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R. v. Young

Between
Regina, and
David Young

[1997] O.J. No. 6214

Ontario Court of Justice (Provincial Division)
Newmarket, Ontario

D. Scott Prov. J.

Oral judgment: July 24, 1997.

(29 paras.)

Criminal law -- Sentencing -- Considerations on imposing sentence -- Seriousness of offence -- Protection of the public -- Previous criminal offences -- Denunciation or repudiation of conduct -- Sentence, particular offences -- Arson -- Killing or injuring cattle -- Threats.

Sentencing of the accused Young on charges of arson, threatening to commit arson, and killing cattle. Young was alleged to be a member of a motorcycle gang. He was arrested in connection with a threat to burn down a building and the subsequent fire at the building. The threat was made to discourage the owner of the building from reporting the theft of his vehicle. The owner lost substantial property and several cattle in the fire. Young had a prior criminal record which included several property offences.

HELD: Young was sentenced to five years imprisonment for arson, one year consecutive for threatening and a year and a half consecutive for killing the cattle. There was no other reasonable inference to draw but Young was connected with the motorcycle gang and organized crime. The arson was more serious than those committed for the purpose of collecting insurance proceeds. The offence was premeditated and calculated to threaten the victim. It was necessary to denounce this type of conduct. If not for the principle of totality, Young would have been sentenced to a longer period of imprisonment for the arson offence alone.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 264.1(b), 444(a).

Counsel:

Harold Dale, for the Crown.
Iain Donnell, for the accused.

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1 **D. SCOTT PROV. J.** (orally):-- In his submissions to sentence on this case Crown counsel has focused particularly upon motorcycle gangs and the members of motorcycle gangs, commonly known as "bikers". Mr. Dale called as a witness, Robert Lines, who is in charge of the "biker" squad of the Ontario Provincial Police. Mr. Lines was accepted by the Court as a qualified expert on motorcycle gangs and matters related thereto. He testified that both the Loners and Satan's Choice are established in the Keswick area. He explained that these clubs designate probationers as "strikers" usually for a minimum of six months before such person can become a member. He further explained that a "striker" must do whatever he is requested to do by any member. He stated that both Desroches and Archibald were members of the Loners but have since joined Satan's Choice as full members. He concluded his testimony by stating that his biker squad recognizes the biker gangs as a serious threat in Ontario.

2 Starting from this position, Mr. Dale submitted that, in the Young case, it is not a simple arson, but rather an act of terrorism against the community. He claimed that it is all about control of a community. He submitted that in these circumstances an arson following a threat to burn is a more serious arson than, for example, an "insurance fire". Counsel maintained that in sentencing Mr. Young denunciation should be paramount, together with deterrence, particularly general deterrence. Counsel suggests a penitentiary sentence in the range of five to seven years, less some period for the "dead time" from February 15 to July 9.

3 Specifically on the "biker" aspect of this case, Mr. Donnell maintained that there was no indication that Mr. Young or Mr. Desroches or any of these people were bikers. He said, "We had no information whether they were bikers or not bikers." He acknowledged that Mr. Dale was free to draw that inference, and noted that Robert Lines had testified that Mr. Desroches and Mr. Archibald are now bikers, but he maintained that, "Nobody bothered to ask if they were at the time. He meant, of course, any material time with respect to this case. On the same subject he later submitted, "No one has ever asked what their status was then." He noted that Mr. Young had testified that he was not a biker at that point in time, meaning neither at the time of the threat nor the time of the arson. I had previously stated to Mr. Donnell that my notes of Young's testimony at trial were to the effect that Young had testified that he became a striker between the time of the alleged threat and the time of the fire. Mr. Donnell's position is that Mr. Young became a striker after the date of the fire.

4 Mr. Donnell takes issue with Crown counsel's contention that this whole matter involves a criminal organization who is out to show the community what happens if you "fuck with the bikers". He maintains that this entire Crown position is based on a lot of speculation, not evidence from the trial. He maintains that there are gaping holes in the Crown's theory on this point. His position is that from the evidence on the trial, as well as the testimony of Robert Lines, Mr. Young might or might not have been an associate or a striker at any material time, and that the same goes for Desroches and Archibald. I suggested to Mr. Donnell that we certainly knew that Mr. Pollard and Mr. Reddon were in no doubt that they had been subjected to threats from bikers and on behalf of bik-

ers. Mr. Donnell conceded that Pollard and Reddon had said that both Young and Allen had threatened them and held out that it might be from bikers, but he asks, "Who knows what it was from?" He maintained that Mr. Allen had never made an appearance at trial, that "Mr. Allen was never brought here". I took Mr. Donnell's position on this point to be that any evidence heard at trial as to a threat by Mr. Allen was hearsay, relevant only to the state of mind of Pollard, but inadmissible to prove that Mr. Allen had linked any threat to bikers. I may say that I disagree with Mr. Donnell on that point, as I hope to show presently. Finally Mr. Donnell submitted that in order to arrive at the "scenario" put forward by Mr. Dale one must, "Look at the gaps that have to be filled in, look at the Jumps in logic that have to be taken ....."

