Case Name:
R. v. A.F.

Between
Her Majesty the Queen, and
A.F.-S.

[2015] O.J. No. 1975

2015 ONCJ 206

Brampton Court File No.: 14-Y434

Ontario Court of Justice

P.A. Schreck J.

Heard: October 21, 2014; March 30, 2015.
Judgment: April 16, 2015.

(41 paras.)

Counsel:

R. Rota and C. Hackett, Counsel for the Crown.

J. Goldlist, Counsel for A.F.-S.

REASONS FOR JUDGMENT

1 P.A. **SCHRECK** J.:-- The Roy McMurtry Youth Centre is a secure custody facility in Brampton. Young persons held in custody there are primarily supervised by Youth Services Officers ("YSO"), who are responsible for overseeing programming and maintaining discipline. Given that youths in custody at the Roy McMurtry Centre are there because they are in conflict with the law, it is unsurprising that there are sometimes incidents of misconduct, with varying degrees of seriousness. Maintaining discipline at the institution undoubtedly poses a significant challenge. This is, however, the responsibility of the YSOs and not the courts, unless the misconduct in question

crosses the line into criminal behaviour. In that case, YSOs, like everybody else, are entitled to the protection of the criminal law.

2 A.F.-S. was an inmate at the Roy McMurty Youth Centre on September 29, 2013. While under the supervision of three YSOs, he began to behave in an aggressive and belligerent manner because he was upset about not being able to use the telephone. He repeatedly disobeyed directions from the YSOs, left his room without permission, shouted and called the YSOs names, and damaged property belonging to the institution. He was eventually subdued when other staff members arrived.

3 As a result of his conduct, Mr. F.-S. was charged with three counts of unlawfully using violence with the intent of provoking a state of fear in a justice system participant in order to impede her in the performance of her duties, contrary to s. 423.1(1)(3) of the *Criminal Code,* three counts of criminal harassment, contrary to s. 264(2)(*d*) of the *Criminal Code,* and one count of mischief to property under $5000 contrary to s. 430(4) of the *Criminal Code.* The issue before this Court is whether Mr. F.-S.'s behaviour crossed the line from mere misconduct to criminal behaviour.

I. EVIDENCE

A. The Testimony of the Complainants

4 Every young person admitted to the Roy McMurtry Centre spends the first two weeks in the intake unit, unit 1B, which can hold up to 16 individuals. As one would expect, life there is subject to a number of routines, including in the evening when the incidents at issue in this case occurred. Every evening, beginning at 7:15 p.m., inmates are given the opportunity to shower. However, only two inmates can shower at a time. Other inmates are expected to remain in their rooms with the door closed while showers are taking place. After everybody has showered, the inmates are given free time including, if they wish, the opportunity to make telephone calls. While the evidence was not entirely clear, it seems that inmates were sometimes given permission to make telephone calls during shower time. Telephone calls were made from a room in the unit which has a telephone for inmates. There is another telephone on a desk used by YSOs directly outside the inmates' rooms. This telephone is only for use by staff members.

5 On the evening of September 29, 2013, three YSOs were on duty: Adriana Campbell, Samantha Harrison and Sherri Shaw. When the showers began, all of the inmates were directed to return to their rooms. Mr. F.-S. did not want to return to his room and was argumentative when asked to do so. However, he eventually complied.

6 While some of the youths were showering, Mr. F.-S. began to open the door to his room and shout at the other youths to hurry up. He wanted them to the finish showering so that the free time would begin and he would have an opportunity to use the telephone. He was told by the YSOs to be quiet and return to his room. He did so, but later opened his door again and shouted that he wanted to use the telephone. He called the YSOs "waste staff", which is apparently a derogatory term used by the inmates at the Centre. At one point, he said that if he was not allowed to the use the telephone, "there would be fucking issues".

