NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Frank***, 2013 NSCA 148

Date: 20131217
Docket: CAC 382020
Registry: Halifax

Between:

Robert Douglas Frank

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Beveridge and Scanlan, JJ.A.
Appeal Heard:	December 3, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Fichaud and Scanlan, JJ.A. concurring
Counsel:	Appellant in person William Delaney, Q.C., for the respondent

Reasons for judgment:

[1] Mr. Frank was charged with 23 counts of mischief, criminal harassment, breaches of undertakings, recognizances and probation orders. The charges were spread out over four informations.

[2] Judge Anne S. Derrick of the Provincial Court convicted him of 20 counts, and sentenced him to a total of 18 months' incarceration, less 10 months' credit for time spent on remand. Other ancillary orders were made. The conviction and sentence decisions are reported (2011 NSPC 107 and 2012 NSPC 5).

[3] Mr. Frank, representing himself, filed a Notice of Appeal with the Registrar of the Nova Scotia Court of Appeal challenging the convictions. He attacks the factual findings made by the trial judge. The Crown suggests that, in essence, the appellant's complaint is that the verdicts are unreasonable or not supported by the evidence. The Crown's suggestion is accurate. At the hearing of the appeal, the appellant did not say otherwise.

[4] The complaint by the appellant is without merit. But for one minor slip, the decision by the trial judge is without error. I would dismiss the appeal pursuant to s. 686(1)(b)(i) of the *Criminal Code* and correct the verdict pursuant to s. 686(3).

ANALYSIS

[5] The behaviour exhibited by the appellant toward the complainant and her family is disturbing, even bizarre. A friendship at church between the appellant and the complainant went horribly wrong. They knew each other for some 15 years. In the summer of 2009 they went on a few dates. She knew pretty quickly the relationship would not progress. Unfortunately, he felt he loved her. He said God had told him they were meant to be together in a relationship.

[6] When it seemed that was not going to happen, he tormented her and her family. Police were called. He was undeterred. Charges of criminal harassment were laid. Still, he was not deterred. Additional charges were laid for breaches of no contact conditions in undertakings and recognizances, and damage to property. Eventually the appellant was remanded. On the last information, the Crown proceeded by indictment.

[7] His trial on these four informations was held before The Honourable Judge Anne S. Derrick over five days in June and August 2011. The appellant had counsel. He testified and denied any wrongdoing. On August 12, 2011, the learned trial judge delivered oral reasons.

[8] In the course of delivering her decision, she made a number of key findings of fact. She rejected the evidence of the appellant, and found the evidence of the complainant to be credible and reliable. She did not mince her words: the appellant imagined and invented his so-called relationship with the complainant. The following excerpts illustrate:

> [21] … I accept Ms. Chawner's evidence that she briefly dated Mr. Frank. I do not believe the elaborate story Mr. Frank has told about a romance with Ms. Chawner and a friendship with her father. I am wholly satisfied that the relationships Mr. Frank described lived only in his imagination.
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> [22] Mr. Frank's version of these relationships sounded like a story about how he wanted these relationships to be, not how they were. Reverend Ashton confirmed that Mr. Frank felt he had a special relationship with Ms. Chawner and wanted it to be more intimate. This indicates that Mr. Frank yearned for something he did not have, not, as he has testified, that he already had achieved intimacy with Susan. And, according to Joyce Chawner, Mr. Frank was "not at all close" to her late husband. I have no doubt that Mrs. Chawner would have known if her husband had been meeting regularly with Mr. Frank, something she never mentioned in her evidence and was not asked about on cross-examination.
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> [23] In arriving at my conclusion that Mr. Frank has conjured up his relationships with Susan Chawner and her father, embroidering them with details that are completely invented, I have considered the credibility of Susan Chawner and her mother. I found Susan Chawner to be an impressive witness. She had clear recall and gave very precise responses to questions without hyperbole or embellishments. She presented as an organized and focused person. She was balanced and fair in her responses and gave a narrative that resonated with credibility.
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> ...
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> [25] As for Mr. Frank I have found him to be a distinctly unimpressive witness, diffusely focused, confusing to listen to, evasive and unconvincing. I will have more to say about this in due course. I had no trouble concluding that Mr. Frank's evidence failed to withstand scrutiny time and time again. I do not accept that the dyslexia he claims to have has any bearing on this nor is there any evidence to suggest that it does. Susan Chawner and Joyce Chawner on the other hand gave evidence that consistently emerged intact under questioning.

[9] The trial judge carefully set out the appropriate legal principles, the Crown evidence, and that of the appellant. She found that the Crown had proven beyond a reasonable doubt all 23 of the charges, but stayed three of them under the *Kienapple* principle (the prohibition against multiple convictions for the same wrong).