5 In response, Mr. Dale stated as follows:

> "First of all, I am not asking this Court to make any leaps in logic. I am not asking that this be looked upon as a worst case scenario. I am asking this Court to rely upon the evidence that occurred and the reasonable inferences that can be drawn. This isn't a whiff of organized crime, this a stench of organized crime. I'm not suggesting that there be any inference drawn from evidence that doesn't exist, as it relates to biker organized crime. I would suggest there is ample evidence upon which this Court can make that finding."

6 As I stated at the outset, Crown counsel makes the alleged "biker connection" the focal point of his submissions to sentence, and it is apparent that Mr. Donnell disagrees most strongly with this position. We must therefore look at the evidence called at trial, in addition to the testimony of Robert Lines which has already been reviewed. We turn first to the testimony of Detective McKay. By way of general information and explanation he stated that the Loners is a motorcycle gang that was situated in Keswick during the summer of 1996; further that the term "bikers" means an outlaw motorcycle gang; further that a "striker" means a member or a proposed member, and finally that in a gang such as this a striker would go through an initiation period before becoming a full member, and therefore a striker is correctly designated as a probationary member. In addition he explained that when a striker becomes a full member he receives a patch or crest to be placed on the back of his jacket. Keeping in mind this background information, Detective McKay reported on his conversation with Young at the time of Young's arrest on September 28, 1996, as follows: -

Question: "Are you a full member of the Loners yet or a striker?"

Answer: "Still a striker".

Question: "When are you going to get your patch?"

Answer: "I don't know what is happening with that yet.

Question: "Where is the new club house going to be, now that Keswick is torn down?"

Answer: "I don't know what's going on with that."

7 (Detective McKay testified that the Loner's club house was torn down in the early fall, which I take to mean sometime in September prior to the 28th). McKay continued by stating that when he had arrived at the police station with Young, and while Young was speaking to a lawyer, he (McKay) had received a phone call from Joshua Desroches who was known to McKay as a striker with the Loners motorcycle gang. Desroches had made inquiry concerning the well being of Young.

8 Thus we have direct evidence from Detective McKay that on September 28, 1996 Young claimed that he was "still a striker" in the Loner's motorcycle gang, and that Joshua Desroches was known to McKay to be a striker at that time. However, Mr. Donnell makes the point that there was no evidence as to the status of either Young or Desroches prior to September 28, 1996, and that no inference to that effect should be drawn. My view is that if as of September 28, 1996 Young was still a striker, and if by that date Desroches had already become known to McKay as a striker, it is a reasonable inference that both were strikers prior to September 28, 1996, but I would agree that on this evidence alone it could not be determined that either or both of them were strikers either at the time of the alleged threat or at the time of the fire.

9 Pursuing the matter further, I note that Mr. Donnell elicited from Detective McKay in cross-examination the hearsay evidence that Frank Allen had pled guilty to possession of the stolen ATV. This might be the basis for the argument that as far as the defence is concerned this hearsay should be received as proof of its truth. However, it is not necessary to pursue that point because, as already outlined in my reasons for judgment, Mr. Donnell, in an attempt to establish a defence to the threat charge, had agreed at trial that the taped recording of Allen's plea of guilty should be played and entered as evidence therein, insofar as it related to exactly what charge and to what facts Allen had pled guilty. The alleged facts to which he pled guilty and was convicted, thus transforming them from alleged facts to facts, included 'his assertion to Pollard that, "The guys who stole the vehicle are bikers, they are going to burn your house and your barn if you pursue it." Thus it was proven by direct and uncontradicted evidence in Young's trial that Pollard's ATV had been stolen by "bikers". We also had the direct testimony from Pollard that Allen had attempted to sell him this ATV. The only reasonable inference that can be drawn is that the same ATV was the subject of Allen's plea of guilty to possession of stolen goods; but even apart from any such inference it can only be concluded from Pollard's testimony that Allen was in possession of the stolen vehicle which he was attempting to sell to a person who turned out to be the true owner. At this point, therefore, we have Frank Allen attempting to sell a vehicle which had been stolen by "bikers", which firmly establishes Allen's connection with these "bikers". It could surely not be inferred that Allen was not acting on behalf of these bikers, but had himself stolen the ATV from them and was attempting to sell it on his own. Next we have the direct evidence from Pollard reporting his conversation with Young, behind the Becker's Milk Store, to the effect that Young had proceeded to the location