7 The YSOs decided among themselves that because of his conduct, Mr. F.-S. was going to be

disciplined by being given "early bed time." However, they wanted to have a manager present when they informed him of this. A manager was summoned, but before the manager's arrival Mr. F.-S. exited his room and approached the YSOs' desk. He was clearly upset, had his fists clenched and was pacing back and forth. He ignored directions from the YSOs to return to his room. According to Ms. Campbell, at one point he approached her, stood about a foot away from her and "towered over her" (Mr. F.-S. is approximately 6'6" tall while Ms. Campbell is 5'7"). He once again demanded to use the telephone and said that there "would be issues" if he was not able to do so. Ms. Campbell testified that she felt "a bit intimidated" by this. Ms. Shaw also described Mr. F.-S as being "in her face", which made her feel intimidated and threatened. All three YSOs testified that they were concerned that Mr. F.-S. may engage in assaultive behaviour of some sort.

8 While Mr. F.-S. was out of his cell, Ms. Harrison took the precautionary step of locking the doors of the other youths' rooms. At one point, Mr. F.-S. yelled out to the other youths, although the testimony of the two complainants who heard him differed as to what he said. According to Ms. Campbell, although she could not remember his exact words, he said something to the effect that the inmates should get together and should not let the staff run the place. According to Ms. Shaw, he said "come out and let's get this fucking waste staff".

9 After carrying on in the manner described, Mr. F.-S. reached across the YSOs' desk and picked up the receiver of the telephone, which was intended for staff use only. Ms. Campbell grabbed the body of the telephone and a "tug of war" ensued, causing the cord between the receiver and the telephone to break. The YSOs became concerned that Mr. F.-S. would use the telephone receiver as a weapon. He waved the receiver around as he continued to shout, but did not use it to threaten anybody. He then threw the receiver against a wall, causing it to break. At one point in her testimony, Ms. Harrison described the receiver as being thrown towards her or over her head.

10 Eventually other staff members arrived and ordered Mr. F.-S. to stand against the wall. He complied and was handcuffed and taken out of the unit.

11 All of the YSOs agreed in cross-examination that at no point did Mr. F.-S. come into physical contact with any of them, attempt to strike them or touch them, or utter any threats towards them.

B. The Video Surveillance

12 Three security cameras located at various locations in the unit captured the events, although there was no sound recording. Between the three cameras, all of the relevant events are captured from the point at which Mr. F.-S. left his room until another officer entered the unit and took control of him, a period of approximately 90 seconds.

13 The video footage confirms much, but not all of the witnesses' testimony. Mr. F.-S. clearly appears agitated in the video and is seen pacing up and down. At one point, he picks up the telephone receiver on the desk. Ms. Campbell picks up the body of the telephone and both pull on their respective ends, causing the cord to break. Mr. F.-S. then paces around holding the receiver, but there is nothing to indicate that he uses it as a weapon or in a threatening manner. He then throws the receiver against a wall that is not seen on the screen. It is clear that he does not throw the receiver at Ms. Harrison or anybody else. At no point does Mr. F.-S. approach any of the YSOs or

stand directly in front of any of them.

III. ANALYSIS

A. Intimidating Justice System Participants

The Elements of the Offence

14 Mr. F.-S. is charged in Count 1 that he

> . . . unlawfully did without lawful authority, intending to provoke a state of fear in Adriana Campbell, a justice system participant in order to impede her in the performance of her duties, use violence contrary to section 423.1(1)(3) of the *Criminal Code of Canada.*

Counts 3 and 5 are identically worded in relation to the other two complainants.

15 In order to obtain a conviction under s. 423.1 of the *Criminal Code,* the Crown must prove the following elements:

> That the accused engaged in conduct described in subsection (2) (in this case, using violence as described in s. 423.1(2)(*a*));
>
> that the conduct was intended to provoke a state of fear in a person or group of persons;
>
> that the person or group of persons are part of the categories described in subsection (1) (in this case, a "justice system participant" as described in s. 423.1(1)(*b*));
>
> that the accused's intent in engaging in the prohibited conduct was for the purpose described in subsection (1) in relation to the specified category of individuals (in this case, for the purpose of impeding him or her in the performance of his or her duties).