[10] Sentence was adjourned. The defence sought a mental health assessment. Forensic psychiatrist, Dr. Aileen Brunet saw the appellant. Her preliminary report said that there was sufficient evidence to warrant a detailed assessment of the appellant to determine if he may have been suffering from a mental disorder to the extent that he was not criminally responsible, within the meaning of s. 16 of the *Criminal Code*.

[11] The trial judge ordered an assessment pursuant to s. 672.11 of the *Criminal Code*. The initial 30 day assessment was extended. Dr. Brunet eventually completed a detailed report dated November 25, 2011. Although her opinion was that the appellant did not have a mental disorder defence available to him for the charges before the Court, she did refer to the nature of the appellant's explanations for the events surrounding the charges as "extreme and borderline bizarre"; and set out her belief that the appellant is mentally disturbed and may have a burgeoning mental illness.

[12] The appellant was sentenced on January 24, 2012 to eighteen months' incarceration, less ten months' credit for time spent on remand. He remains in custody on other related charges.

[13] We heard this appeal on December 3, 2013. Oral submissions were made by the appellant. We also permitted the appellant's brother to address the Court.

[14] The appellant did not identify any claimed errors by the trial judge. Instead, his submission was that if he were released from prison, he would then be able to dig up a lot of facts and prove that he was not where they say he was. This, he said, could not be accomplished from prison.

[15] William Delaney, Q.C., relied on his factum. However, he did, fairly and appropriately, identify one potential problem he had uncovered in his detailed review of the record. Count # 6 in the information sworn November 3, 2010 charged the appellant as follows:

> AND FURTHER that he at the same place aforesaid, on or about the 1st day of November, 2010, while being at large on his Undertaking issued on the 1st day of September, 2010 entered into before an Officer in Charge and being bound to comply with a condition of said Undertaking did fail without lawful excuse to comply with a condition of said Undertaking to wit., "abstain from any communication with and have no direct or indirect contact with Susan CHAWNER or from going to within a 50 meter radius of 5548 Sentinal Square and 5670 Spring Garden Road, Halifax, N.S.", contrary to Section 145(5.1) of *Criminal Code*.

[16] The trial judge in her oral reasons, after finding that the Crown had proved beyond a reasonable doubt all of the charges against the appellant, listed the charges he was found guilty of. In that list are the following:

> [142] On the Information sworn November 3, 2010:
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> - On September 1, 2010, breaching an OIC undertaking issued September 1, 2010 by going within a 50 meter radius of 5670 Spring Garden Road contrary to section 145(5.1) of the *Criminal Code*; [Count 1]
> - On September 8, 2010, breaching an OIC undertaking issued September 1, 2010 by going within a 50 meter radius of 5670 Spring Garden Road contrary to section 145(5.1) of the *Criminal Code*; [Count 2]
> - On October 13, 2010, breaching an OIC undertaking issued September 1, 2010 by going within a 50 meter radius of 5670 Spring Garden Road contrary to section 145(5.1) of the *Criminal Code*; [Count 3]
> - On October 13, 2010, breaching an OIC undertaking issued September 1, 2010 by again going within a 50 meter radius of 5670 Spring Garden Road contrary to section 145(5.1) of the *Criminal Code*; [Count 4]
> - On October 14, 2010, breaching an OIC undertaking issued September 1, 2010 by going within a 50 meter radius of 5670 Spring Garden Road contrary to section 145(5.1) of the *Criminal Code*; [Count 5]
> - **On November 1, 2010, breaching an OIC undertaking issued September 1, 2010 by going within a 50 meter radius of 5670 Spring Garden Road contrary to section 145(5.1) of the *Criminal Code*; [Count 6]**
> - Between August 31 and November 2, 2010, breaching an OIC undertaking issued September 1, 2010 by having indirect contact with Susan Chawner. (This charge relates to the communication by

> Reverend Ashton to Ms. Chawner following Mr. Frank's request, while he was on no-contact conditions, for a meeting.) [Count 7]

[17] The problem is there is no evidence that the appellant breached the 50 meter radius prohibition on November 1, 2010; the evidence was that he called her that day and left a message on her phone. That conduct was contrary to the condition set out in his Undertaking to "abstain from any communication with and have no direct or indirect contact" with the complainant. The trial judge found that this contact had in fact occurred (¶ 56 and ¶125).

[18] In my opinion, the trial judge made a simple slip; the appellant was not properly convicted of breaching the 50 meter restriction in Count # 6 of the November 3, 2010 information. However, the appellant was properly convicted on the remaining counts. Pursuant to s. 686(3)(a) of the *Code*, I would substitute a verdict of guilty on Count #6 of violating the no contact condition of his Undertaking and affirm the sentence imposed.

[19] Accordingly, I would dismiss the appeal.

Beveridge, J.A.

Concurred in:

Fichaud, J.A.

Scanlan, J.A.