

ONTARIO COURT OF JUSTICE

CITATION: []

DATE: 2021-01-14

COURT FILE No.: Hamilton 19/10430

B E T W E E N :

HER MAJESTY THE QUEEN

– AND –

DALE ROBERTSON

Before Justice George S. Gage

Heard on November 1, 2019, January 17 and March 13, 2020 and January 14, 2021

Reasons for Sentence released on January 14, 2021

B. Adsett counsel for the Crown
S. Bernstein counsel for the defendant

Gage J.:

Overview

[1] On July 27, 2018, Dale Robertson used his truck to assault Neha Sharma and he used ugly, hateful, vicious and racist words to threaten Upender Kaura.

[2] Most of this repugnant and shameful episode was video recorded by Ms. Sharma.

[3] Mr. Kaura and Ms. Sharma were both profoundly emotionally upset, fearful and shaken by the incident

[4] The video recording was uploaded to, and shared on, social media platforms. It attracted the attention of national news media and was replayed on national newscasts. Mr. Robertson was identified. The recording acquired considerable notoriety with the result that Mr. Robertson's life and the life of his immediate family have been adversely affected.

[5] Dale Robertson has no prior involvement with the criminal justice system.

[6] On November 1, 2019, Dale Robertson entered pleas of guilt to the charges of assault and threatening. The Crown proceeded summarily.

[7] A pre-sentence report was prepared and filed with the court on January 17, 2020. The Court heard submissions on that date. Sentencing was scheduled for March 13, 2020. The COVID pandemic intervened with the result that a sentencing disposition has been deferred until today.

Positions of Crown and Defence

[8] The Crown seeks a sentence of incarceration of 6 months followed by three years of probation.

[9] It is submitted on Mr. Robertson's behalf that a conditional discharge with counselling and community service would be in his interest and not contrary to the public interest and that a discharge would otherwise serve the ends of justice in this instance.

[10] Both Counsel agree that the imposition of a conditional sentence is not statutorily excluded unless a conditional sentence is found, in the circumstances prevailing in this case, to be contrary to the general purposes and principles of sentencing.

The Facts

Circumstances of the Offence

[11] On July 27, 2018, at about 1 in the afternoon, Dale Robertson was in the parking lot adjacent to the Walmart store on Centennial Parkway in Hamilton with his child.

[12] On the same date and at the same time Upender Kaura and his spouse Neha Sharma were walking through the same parking lot.

[13] Some form of verbal interaction prompted Mr. Robertson to direct racial slurs toward Mr. Kaura. He told Mr. Kaura to go back to his own country.

[14] Mr. Kaura, understandably, took offence to the slurs and approached the pickup truck that Robertson was getting into. He was seeking an apology. He asked Robertson what kind of example he was setting for his children. As this was going on Ms. Sharma was at the right front corner of the Robertson truck.

[15] Robertson offered no apology. He moved the truck forward and struck Sharma. He stopped, said oops, then continued driving forward while shouting – “get out of the way!”. Kaura asked Robertson to stop. Robertson had his arm out the window. Kaura grabbed his arm to attempt to stop him from leaving. Robertson responded by saying: “You put your fucking hands on me I will break your legs”. Kaura followed at the side of the truck asking Robertson to stop.

[16] Kaura told Robertson that he was a Canadian citizen. Robertson responded with: “Show me. Prove it. I don’t believe it. You don’t talk like a Canadian. (while mocking and purporting to mimic Kaura’s speech pattern) I am racist as fuck. I don’t like you. I don’t like her. I would kill your children first. Yeah I would. Don’t ever attack me again”.

[17] Robertson then drove away.

Circumstances of the Offender

[18] Dale Robertson is 49 years old. He has no prior criminal record. He enjoyed the benefit of a positive upbringing with strong supportive relationships with his parents and his siblings. That family life was affected to some degree by his father’s alcoholism. He participated in sports and excelled at soccer, football and hockey. He enjoyed time at a family cottage. He completed high school. He completed three diploma programs at community college.

[19] Mr. Robertson has been steadily employed throughout his life with the exception of almost two years immediately following the commission of these offences when he lost his job as a result of his employer learning of the offences as a result of media coverage.

[20] He has been employed at his present position since March of 2019. He enjoys his job.

[21] He reports being bullied by members of a neighbouring family in the community he grew up in. He believes the bullying was racially motivated and he believes this experience may have had a lingering negative effect on him. It is apparent that the experience did not increase his sense of empathy for persons in a similar position.