where Allen had suddenly discovered that he was trying to sell a stolen ATV to its true owner, as a result of a call f rom Allen requesting "reinforcements". This clearly establishes a connection between Young and Allen in the latter's activities as the prospective vendor of stolen goods on behalf of "bikers".

10 In addition, we may refer to the direct testimony of Kevin Reddon as to the utterances made to him by Young. These include Young's statement to Reddon that if Joe (Pollard) wanted to see who had stolen the ATV he should "come to the club house", as well as his further statement, "If he wants to cause shit, I will burn his house or barn down. He is fucking with the wrong people". It is to be noted that Young employed the plural rather than the singular in this assertion, although he employed the singular in the threat itself. In addition, we have Reddon's testimony that Young 'had stated that Joe would get a beating one day a week for the rest of his life he went to the police. It must be noted that all of these threats concerned the stolen ATV, and the possibility that Pollard might take some further action to pursue the matter. Young was careful to inform Reddon that Frank Allen had just been released from jail and did not want the police involved in this matter with the ATV.

11 In the light of all of this evidence, I cannot see how it can be successfully argued that there are "gaps" that have to be filled in or that it requires any "jumps in logic" to conclude that this entire matter had everything to do with bikers and therefore with organized crime. In my view, there is no other reasonable inference to be drawn on all of the evidence heard in this case, and admissible on that point. I am in complete agreement with Mr. Dale's submission on this point. It follows that the entire matter of sentencing in this case must be viewed in this light. Whether or not one can draw the inference that at the time of the threat and the fire David Young was a striker with the Loners need not be decided. It is perfectly clear that at all material times he at least was closely connected with that organization, and that the words he spoke and the actions he took which form the basis of this case were spoken and taken by him with that organization in mind.

12 The body of evidence, just reviewed, which supports this inference is so overly-sufficient that further analysis is unnecessary. Otherwise one might consider whether the evidence of concerted action between Young and Allen is sufficient to bring the case within the principle wet forth by the S.C.C. in Koufis v. The King, [1941] S.C.R. 481, in which event the threats uttered by Allen would become admissible against Young.

13 Although, as already stated, the "biker" aspect of this case is the Crown's main focal point on the matter of sentence, additional matters were raised by counsel in the course of their submissions. Mr. Donnell maintained that much earlier, at the pre-trial stage, the pre-trial judge had suggested a sentence of between four and six months for these charges. He maintained that although this offer was very attractive to Mr. Young, he was unable to avail himself of it because he was innocent of these charges and therefore could not plead guilty to them. Mr. Dale's reply was by way of explanation that the pre-trial judge had offered a sentence of four to six months on the threatening charge, and six months for the arson, on the basis of the synopsis on that latter charge which had been read at the pre-trial by Mr. Dale and which, in the view of the pre-trial judge, disclosed insufficient evidence to secure a conviction on that charge. According to Mr. Dale, this was largely based on the Fire Marshall's report that the cause of the fire could not be determined, and the complete absence, at that stage of the proceedings, of any of the evidence to indicate that the fire was incendiary in origin. Mr. Dale ended this submission by urging me to disregard any of these discussions held in chambers at the pre-trial stage. I am in complete agreement with Crown counsel on that point and I

wish to make perfectly clear that in sentencing Mr. Young on these charges I have disregarded totally and completely anything which took place at the pre-trial stage.

14 There was much discussion between counsel and between the Court and counsel as to the pre-trial and pre-sentence custody served by Mr. Young, and the extent to which it should be considered in sentencing him for these offences. It is unnecessary to reiterate any of these arguments. It is agreed between counsel and the Court that five months of pretrial custody and or pre-sentence custody should be considered as applicable to the arson offence. Mr. Donnell submits that it should be counted on the usual basis of two for one, thereby crediting Mr. Young with a total of ten months. Mr. Dale agrees that some credit should be given for this "dead time", but refrains from endorsing the "two for one" formula.