16 In this case, there is no issue with respect to the third element. Counsel for Mr. F.-S. concedes that all three complainants clearly fall within the definition of a "justice system participant" as set out in s. 2 of the *Criminal Code.*

(ii) "impeding her in the performance of her duties"

17 With respect to the third element, counsel for Mr. F.-S. submits that there is no evidence that any of the complainants were impeded in the performance of their duties. I disagree. The three YSOs were obviously prevented from carrying out their duties as they ordinarily would have. They had to stop the usual routine, lock the doors of the other youths' rooms, and summon additional staff.

18 With respect to whether Mr. F.-S. intended that the YSOs be impeded in the performance of

their duties, in my view he clearly did. This element of s. 423.1 of the *Criminal Code* was considered by the British Columbia Court of Appeal in *R. v. Armstrong* (2012), 288 C.C.C. (3d) 282 (B.C.C.A.), lv. to appeal refused [2012] S.C.C.A. 529. Relying on *R. v. Chartrand,* [1994] 2 S.C.R. 864 and *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), the Court concluded that the element of intent is established where the effect of impeding the performance of duties is a natural and probable consequence of the accused's actions. See also *R. v. Treleaven,* [2012] O.J. No. 6193 (S.C.J.) at para. 87. In this case, the natural and probable consequence of Mr. F.-S.'s disruptive behaviour was that the YSOs would be impeded in the performance of their duties. I therefore conclude that this element has been established. The more difficult issue in this case is whether the first two elements have been established.

"did . . . use violence"

19 With respect to the first element, whether it has been established that Mr. F.-S. used violence, I note that the term "violence" is not defined in the *Criminal Code.* However, the meaning of the term was considered in *R. v. C.D.,* [2005] 3 S.C.R. 668 in the context of s. 39(1) of the *Youth Criminal Justice Act,* S.C. 2002 c.1, which provides that a custodial youth sentence is justified for a "violent offence". Writing for the Court, Bastarache J. concluded (at para. 82) that a "violent" offence in that context is one where a person "causes, attempts to cause or threatens to cause bodily harm".

20 More recently, this definition was adopted in *R. v. Steele,* [2014] 3 S.C.R. 138 in the context of the meaning of a "serious personal injury offence" in the dangerous offender provisions of the *Criminal Code,* particularly s. 752. In that case, after reviewing *C.D.* and other jurisprudence, Wagner J. concluded as follows (at para. 51):

> This brief survey of judicial interpretations of the term "violence" suggests that the focus is on the harm caused, attempted or threatened rather than on the force that was applied. I do not suggest that the definition of violence must be a harm-based one in every case. Context will be paramount. As I mention below (see para. 65), there may be situations in which the presumption of consistent expression is clearly rebutted by other principles of interpretation and, as a result, the intended meaning of violence may vary between statutes and even, in some circumstances, within them: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 222. *However, unless the context or the purpose of the statute suggests a different approach, the prevailing definition of "violence" is a harm-based one that encompasses acts by which a person causes, attempts to cause or threatens to cause harm*. [Emphasis added].

21 In the context of s. 423.1 of the *Criminal Code,* an argument could be made that threats of violence are not encompassed in the definition of violence since threats are listed as a separate category of prohibited conduct in s. 423.1(2)(*b*). If the term "violence" included threats of violence, subsection (*b*) would be redundant. Similarly, as with the *Steele* definition, "violence" does not include the destruction of property since that is also a distinct category of prohibited conduct in s. 423.1(2)(*a*). However, even if the wording of s. 423.1 supports a narrower definition than that

adopted in *Steele,* nothing in the context or the purpose of the statute supports a broader definition. In my view, the term "violence" in s. 423.1(2)(*a*) means "acts by which a person causes or attempts to cause bodily harm". There is no evidence that Mr. F.-S. caused or attempted to cause bodily harm to any person.