[22] For the past 15 years he has been in a strong, stable and loving common law relationship with Erin Taylor. They have a 10 year old son.

[23] For 18 years prior to the offences Mr. Robertson was a volunteer hockey coach. As a result of his arrest he was barred from continuing as a coach.

[24] Prior to the date of the offence Mr. Robertson had been experiencing stress and anxiety in the workplace. In 2015 he was diagnosed with depression. In 2017 he was diagnosed with PTSD. Prior to the date of the offences he had taken a stress leave from employment.

[25] After his arrest and the accompanying publicity surrounding it, Mr. Robertson's mental health issues became more pronounced. According to his wife he was despondent, lethargic and suicidal. He lost his job. He could not get out of bed. He was not able to function as a father or a partner. His relationship with his wife was "rocky". His son and wife were affected by the notoriety surrounding this event as well. Their ordeal is described in a letter from Ms. Taylor filed as Exhibit 3.

[26] Mr. Robertson has been pro-active in addressing his mental health issues. He underwent counselling for four months. His relationship with his wife is largely restored.

[27] Mr. Robertson expressed remorse and regret to the presentence reporter. He has taken responsibility for his actions as demonstrated by his pleas of guilt.

[28] There are no known substance abuse issues.

Victim Impact

[29] The court received two victim impact statements. They both speak eloquently for themselves.

[30] Mr. Kaura feels shaken, fearful, distressed and discouraged. He feels that the City of Hamilton is no longer a safe place to raise his family. He has isolated himself from social contact in order to avoid another incident of a similar nature.

The incident has affected his ability to concentrate and interact with others at his place of work. He fears that his children will be subjected to racial profiling.

[31] Ms. Sharma feels frightened and violated. The threat to kill her children was particularly upsetting for her. Her self confidence has been diminished. She panics when she is around pickup trucks. She has continuing pain in her shoulder and back. She lost time from work. Her grades in the University program in which she was enrolled at the time of the incident were adversely affected.

[32] In assessing the nature of the harm sustained by the victims in this instance I am guided by the thoughtful comments of Justice Scanlan of the Nova Scotia Supreme Court in *R v Feltmate*¹:

[16] Racially motivated crimes are indicative of a lack of respect. The respect of which I speak is the essence of Canadianism. A country where we foster diversity, we recognize diversity. We do not ask or require that every Canadian be the same, whether you are from Newfoundland, Nunavut, British Columbia, or any place in between. We do not require of people in this country that they forget where they came from when they arrive, no matter how far they have moved. In fact, we are a better country when we take the best of what people have to offer and embrace it. We don't ask them to leave their clothes behind; we do not demand of them that they leave their religion behind. About the only thing we ask them to do is respect other people when we tell them racial intolerance in this country is not acceptable.

[17] We do ask of Canadians—no, in fact we demand of Canadians that they respect fellow citizens in this country no matter what their ethnic or religious background is. This is because a Canadian, is a Canadian, is a Canadian no matter what their vintage, religion or attire. Your children, your grandchildren are not more Canadian because they have been here one or two generations more than you have. Mr. MacIsaac's children are not more Canadian than he is because they have been here one more generation than he has. That's not the way we do it. That's not the test. How many generations do you have to have in this country before you are a Canadian.

[18] In the case *R. v. Alexander Steven Ingram* [1977 CanLII 2018 \(ON CA\)](#), [1977] 35 C.C.C. (2d) 376, I quote in part Justice Dubin. He says:

Crimes of violence increase when respect for the rights of others decreases...
An assault which is racially motivated renders the offence more heinous. Such assaults, unfortunately, invite imitation and repetition by others and incite retaliation.
The sentence imposed must be one which expresses the public abhorrence for such conduct...

¹ [2012] NSSC 319

[19] It is a slippery slope and a very short journey between the trading of insults, escalating to an eye for an eye and then a life for a life. We see around the world that is happening every day. We do not choose that type of country for ourselves and I hope we never, ever find ourselves in that place in this country.

[20] A country as diverse as Canada cannot countenance even baby steps down that slippery slope because we are so diverse. We come from so many different places. Like I said, what we can do is respect who and what other people are if they are different than ourselves and embrace the best that they have to offer.

The Law

The Offences

[33] Neither assault nor threatening carry a mandatory minimum sentence. Both are eligible for the imposition of a conditional discharge and both are eligible for the imposition of a conditional sentence. Absent the use of racialized language and the use of a motor vehicle in the assault the offences would not ordinarily attract a sentence of imprisonment for a first offender. The presence of those circumstances brings custodial dispositions into consideration.