15 Mr. Donnell points out that the accused has no previous record of convictions for either arson or uttering threats. Mr. Dale responds that the accused's record extends back to 1986 and contains at least a couple of dozen convictions for various 15 property offences. He points out that, despite this extensive record, upon his recent guilty pleas to possession over, unlawfully at large and breach of recognizance, Young received a sentence of only forty-five days, arrived at by an appropriate adjustment in his credit for pre-trial custody, leaving the balance of five months to be applicable to the present arson offence. Mr. Dale's position is that Young has received ample compassion and leniency in the matter of sentence, and that nothing in the present case would indicate that he is entitled to any more of the same. My analysis of his previous record leads me to the same conclusion.

16 Finally, Mr. Donnell submits that the sentencing for these three offences should be approached on a "global" basis, without any attempt to assign more or less importance to any one of them. His suggestion for a fit and appropriate sentence ranges from time served to maximum reformatory time (2 years less a day). It seems to me, however, that by the maximum penalty provisions provided in the Code, Parliament has indicated its view of the seriousness in which it views the offence of arson as compared, for example, with the offence of threatening. In my view this precludes the considering of all three of these offences on a global basis, for sentence purposes, without making any distinction among them.

17 I was referred by counsel to several decided cases, some of which I have found helpful in the present matter. I have formed the impression that very many, if not most, of the reported decisions on arson involve the so-called "insurance fire", where the person either burns or causes to be burned his own property in order to collect a settlement from the insurer. It would appear that in many of such cases the courts take a rather lenient view to sentence. I have therefore focused my attention in the direction of arson cases which do not fall into that category. One such case is that of Dufort v. The Queen (1959), 32 C.R. 121 (Quebec Court of Appeal). This involved the arson of a barn committed in order to cover the theft of some animals from the barn. The buildings, equipment and all of the remaining animals were destroyed in the fire. The accused pled guilty and possessed no previous criminal record. A sentence of four years imprisonment, imposed by the trial judge, was upheld on appeal. The judgment of the Court was delivered by Montgomery J., who stated at the bottom of page 122: "The crime of arson is rightly regarded by dwellers in the country as a serious one, liable to endanger both life and property. It is particularly serious where it is committed as a cover for a theft, and it is still more odious when it is committed by a man employed in a position of trust upon the property of his employer." In the case at bar, Mr. Young was not in a position of trust, but he burned this property following his threat so to do, the threat being a particularly terrifying one by its particular nature. In my view, these are circumstances still more odious than those recited by

Montgomery J. in the Dufort case. It is of interest to note an entirely different set of facts also recited by the same judge at the top of page 123 as follows: - "In a case that recently came before this Court, Boivin v. The Queen (unreported), the accused had been sentenced to five years imprisonment for arson, and the notes of the trial judge submitted were a convincing exposition of the reasons why such a crime should in general entail and exemplary punishment, even in the case of a first offender. In that case we intervened and reduced the sentence to two years, but there were special extenuating circumstances. There was no element of theft and no danger to life or property of others. The accused, a young man of limited intelligence, burned down his own farm buildings, which were vacant at the time, in an effort to collect a comparatively small amount of insurance." This factual situation is so different, in so many aspects, from the facts in the Young case, as to require no further comment.

18 The case of Regina v. MacLeod, [1968] 2 C.C.C. 365 was a decision of the Prince Edward Island Supreme Court (sitting in Appeal). In this case a man had set fire to a dwelling house (not his own) while apparently out of control in a drunken rage. The premises was totally destroyed. The normal occupants of the house were absent at the time. In upholding both the conviction and the sentence, Chief Justice Campbell stated, "The sentence of three ears imprisonment is by no means excessive, ...".

19 The case of Regina v. Astaforoff and Berikoff (1981), 27 C.R. (3d) 286 (B.C. C of A) is not, in my view, sufficiently comparable as to its facts to be of much guidance in the present situation. In that case two women, apparently acting because of their adherence to a particular religious group, set fire to a restaurant washroom, resulting in minimal damage, as the accused had announced immediately afterwards that they had set the fire. One accused had many previous convictions for the same offence and the other one had three convictions for arson. It was apparent to the Court that neither deterrence or rehabilitation were factors to be considered, but rather the protection of the community. Accordingly, one was sentenced to three years imprisonment and the other to two years.

20 In the case of Bernier v. Regina, a decision of the Quebec Court of Appeal, a man of no previous criminal record set fire to property which may well have been a dwelling house, as the trial judge had noted the fact that human life as well as property was placed in danger. The Appellate Court found that the sentence of three years imprisonment was fitting, and accordingly the appeal against sentence was dismissed.