22 Crown counsel submits that it has nonetheless been established that Mr. F.-S. behaved violently. She submits that the entire context must be considered and that this context includes the following behaviour by Mr. F.-S.:

> He failed to follow the directions of the complainants;
>
> He shouted and swore;
>
> He clenched his fists;
>
> He approached the complainants, got "in their faces" and "towered over them" in an attempt to make himself appear larger than he was;
>
> He threw the telephone receiver against the wall.

Crown counsel submits that his behaviour was clearly escalating and that he was therefore clearly engaging in "a violent behaviour as opposed to a calm behaviour".

23 Leaving aside the throwing of the receiver, which I will consider separately, I have considerable difficulty with this submission. First of all, some of it is unsupported by the independent video surveillance evidence. Although two of the complainants testified that Mr. F.-S. got "in their faces", the video evidence does not support this. With respect to Mr. F.-S. "towering over" them, he is considerably taller than each of the complainants and it is difficult to see how he could help "towering over" them. I see no evidence on the video to support the suggestion that Mr. F.-S. was attempting to make himself appear larger than he is. He is well over six feet tall and it is unlikely that he would have any need to do so.

24 The Crown's argument in effect invites me to equate "violence" with belligerence. In my view, this interpretation is inconsistent with the jurisprudence and the intent of the section. Section 423.1 of the *Criminal Code* is designed to protect justice system participants from criminal behaviour. It was never intended to criminalize any disruptive behaviour that takes place in a correctional institution. To be clear, I am not condoning Mr. F.-S.'s conduct. It was completely inappropriate, disrespectful, disruptive and deserving of disciplinary sanctions. Being subjected to such conduct is undoubtedly a difficult and challenging aspect of employment in the correctional field. However, maintaining discipline in the institution is not this Court's function.

25 The throwing of the telephone receiver could fall within the scope of s. 423.1(2)(*a*), which mentions "destroying or causing damage to the property" of the alleged victim of the offence. In this case, however, the Crown chose to particularize the charge as having been committed through the use of violence. As I have found, the charge, as particularized, has not been proven.

"intending to provoke a state of fear"

26 For the reasons outlined earlier, I am not persuaded that Mr. F.-S.'s conduct can properly be characterized as "violence." Nor am I satisfied that it was his intention to provoke a state of fear in the YSOs. He was clearly angry and frustrated, but as the witnesses acknowledged, he did not harm them or threaten them.

27 Similarly, I am not persuaded that Mr. F.-S. threw the telephone receiver with the intent to provoke a state of fear in the complainants. It is more likely that he did so out of frustration.

28 For the foregoing reasons, I am not satisfied beyond a reasonable doubt that Mr. F.-S. used violence or that he conducted himself in the manner that he did with the intent to provoke a state of fear in any of the YSOs. As a result, he must be found not guilty on Counts 1, 3 and 5.

B. Criminal Harassment

The Elements of the Offence

29 Count 2 charges that Mr. F.-S.

> . . . unlawfully did engage in threatening conduct directed at Adriana Campbell, thereby causing Adriana Campbell to reasonably, in all the circumstances, fear for her safety, contrary to section 264(2)(*d*) of the *Criminal Code of Canada*.

Counts 4 and 6 are identically worded but in relation to the other two complainants.

30 The elements of the offence of criminal harassment were set out in *R. v. Sillipp* (1997), 120 C.C.C. (3d) 384 (Alta. C.A.) at para. 18 and *R. v. Kosikar* (1999), 138 C.C.C. (3d) 217 (Ont. C.A.) at para. 19. To obtain a conviction, the Crown must prove the following:

> That the accused has engaged in the conduct set out in s. 264(2)(*a*), (*b*), (*c*), or (*d*) of the *Criminal Code*;
>
> that the complainant was harassed;
>
> that the accused who engaged in such conduct knew that the complainant was harassed or was reckless or wilfully blind as to whether the complainant was harassed;
>
> that the conduct caused the complainant to fear for her safety or the safety of anyone known to her; and
>
> that the complainant's fear was, in all of the circumstances, reasonable.