Principles of Sentencing

[34] Section 718 codifies the purpose of sentencing and the objectives that sentencing should attempt to achieve. The purpose of sentencing is to protect society and to contribute to respect for the law and a just, peaceful and safe society. The objectives are:

- Denunciation of the unlawful conduct and the harm caused by the conduct
- Specific (individual) and general deterrence
- Separation of offenders from society where necessary
- Rehabilitation of the offender
- Reparation
- Promotion of a sense of responsibility in offenders

[35] It is a fundamental principle of sentencing that the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility

of the offender – per section 718.01.

[36] Other statutory principles that have application to this case include the principle that similarly situated offenders should be treated in a similar fashion and the principle of restraint that directs the court to consider all available sanctions other than imprisonment for all offenders and to determine whether less restrictive sanctions may be appropriate.²

[37] A sentence may be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[38] As Justice Charron observed in *R v. BWP*: “General deterrence is intended to work in this way: potential criminals will not engage in criminal activity because of the example provided by the punishment imposed on the offender. When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity.”³

[39] But as Justice Charron also observes in the same decision: “While general deterrence as a goal of sentencing is generally well understood, there is much controversy on whether it works or not.”⁴

[40] In the same vein, Chief Justice Lamer in *Proulx* said this about deterrence: “The empirical evidence suggests that the deterrent effect of incarceration is uncertain.”⁵

[41] This same concern about the effectiveness of incarceration as a general deterrent was recently reiterated by the Supreme Court of Canada in the decision of the Court in *Nur and Charles*.⁶

² Criminal Code section 718.2 (b), (d) and (e)

³ [2006] 1 SCR 941 at para. 2

⁴ *R v. BWP*, *ibid*, para. 3

⁵ [2000] 1 SCR 61 at para. 107

⁶ [2015] SCC 15 at para. 113-115

[42] That said, there can be little argument that a sentence of institutional incarceration represents a more profound expression of denunciation than any form of non-custodial disposition including a conditional sentence.

[43] A conditional discharge may be imposed by the Court if it is found to be in the interest of the offender and not contrary to the public interest.

[44] The first part of the equation generally presupposes that candidate for a discharge will be a first-time offender with a pro-social background, that he does not require personal deterrence or rehabilitation and that a criminal conviction may have significant adverse repercussions.

[45] The second condition involves a consideration of the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes towards it and public confidence in the effective enforcement of the criminal law.

Availability of Conditional Sentence

[46] A conditional sentence of imprisonment is available if:

1. The offence does not have a mandatory minimum sentence;
2. The offence is not otherwise disqualified from the imposition of a conditional sentence by the operation of section 742.1 (c)-(f)
3. The appropriate sentence is less than two years and more than a suspended sentence with probation;
4. The court is satisfied that serving the sentence of imprisonment in the community would not endanger the safety of the community; and,
5. The imposition of a conditional sentence of imprisonment is consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Code*

[47] The offences herein do not have a mandatory minimum sentence.

[48] A suspended sentence would be disproportionate to the gravity of the offence and the degree of responsibility of the accused.

[49] The Crown position confirms that an appropriate custodial sentence would be less than two years.

[50] Mr. Robertson had no prior involvement with the criminal justice system.

[51] Since his arrest and release, Mr. Robertson has been compliant with all of the conditions of his bail. He has addressed his mental health issues with counselling. He is remorseful. He has demonstrated an understanding of the gravity of his conduct. He has made no attempt to contact the victims. I am satisfied that safety of the community would not be endangered if Mr. Robertson were permitted to serve a sentence of imprisonment, on conditions, within the community.

[52] The remaining question is whether the imposition of a conditional sentence in this case would be consistent with the fundamental purpose and principles of sentencing.

[53] There can be no doubt that general deterrence and denunciation will be important factors in any prosecution in which the commission of the offences includes the element of racially charged language.

[54] The leading authority on conditional sentences is the Supreme Court of Canada decision in *R v Proulx*⁷.

