CITATION: R. v. O.O., 2014 ONSC 6414
COURT FILE NO.: 13-40000569-0000
DATE: 20141106

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	*Martin Sabat*, for the Crown
Respondent	)	
– and –	)	
	)	*Anthony DeMarco*, for Mr. O.O.
J.L.O.O.	)	
Applicant	)	
	)	
	)	
	)	
	)	**HEARD:** October 17, 2014

RULING ON MOTION FOR DIRECTED VERDICT

TROTTER J.

INTRODUCTION

[1] When someone walks into a bank and hands a teller a note demanding money, it is usually considered to be a robbery. But in the unique circumstances of this case, it was just a theft.

FACTUAL BACKGROUND

[2] Mr. O.O. was charged with robbery under s. 343(*a*) of the *Criminal Code*. It was alleged that he walked into a bank, approached the counter and presented the teller with a note that said: "This is a robbery, give me the money, my mother is sick." The teller initially hesitated because she could not believe what was happening. In a calm voice, the accused said: "Give me the money."

[3] The teller took about $600 from her drawer and put it on the counter. In the meantime, the accused retrieved the note. Again with a calm voice, the accused asked for more money. The teller refused. The accused asked the teller to place the money in an envelope. She did, and the accused walked out of the bank. He was apprehended about a month later.

[4] The teller testified that, during the incident, she did not fear for her own safety, or that of anyone else. She agreed that she gave the accused the money because he asked for it and also because she felt sorry for him, given that he looked so young and his mother was sick.

[5] Another teller witnessed the incident and overheard some of the words exchanged between the accused and the first teller. This teller experienced no fear either.

[6] At the conclusion of the Crown's case, Mr. DeMarco for the accused brought a motion for a directed verdict, arguing that because the note did not cause the teller to apprehend physical harm, there was no evidence on a key element of the offence of robbery. On behalf of the Crown, Mr. Sabat argued that the note conveyed an implied threat of violence and that the teller's state of mind was irrelevant. I agreed with the defence and directed a verdict of acquittal on the charge of robbery. These are my reasons.

ANAYLSIS

[7] The test for granting a directed verdict is the same as the test for committal for trial – whether there is some evidence upon which a reasonable jury, properly instructed, could return a guilty verdict: see *R. v. Arcuri* (2001), 2001 SCC 54 (CanLII), 157 C.C.C. (3d) 21 (S.C.C.) and *R. v. Charemski* (1998),1998 CanLII 819 (SCC), 123 C.C.C. (3d) 225 (S.C.C.).

[8] The accused is charged under s. 344 of the *Criminal Code*. However, it is common ground that his liability must be determined under s. 343(*a*), which reads:

> **343.** Everyone commits robbery who
>
> **(*a*)** steals and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property.

[9] While the actions of the accused clearly amounted to a theft, there was no evidence of violence or an explicit threat of violence. However, the authorities provide that, under s. 343(*a*), the threat may be explicit or implied: see *R. v. Pelletier* (1992), 71 C.C.C. (3d) 438 (Que. C.A.), at p. 442. Implied threats must be accompanied by a "reasonable apprehension of physical harm": see *R. v. Sayers and McCoy* (1983), 8 C.C.C. (3d) 572 (Ont. C.A.), at p. 575. The Crown argued that, all it need prove is that, from an objective perspective, the conduct of the accused was threatening, or that a reasonable person would be fearful. The defence argued that the victim's subjective fear is also required.

[10] A reasonable apprehension of physical harm is comprised of a fearful state of mind that is reasonable in all of the circumstances. In *Sayers and McCoy*, Lacourciere J.A. confirmed the importance of the subjective element (at p. 575):

> Applying this test to the admitted facts, the words used by the respondents referred to a "robbery in progress", together with the respondents' gestures and the manner in which the respondent Sayers spoke or screamed his commands to the tellers, could only have the

> effect of causing a reasonable apprehension of physical harm unless the tellers complied with the demand. ***The predictable reaction of the tellers was one of fear and concern.*** [emphasis added]

[11] The decision of the Court of Appeal in *R. v. Lecky* (2001), 2001 CanLII 6026 (ON CA), 157 C.C.C. (3d) 351 (Ont. C.A.) provides greater clarity on this issue. As the Court said at p. 352:

> The trial Judge properly instructed himself on the constituent elements of robbery as defined in s. 343(*a*). On the totality of the evidence, it was open to the trial Judge to find that the appellant's conduct could result in a reasonable apprehension of physical injury ***and did in fact cause this victim to apprehend physical harm.*** Consequently, his actions amounted to threats of violence under s. 343(*a*). [emphasis added]