31 In this case, counsel focussed their submissions on the first element, which particularized the alleged harassment as being the result of "threatening conduct".

Threatening Conduct

32 In *R. v. Burns,* [2007] O.J. No. 5117 (C.A.), the Ontario Court of Appeal stated:

> To establish harassment under s. 264(2)(*d*) of the *Criminal Code*, the Crown had to establish that the appellant engaged in "threatening conduct". We accept the definition of threatening conduct given in *R. v. George* (2002), 162 C.C.C. (3d) 337 (Y.T.C.A.) at para. 39 that, in order to meet the objectives of s. 264, the threatening conduct must amount to a "tool of **intimidation** which is designed to instill a sense of fear in the recipient". The impugned conduct is to be viewed objectively, with due consideration for the circumstances in which they took place, and with regard to the effects those acts had on the recipient.

33 Crown counsel submitted that the threatening conduct in this case consisted of the following:

> Failing to follow the directions of the staff;
>
> Speaking loudly and yelling;
>
> Making repeated demands;
>
> Clenching his fists;
>
> > Saying that there "would be issues" is he did not get to use the telephone;
> >
> > Suggesting that the other inmates get together and "get" the "waste staff";
>
> Throwing the telephone receiver.

34 There is no merit to the suggestion that the failure to follow directions, shouting, making repeated demands and clenching fists that occurred here is threatening conduct. As with the submission respecting "violence", this amounts to nothing more than an attempt to criminalize disruptive behaviour. Saying that "there would be issues" is simply too ambiguous to constitute a threat. All of the witnesses who heard this utterance acknowledged that they did not know what Mr. F.-S. meant and could put it no higher than to say that it was possible that he was referring to some future act of violence.

35 This leaves the suggestion to the other inmates that they "get" the "waste staff" and the throwing of the telephone. With respect to the former, as I observed earlier the witnesses who heard this comment gave different versions of what was said. Ms. Shaw's version ("Come out and let's get this fucking waste staff") could well be viewed as a threat. Ms. Campbell's version (to the effect that the inmates should get together and not let the staff run the place) is more ambiguous. Given the different versions, I am unable to make a finding about what was said and am unable to conclude that it constituted a threat.

36 With respect to the telephone, I have already found that this was likely thrown out of frustration and not with the intent of causing fear. I am not satisfied that he did so for the purpose of intimidating anybody.

37 Having considered all of the evidence, I am unable to conclude that Mr. F.-S.'s conduct was "designed to instil a sense of fear".

"Harassed"

38 Given my conclusion that the Crown has failed to prove that Mr. F.-S. engaged in "threatening behaviour", it is unnecessary for me to consider the remaining elements of the offence. I would note, however, that I have serious reservations about whether any of the complainants were "harassed" in the sense that they were "tormented, troubled, worried continually or chronically, plagued, bedeviled and badgered" (see *R. v. Kosikar, supra* at para. 25). Ms. Campbell described being "a bit intimidated" and Ms. Harrison said she "wasn't absolutely scared". Having considered the evidence of all three complainants, including the manner in which they testified, in my view their state of mind is more accurately described as "disquieted", rather than "harassed" (see *R. v. Kosikar, supra* at para. 24).

39 Based on the foregoing, Mr. F.-S. must be found not guilty on Counts 2, 4 and 6.

C. Mischief to Property

40 Count 7 charges Mr. F.-S. with committing mischief by wilfully damaging property, the value of which did not exceed $5000, "to wit: a telephone receiver". The evidence clearly establishes that Mr. F.-S. threw the telephone receiver against a wall with considerable force. It was Ms. Harrison's unchallenged testimony that as a result of this, the receiver broke and was unusable. I have no doubt that when Mr. F.-S. threw the receiver, he knew it would break and intended this consequence. He is therefore found guilty on Count 7.

IV. CONCLUSION

41 Mr. F.-S. is found not guilty on Counts 1, 2, 3, 4, 5 and 6. He is found guilty on Count 7.

P.A. **SCHRECK** J.