[55] In *R v Zhou* Justice O'Marra summarizes some of the important principles to be derived from the *Proulx* decision:

- A conditional sentence will generally be more effective than incarceration at achieving rehabilitation and reparations to the victim and the community;
- A conditional sentence is also a punitive sanction that can serve the objectives of denunciation and deterrence;
- A conditional sentence is distinguishable from probation on the basis that it is defined in the *Code* as a sentence of imprisonment and where conditions restricting the offender's liberty are properly utilized it carries greater punitive value than probation;

Collateral Consequences

[56] The important sentencing principle of individualization allows the court,

⁷ [2000] SCC 5

in the process of determining a fit sentence, to take into account any collateral consequences that flow from the commission of the offence and have impacted the offender.⁸

Analysis

Aggravating and Mitigating Factors

[57] The aggravating features of this offence include:

The threat included racially bigoted and insensitive language;

That a motor vehicle was an instrument of the assault;

That the offences were committed in the presence of a minor – Robertson’s son;

[58] The mitigating factors include:

Mr. Robertson’s previous good character and community service and lack of prior criminal involvement – the offence appears to have been inconsistent with his general character;

The steps taken by Mr. Robertson, since the commission of the offences, to address existing mental health issues that may have been a contributing cause to the offending;

His expressions of remorse including his pleas of guilt.

Collateral Consequences

[59] It is a part of the history of punishment that offenders were sometimes bound in irons, or by a wooden contraption, in the village square where they could be subjected to the condemnation of the community, both physical and verbal. In this case the posting of the video of these offences on the internet serves as a form of modern stockade in which the behaviour of Mr. Robertson on July 29, 2018 has been exposed and condemned. The difference is that in the historical example the offender was released from the stockade after a period of time, usually measured in days, and the public shaming was ended, whereas in the digital universe the

⁸ R v Pham [2013] 1 SCR 739 para. 8-15

public shaming may diminish but it is permanently on display. Even today, more than two years after the event, if you search under racialized incidents in Canada the video of this incident will appear and can be replayed. This is a consequence that will almost certainly follow Mr. Robertson to his grave.

Suitability of a Conditional Discharge or a Suspended Sentence

[60] The granting of a conditional discharge to Mr. Robertson would not be proportionate to the gravity of the offences nor to the moral blameworthiness of Mr. Robertson's conduct. The use of racialized slurs in the commission of these offences cause general deterrence and denunciation to be the principles that are predominant in the sentencing calculus in this case. A conditional discharge would not be consistent with the proper application of those principles to the facts of this case.

[61] For the same reasons outlined in the preceding paragraph the imposition of a suspended sentence would not be consistent with the gravity of the offence or the need for clear denunciation.

[62] A sentence of imprisonment is required to properly give voice to the need to denounce the conduct exhibited in these offences.

Suitability of a Conditional Sentence of Imprisonment

[63] Considering all of the circumstances present in this case I conclude that the imposition of a conditional sentence of imprisonment would not be inconsistent with the mindful application of the fundamental purpose and principles of sentencing, including in particular general deterrence and denunciation, as set out in sections 718 to 718.2, for the following reasons:

- The entire incident, while deeply disturbing and morally offensive was relatively brief;
- There is no indication of any prior or subsequent incident of a similar nature;
- The collateral consequence of permanent public shaming and condemnation is both profound and permanent. This consequence serves as both a powerful deterrent and a continuing denunciation;
- Mr. Robertson has expressed appropriate remorse;

- Mr. Robertson has demonstrated by his behaviour since his arrest that he can abide by conditions within the community;
- The imposition of a conditional sentence is a sentence of imprisonment that can be converted to institutional incarceration by any breach of the conditions.

[64] I am satisfied that the imposition of a conditional sentence of 6 months with 3 months of house arrest with the usual exceptions for work, medical emergencies and necessities of life will adequately serve the twin principles of general deterrence and denunciation. The other conditions will include no contact with the victims, no attendance at their places of residence, education, recreation employment or worship and attendance on such counselling or seminars on racial sensitivity as may be recommended by his conditional sentence supervisor

[65] The conditional sentence will be followed by a two year probation order during which time Mr. Robertson will abide by the following conditions:

- Keep the peace and be of good behaviour;
- Report to a probation officer once and thereafter as required;
- Have no contact, direct or indirect, with Upender Kaura or Neha Sharma;
- Not to be within 25 meters of their physical person;
- Not to be within 100 meters of any place known to be the place of employment, education, residence or worship of Upender Kaura or Neha Sharma

Mr. Robertson will present himself at the Central Police station and provide a sample of his DNA within 10 days of today's date.

In closing let me say that it is an exceedingly sad commentary on the condition of our community that, more than 50 years after Dr. Martin Luther King's dream of a society in which a person is judged by the content of their character rather than the colour of their skin, this type of abhorrent conduct continues to be displayed with depressing regularity.

Plainly, Mr. Robertson is not the only one who needs to reflect on how this type of conduct might be avoided in the future.

Released: January 14, 2021

Signed: "Justice George S. Gage"