There is further appellate support for the requirement of a subjective fear on the part of the victim in *R. v. Kulscar*, 2009 BCCA 515 (CanLII), 2009 BCCA 515 (B.C.C.A.), *R. v. Provencal* (1988), 21 Q.A.C. 129 (C.A.), *R. v. Arsenault* (2006), 2006 CanLII 34406 (ON CA), 216 O.A.C. 198 (C.A.), *R. v. MacDonald* (1981), 64 C.C.C. (2d) 415 (Man. C.A.), *R. v. McClarty* (1984), 62 N.S.R. (2d) 273 (N.S.S.C. A.D.), *R. v. Bourassa* (2004), 2004 NSCA 127 (CanLII), 189 C.C.C. (3d) 438 (N.S.C.A.), at pp. 442-444 and *R. v. Griffin* (2011), 2011 NSCA 103 (CanLII), 279 C.C.C. (3d) 464 (N.S.C.A.), at p. 474.[1]

[12] The Crown argued that *R. v. MacCormack* (2009), 241 C.C.C. (3d) 517 (Ont. C.A.) casts doubt on the Court's earlier decisions. In that case, Watt J.A. held at pp. 536-537:

> Under s. 343(*a*) anyone who steals, and in order to extort what is stolen or to prevent or overcome resistance to the theft, uses threats of violence to a person or property commits robbery. A threat of violence may be express, or implied from words or conduct, or from both words and conduct. All the circumstances require consideration: *R. v. Sayers and McCoy* (1983), 8 C.C.C. (3d) 572, at p. 575 (Ont. C.A.); *R. v. Pelletier* (1992), 71 C.C.C. (3d) 438, at p. 442 (Que. C.A.).
>
> This ground resonates with the sound of a claim that the finding of "threats of violence" was unreasonable. In my view, it was not. A bank. A direct approach to a teller. A demand for money, not a withdrawal slip or any other typical banking document. Conduct designed to intimidate and to instil a sense of fear in its recipient and to ensure compliance with its demand. Such a crime is robbery, not theft.

[13] I acknowledge that the facts in *MacCormack* are similar to the facts in this case. However, the Court did not specifically address the subjective/objective components of implied threats. Moreover, there is nothing in this excerpt that undermines the authoritative value of the decisions discussed above. Indeed, Watt J.A. specifically relied on *Sayers and McCoy* and *Pelletier*, the cases from which the requirement of a reasonable apprehension is derived.

[14] Mr. Sabat argued that requiring a subjective component frustrates the operation of the provision. He contended that the conduct of the accused amounted to what everyone considers to be robbery, pointing out that even the accused's note declared the situation to be "a robbery."[2]

[15] In common parlance, the word "robbery", and the past tense verb "robbed", have variable meanings. "Robbery" is often misused to describe the crime of break and enter (or burglary), as well as dishonest or fraudulent financial dealings. More colloquially, and beyond the realm of the criminal law, the term "robbed" is sometimes used to describe great misfortune in other circumstances, including sporting events.

[16] Under s. 343(*a*) of the *Criminal Code*, "robbery" has a very specific legal meaning. It is a term of art. As Epstein J.A. said in *R. v. Lebar* (2010),2010 ONCA 220 (CanLII), 252 C.C.C. (3d) 411 (Ont. C.A.), at p. 418: "Section 343(*a*) applies to a robbery committed with violence. It is categorically a crime of violence – violence is an essential element of an offence under that section." This passage was quoted with approval by Wagner J. in *Regina v. Steele*, 2014 SCC 61 (CanLII), at para. 50. When this element is missing, because of the absence of actual or threatened violence, there is no robbery.

[17] The Crown relied on the "uttering threats" (s. 264.1 of the *Criminal Code*) jurisprudence to support its position that an implied threat need only be considered from an objective perspective. In *R. v. McRae* (2013), 307 C.C.C. (3d) 291 (S.C.C.), the Supreme Court of Canada held (at p. 298) that "[t]he Crown need not prove that the intended recipient of the threat was made aware of it, or if aware of it, that he or she was intimidated or took it seriously." See also *R. v. O'Brien* (2013), 292 C.C.C. (3d) 526 (S.C.C.), at p. 530. Under s. 264.1, the threat need not be directed towards a specific person; a threat against an ascertained group is sufficient: *McRae*, p. 298. More importantly for present purposes, whether the words constitute a threat is a question of law to be decided on an objective basis – looked at in context, would the words convey a threat to a reasonable person in the circumstances? (*McRae*, at p. 297 and *R. v. McCraw* (1991), 1991 CanLII 29 (SCC), 66 C.C.C. (3d) 517 (S.C.C.)).

