Citation: *R.* v. *F.B.,* 2017 YKTC 5

Date: 20170210
Docket: 16-00262
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Lilles

REGINA

v.

F.B.

Appearances:
Noel Sinclair — Counsel for the Crown
Gordon Coffin — Counsel for the Defence

REASONS FOR SENTENCE

[1] F.B. entered a guilty plea to an offence contrary to s. 264.1(1)(a) of the *Criminal Code*, namely that she did knowingly utter a threat to [H.S.] to cause bodily harm to her, on or about July 11, 2016.

[2] As there was no agreement as to the circumstances of the offence, I held a *Gardiner* hearing pursuant to s. 724(3) of the *Criminal Code* and then, based on my findings, proceeded to sentencing. After hearing submissions of counsel, I adjourned the matter for one day in order to consider an appropriate disposition.

[3] A brief summary of the circumstances of the offence will be helpful in order to provide context to my reasons.

[4] F.B.'s two children were in attendance at a daycare operated by [H.S.]. [H.S.] is the grandmother of F.B.'s children, as her son is their father, but F.B. and the father were estranged. It was readily apparent that the relationship between F.B. and [H.S.] was also strained, to say the least.

[5] While at work on July 11, 2016, F.B. was advised by her mother that Family and Children's Services had become involved and were taking custody of her two children on an interim basis. F.B. attended at the daycare just before 4:50 pm to speak to her children and explain to them that she would not be seeing them for several days.

[6] F.B. entered the daycare and located and hugged her youngest child. [H.S.] confronted her and while she did not say anything to F.B., she stood very close to her. [H.S.] and two other daycare workers reported overhearing statements made by F.B. that may have included swearing and threats directed at [H.S.]. F.B. was escorted out of the daycare area to another part of the building without incident. The police were called and she was arrested and charged.

[7] The result of the *Gardiner* hearing was that I found that F.B. uttered the following threat to [H.S.]: "Get the fuck away from me. If you come near me, I'm going to smash your face in." Apart from the words uttered, there was no evidence of any physical action or movement by F.B. that indicated that she was intending to follow through with this verbal threat.

Personal Circumstances

[8] F.B. is 29 years old and is a First Nations woman who was born in Inuvik. She experienced parental alcohol abuse and neglect as a child, as her parents were residential school survivors. Her first child was born when she was 17 years old and was adopted by her mother. Her two children referred to earlier were a result of a relationship with [H.S.'] son, which has been on and off for about ten years.

[9] It is apparent that the apprehension of her children and the charges resulting from her attendance at her children's daycare have been a "wake-up call" for F.B. This is reflected in the letter from Chantal Genier from the Skookum Jim Friendship Centre, who serves as the Women's Legal Advocate and with whom F.B. has, on her own initiative, maintained regular contact. In her letter to the Court, Ms. Genier states as follows:

> I have witnessed [F.B.] be assertive and passionate when it comes to advocating for the children and their wellbeing. She has consistently shown an openness and willingness to attend programming for herself and her children in order to benefit them individually and as a family.

[10] Later in her letter she states:

> I am aware of the charges that brought [F.B.] to court today for sentencing. Without minimizing the seriousness of the incident and charges, I feel confident in saying that I feel that [F.B.] has demonstrated a lot of growth and maturity since this incident occurred.
>
> In addition to providing support with processes, I also provide a certain amount of emotional support and counselling to [F.B.] as well. I feel that [F.B.] has actually shown a lot of insight and remorse for her actions that day.

Aggravating Factors

[11] It is an aggravating factor that the incident took place in a daycare setting with other children present. Although I received no information as to how this incident affected any children who were nearby who might have overheard F.B., I have no hesitation in concluding that the impact would have been negative. On the other hand, F.B. was escorted out of the daycare without resistance or further incident.

[12] F.B. has a limited criminal record. In November, 2016, she pled guilty to a s. 175 *Criminal Code* charge of causing a disturbance. I received no information from the Crown regarding the circumstances of that charge, but I infer from the absolute discharge granted by the Court that the circumstances were not serious.

Mitigating Factors

[13] The insight referred to by Ms. Genier in her letter relates in part to F.B.'s realization that she has deep-seated issues, perhaps as a result of her own childhood, that need to be addressed. Importantly, she has taken a number of significant steps to deal with these issues.

[14] She has attended the local Child and Adolescent Therapeutic Services program for a parenting assessment. She was involved with Many Rivers for a number of counselling sessions, until she started a two year college program in health care last September. Since then, she has had several sessions with a counsellor at Yukon College. Every two weeks she meets with a representative of Family and Children's Services as part of a First Nations-oriented program. She has completed a ten week,

one session per week, cognitive behaviour therapy program. She has now progressed to the point where she is able to visit her children a number of times each week.

[15] I agree with F.B.'s counsel that this incident appears to be out of character for her and that it arose out of somewhat unique and specific circumstances. While not excusable, her reaction when she heard that her children were taken into care and, in addition, placed in the care of her estranged mother-in-law, is understandable in human terms.

[16] While Crown counsel was insistent that an appropriate disposition on these facts would be a suspended sentence with numerous conditions, including one that would place most of the Riverdale portion of Whitehorse out of bounds for her, defence counsel submitted that a conditional discharge would be more appropriate.

[17] Although F.B. received an absolute discharge for the causing a disturbance charge in November, 2016, the *Criminal Code* does not preclude an individual from receiving more than one discharge. Section 730(1) of the *Criminal Code* sets out four criteria:

(1) the offence must not be one which has a minimum punishment;

(2) or an offence punishable by 14 years imprisonment or life;

(3) but the discharge must be in the best interests of the accused; and

(4) must not be contrary to the public interest.

[18] *R. v. Fallofield,* (1973) 13 C.C.C. 2d 450 (BCCA) is a leading case interpreting and applying s. 730(1) of the *Code*. It directs judges not to use the discharge provisions as an alternative to probation or suspended sentence. It follows that the corollary is also true, that probation and suspended sentences should not be used as alternatives to discharges.

[19] *Fallofield* also states at para. 21 (5):

> Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions. [Emphasis added]

[20] Firstly, it is important to note that the conditions prescribed are prefaced by the word “Generally”. I interpret that word to be synonymous with “in most cases” and “usually”. It certainly does not preclude the use of a discharge in every instance where there has been a previous conviction. Secondly, F.B. does not have a previous conviction entered on her record. She has a previous absolute discharge. While an absolute discharge is a finding of guilt, it is not one that has been entered as a conviction.

[21] Based on the counselling and programming F.B. has initiated and completed, I am more than satisfied that it is not necessary to enter a conviction in order to deter her from future offences or to rehabilitate her. Finally, as she is pursuing studies

in health care, a conviction on her record would limit her job opportunities and thus have significant adverse repercussions.

[22] I am satisfied that granting a discharge to F.B. would be in her best interests and not contrary to the public interest.

[23] In the result, I impose a conditional discharge for the offence before the Court. The discharge will be on the conditions specified in a six month Probation Order as follows:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required by the court;

3. Notify the Probation Officer of any change of name, address, employment, or occupation;

4. Report to a Probation Officer within two working days and thereafter and in the manner as directed;

5. Take such programming as may be directed by your Probation Officer and provide for release of information so the probation officer can receive reports of your performance and participation;

6. Have no contact directly or indirectly with the complainant, [H.S.], except with the permission of your Probation Officer after consulting [H.S.];

7. Not attend at the premises of [redacted] Daycare at [redacted], Whitehorse, Yukon.

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LILLES T.C.J.