SURCHARGE

[40] The imposition of victim surcharges would not constitute an undue hardship for Mr. Lyver. Thus a victim surcharge of $50.00 is imposed in relation to each count. Mr. Lyver has 30 days to pay the victim surcharges to the Provincial Court.

CONCLUSION

[41] For the reasons provided herein, sentence is suspended and Mr. Lyver is placed on probation for a period of 12 months.

[42] Judgment accordingly.