[18] Pulling these elements together, the offence under s. 264.1 is complete once the threat has been uttered, whether or not it has any impact on its intended target. The law criminalizes this type of communication, as long as it is objectively threatening in nature, and intended to intimidate or taken seriously: *O'Brien*, at pp. 530-531. The Crown urged me to apply this line of authority to implied threats under s. 343(*a*).

[19] I am not persuaded that this is the correct approach. Threatening words or conduct play a role in a number of other *Criminal Code* provisions, extending beyond mere "uttering." For example, extortion (s. 346) may be committed by "threats", intimidation (s. 423) is committed by someone who "uses violence or threats of violence", and criminal harassment (s. 264) requires that the accused engage "in threatening conduct directed at the other person or any member of their family."[3] The role that threatening conduct plays will depend upon the manner in which the concept is used in the particular section of the *Code*, the language of the section, as well as the nature and requisite elements of the offence.

[20] To obtain a conviction under s. 343(*a*), the Crown must prove that the accused "***uses*** violence or threats of violence to a person" for the specific purpose of "extorting whatever is stolen or to prevent or overcome the stealing." By employing the verb "use", the violence or threats must play an instrumental role in facilitating the theft. When the violence or threats of violence become disconnected (either temporally or functionally) from the stealing, liability for robbery becomes precarious.

[21] This is illustrated in cases involving the use of actual violence to commit a robbery; the violence must be instrumental to the theft. As Finch C.J.B.C. held in *R. v. Jean* (2013), 2012 BCCA 448 (CanLII), 293 C.C.C. (3d) 66 (B.C.C.A.), at p. 74:

> Robbery within the meaning of s. 343(*a*) therefore requires the use of violence or threats of violence ***in the course of, and for the purpose of, taking whatever is being stolen***. In other words, the violence or threat must occur before or contemporaneously with the theft… [emphasis added]

See also *R. v. Newell* (2007), 2007 NLCA 9 (CanLII), 217 C.C.C. (3d) 483 (N.L. C.A.). Violence that occurs after a theft (for the purpose of enabling an escape or to prevent the re-taking of the stolen property) does not come within the definition of s. 343(*a*) because such conduct does not facilitate the theft: see *R. v. McKay* (2014), 305 C.C.C. (3d) 409 (Sask. C.A.).

[22] An implied threat should operate in the same manner under s. 343(*a*) – it must be instrumental in facilitating theft. This is demonstrated in *R. v. Daughma*, [1989] O.J. No. 1765 (C.A.), in which Goodman J.A. said, at para. 5:

> In order to constitute the offence of robbery under s. 343(*a*), ***the threat of violence in question must be used to prevent or overcome resistance to the stealing.*** Such was not the case here. Accordingly, a conviction for robbery cannot be made under s. 343. [emphasis added]

If an implied threat is to function in this manner, it is not sufficient that the words or conduct merely be objectively threatening in nature; there must be some impact on the victim.

[23] Lastly, the Crown argued that the assessment of whether an accused person's conduct amounts to a robbery should not be determined by the subjective reaction of the victim. He submitted that the law operates arbitrarily when identical conduct amounts to a robbery with one victim, but not with another.

[24] This phenomenon is not foreign to the criminal law, nor is it arbitrary. Writing about causation in a manslaughter case, Dickson J. (as he then was) said the following in *R. v. Smithers* (1977), 1977 CanLII 7 (SCC), 34 C.C.C. (2d) 427 (S.C.C.), at p. 437: "It is a well-recognized principle that one who assaults another takes his victim as he finds him." Prosecutors rely on this "thin-skulled man" principle to advance arguments in support of enhanced liability: see Don Stuart, *Canadian Criminal Law – A Treatise*, 6th ed. (Toronto: Carswell, 2011), at pp. 143-152. So applied, the resilience of a victim may be the difference between an assault and a homicide.

[25] Far from having a thin skull, the teller in this case had a thick skin. While others might have reasonably been frightened, she did not experience any fear at all. In these unique circumstances, a properly instructed jury, acting reasonably, could not find that there was an implied threat that was accompanied by a reasonable apprehension of harm. There was no robbery.

CONCLUSION

[26] For these reasons, the motion for a directed verdict was granted. The trial proceeded on the included offence of theft under $5000, contrary to s. 322 of the *Criminal Code*.

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Trotter J.

Released: November 6, 2014

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