21 We now turn to consider the case at bar. Joe Pollard has been a productive and law-abiding citizen for many years. I have described him as "a pillar of the agricultural community". Because he became the victim of the theft of his ATV, he came to the attention of David Young, who proceeded to threaten both his bodily well being and his real property, the latter in the form of his house and his barn, both of which were threatened with destruction by fire. In making these threats, he clearly invoked the identity and reputation of a local outlaw motorcycle gang, with all the atmosphere of terror which that entailed. It has been argued on his behalf that, in effect, he implicated this gang in his threats totally without their knowledge and approval, and purely on his own account as a person possessing no connection whatsoever with them. This argument has been rejected, both as insupportable on the evidence heard at trial, and as being contrary to logic and common sense. The ostensible purpose of these threats was to prevent Pollard from pursuing, particularly with the police, the matter of the theft of his ATV. Both Joe Pollard, to whom the threats were directed, and his brother-in-law by whom they were conveyed from Young, were understandably frightened, even terrorized,

by the thought that a "biker" gang was, so to speak, "on their case". Sometime later, Young followed up his threat in part by causing the destruction of one of Pollard's barns by fire. There were thirty-four animals housed in this barn at the time, but fortunately thirty-one of them were able to escape, no thanks to Mr. Young. The remaining three perished in the fire. The value of these animals was stated to be $12,000. An investigator for the Office of the Fire Marshall estimated the total dollar loss at $171,000, comprising barn at $130,000, contents $36,000 and a second small silo with hay at $5,000. Mr. Pollard testified that, in addition to the dead animals, they had lost equipment worth $100,000, including some irreplaceable antique machinery. Also lost was personal property belonging to his wife and him, including their wedding presents from their recent marriage, stored to await the completion of their new house. They were able to recover only approximately $33,000 in insurance.

22 Crown counsel urges this Court to consider the deleterious effect upon the entire community of this spectacular fire, following upon a threat to burn wherein the identity and reputation of a local criminal organization had been invoked. I am in complete agreement with Crown counsel in this submission. In my view, it is obvious that this arson, committed under those circumstances, is more serious from the standpoint of criminal law than an arson committed to cover a theft, or as the act of a person in a drunken rage, or a person acting in obedience to some real or perceived religious obligation, or indeed a pyromaniac on a burning spree impelled by some phycological defect, and certainly more serious than the act of a person in burning his own property for insurance purposes where no loss of human life results.

23 It is necessary in the best interests of the administration of criminal justice, and for the protection of society in general, as well as the people of this particular community, that the sentence imposed on this conviction for arson clearly indicate society's denunciation of this conduct. In addition it must be capable of deterring the perpetrator and anyone else in the general public so minded or capable of becoming so minded in the future.

24 The loss of animal life was, fortunately, only a relatively small fraction of what it potentially might have been, no thanks to the perpetrator who made no effort to rescue even those animals that were subsequently rescued by other persons present.

25 Mr. Young has an extensive criminal record which reveals that he has been favoured with considerable leniency in the past. It is hoped that an end to this leniency will cause a change in his outlook, which in turn will facilitate his rehabilitation.

26 The charge of arson is an indictable offence which carries a maximum period of fourteen years imprisonment. In all the circumstances of this case a fit sentence in my view is a term of five years imprisonment. Accordingly for this offence you are sentenced to imprisonment in a federal penitentiary for five years.

27 The killing of cattle contrary to section 444(a) of the Code is an indictable offence carrying a maximum period of imprisonment of five years. Taking into account all of the present circumstances, including the fact that the actual loss of life was much less than the potential for such loss, you are sentenced to imprisonment in a federal penitentiary for one and one half years to be served consecutively.

28 On the threatening charge under section 264.1(b) the Crown has elected to proceed by indictment; therefore the offence carries a maximum term of imprisonment of two years. Under all of the

present circumstances, already outlined, you are sentenced to imprisonment in a federal penitentiary for a period of one year, to be served consecutively.

29 In sentencing you to these separate terms of imprisonment, I have nevertheless kept in mind the principle of totality. Otherwise you would have received a longer sentence for the arson offence alone. You are entitled, and will receive, a credit for the agreed amount of pre-trial custody, on the basis of the "two for one" formula, resulting in a credit of ten months. The resulting sentence in a federal penitentiary totals six years and eight months.