



In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

2017 No: 21

BETWEEN:

THE QUEEN

And

CHAE FOGGO

SENTENCE

Date of Sentencing: Friday 6 October 2017
Date of Ruling on Sentence: Monday 9 October 2017

Counsel for the Crown: Javone Rogers on behalf of the DPP
Counsel for the Accused: Charles Richardson of Compass Law Chambers

*Section 290 of the Criminal Code (Threatening to Murder)
Sentencing Guidelines*

RULING of Acting Puisne Judge S. Subair Williams

Introduction

1. The Accused appears before the Court for sentence, upon his guilty plea entered 31 July 2017, on a single count of Threatening to Murder contrary to section 290 of the Criminal Code. Count 2 (Improper use of Public Telecommunications Service contrary to section 53(1)(a)) was left on the file.
2. While it is not the usual practice of the Supreme Court to deliver written rulings on sentence, Counsel observed that there are no previous written rulings of record which offer guidance on the sentence thresholds for an offence of threatening to kill in writing. Moreover, Defence Counsel, in his expressed critical remarks, opined that this Court had been misled in making each of its previous rulings which were not properly founded on persuasive authority from other Commonwealth jurisdictions.
3. It is against this background that I now deliver my reasons for sentence in writing.

Summary of the Facts

4. The Accused shares a 4 year old son with the Complainant in this case. The relationship between the Accused and the Complainant ended some years ago. On 30 March 2017 the Accused inadvertently learned that the Complainant had been co-habiting with another man while caring for their son. This enraged the Accused and immediately preceded the following text message which he sent to the Complainant:

“Yo answer the phone – ‘uma go to fukin jail for u – remember i told you thag- let me see you uma kill you – uma fuckin beat ya car, ya face, everything – don’t even want a son for u fuck u and him – ya a fat whore and uma make that lil nigga hate u when his older watch- feel sorry for that boy honest cause ya nothing but a tramp stamp yo”

5. On the Summary of Evidence placed before the Court, it is stated that the Complainant *‘...immediately became upset and fearful for her safety. She believed that the Defendant would follow through on his threats...’*
6. Defence Counsel, only through the course of his submissions, urged me to reject that the Complainant truly believed that the Accused would in fact follow through on his threats. In the absence of a proper challenge to the facts (eg. by Newton Hearing) I accept the facts as stated in the Summary of Evidence. I am also mindful that the statements made in the Victim Impact Statement are consistent with the assertion of this fear.

The Social Inquiry Report

7. This sentencing was adjourned from 31 July 2017 for a Social Inquiry Report (“SIR”) to be prepared and filed with the Court. The Accused was remanded into custody and an SIR dated 30 August 2017 was produced. Notably, neither Defence Counsel nor Crown Counsel made a single reference to the SIR in the course of their sentence submissions.
8. Notwithstanding, the Court has carefully considered all that was reported in the Social Inquiry Report (“SIR”). Of particular note, it is reported that that the Accused explained his commission of the offence as a venting and fuming occurrence. This is consistent with the submissions made by Defence Counsel and the allocutus statements of the Accused to the Court. According to the SIR, he said that he had not had the chance ‘*to calm down and think twice about it or apologize for (his) actions*’ as the Complainant went straight to the police. (The Offence occurred at approximately 8pm and the Complainant attended the police station three hours thereafter at approximately 11pm.)
9. The Accused reportedly complained that he was mostly upset by the fact that the Complainant previously refused him overnight access with his son due to him having moved on romantically while she cared for their son and cohabited with another man. It is also reported that the Accused had not seen his son for some 6 weeks prior to the day on which this offence occurred.
10. From the report, the Accused appears to have reflected on the impact of this offence on his son in future years and he expressed remorse for his actions. One can also easily glean from the Report that the Accused is challenged by anger management, notwithstanding the Probation Officer’s finding in the SIR that the Accused is of ‘*low risk of engaging in future acts of violence*’.

Sentences Sought:

11. The Crown submitted that a period of 2 years imprisonment was appropriate coupled with a period of probation to follow.
12. The Defence, however, sought an order rendering the Accused’s time spent in custody as sufficient without objecting to an added period of probation. (The Accused has been remanded since 31 July 2017 ie just in excess of nine weeks ago)

The Law

Previous Rulings on Sentences:

13. The Court's record of previous sentences is summarized as follows:

THE SUPREME COURT OF BERMUDA THREATENING TO MURDER IN WRITING s. 290 OF THE CRIMINAL CODE			
CASE	PLEA	SUMMARY	SENTENCE
<p>Detroy Smith</p> <p>(Case # 2013/7)</p>	<p>Guilty Plea</p> <p>March 2013</p>	<p>The Accused and the Complainant ended their on and off relationship of several years. At the time of the offence they shared a four year old son who lived with the Complainant. Shortly after having had a child with another woman, the Accused engaged in text messages with the Complainant inquiring about the new man in her life and around their son. When the Complainant refused to reveal the identity of this new man, the Complainant threatened "...if I want I can put d word out 2 fuck him up". The Accused also wrote, "I'm going to kill you...keep playing with me. I don't care dey can't give mi (sic) life...send mi(sic) back jail..." Additionally, the Accused sent a photo of a handgun to the Complainant (Count 2 Use of threatening gestures)</p>	<p>6 months imprisonment</p> <p style="text-align: center;">+</p> <p>18 months of probation</p>
CASE	PLEA	SUMMARY	SENTENCE
<p>Andre Nesbett</p> <p>(Case # 1 of 2014)</p>	<p>Guilty Plea</p> <p>Jan 2014</p>	<p>The Accused and the Complainant were previously in a romantic relationship. After the relationship ended, the Accused sent a series of text messages to the Complainant: "<i>I will show up at every fucking house you(r) ass gonna try to hide at and kill you...I told ya dumb ass last night if I see ya I'm gonna fuckin kill you, you think I'm jokin, I ain't scared to go to prison. I've already lost my son. I have nothing to lose, you hear me... ya have been fucking with the wrong person leave me the fuck alone. You ass gonna get dealt with...you betta fuckin hide L.M.A.O and got the whip ya, yo ass dead bitch, fuckin dead, you hear me...wur yo ass at? Huh, at ya mama's house? Good, I get to leave ya blood all on her shit- LMAO big leagues bitch? Ya see you when I get there, see big league, yo ass is six feet under...</i>" (The Complainant called the police and the Accused appeared at her bedroom window banging and shouting for her to open the door.) Accused had no previous convictions of record.</p>	<p>12 months imprisonment</p> <p style="text-align: center;">+</p> <p>3 years of probation</p>

CASE	PLEA	SUMMARY	SENTENCE
Giontai Minors (Case # 2013/40)	Guilty Plea Feb 2014	The Complainant having ended her relationship with the Accused, received the following text messages (in part): "...Cuz I am going to do something fuckd up to yu (sic) soon...Cuz you think I'm afraid of yu (sic). Well just know that I'm not gona threaten you no more. I'm just gona pop off and yes that piece is mine n I'm gona use it on your loved one next. So watch the news yu hater....but dnt worry cuz girls get shot to(o) now days so watch out. Cuz ya a DEAD MAN...So you know, just hope I don't bump into yu in town...and test my Gang [star symbol]. I'll show you y dey dnt call me G for nothing ok. Dead serz (serious) ma..have fun being well known ya..."	18 months imprisonment + 3 years of probation
CASE	PLEA	SUMMARY	CASE
Makonnen Lowe (Case # 2013/10)	Guilty Plea April 2013	The relationship between the Accused and the Complainant ended after approximately one year, despite the fact that the Complainant was pregnant with the Accused's child. The Accused sent the following threatening text messages (in material part): "U think my feelns is a joke til I fuckn put I in ya head. I will kill U. I'm tired of ya shit yo. I'm ready to fuck you up. U don't want me to go back to beatin U." A FaceBook message followed: "Ima fuckin see u n deal with u watch I should come down there n rip that fuckin baby outta ya stomach u stupid." The Accused was serving a probation sentence at the time this offence was committed. He also had a previous conviction for uttering threatening words.	2 ½ years imprisonment + 3 years probation
CASE	PLEA	SUMMARY	SENTENCE
Kishauni Wolffe (Case # 2011/2)	Guilty Plea	Following the end of their romantic relationship, the Accused sent a threatening text messages to his former girlfriend's father which read: 'by tonight your daughter will be dead' The Accused had already had a previous conviction for threatening the same young woman	5 years imprisonment REDUCED ON APPEAL TO 2 ½ years of imprisonment + 2 years probation

CASE	PLEA	SUMMARY	SENTENCE
Sahkai Weeks Lowe (Case # 2012/35)	Guilty Plea Feb 2013	Accused passed a note threatening to kill his estranged wife (“ <i>I really do wanna kill u</i> ”) and a newspaper article relating to his previous conviction, through their four year old son by placing the note in his lunch bag. When he placed the note in the lunch bag he also told his son that he was going to kill his mother. This threat was made shortly after his release from custody on another matter. The Complainant also alleged that this was not the first occasion on which a similar type threat occurred via her son’s lunch bag.	2 years imprisonment + 3 years of probation
Kyle Smith (Case # 2012/28)	Guilty Plea Sep 2012	Accused sent a series of threatening text messages to his former girlfriend who is also the mother of his child. In part the messages read: “... <i>u gonna die 2day whore anyway. Just 2 let you know. U fuckin bum..ya getting ya ass beat 2day bitch. I felt sorry for you yesterday...n everybody round u is getn it. U aint seen psycho yet. You’re going to die today. Believe dat! Keep thinking I’m playing. I’m really going to stab the shit out of you...</i> ” This threat was made shortly after the Accused had seen the Complainant in public with another man.	2 ½ years imprisonment + 2 years of probation

14. It is clear that an immediate custodial sentence is the only appropriate starting point in passing sentence for a written threat to kill. The previous custodial sentences handed down by this Court have ranged from 6 months up to 2 ½ years, notwithstanding that the maximum sentence is up to 7 years imprisonment.

Sentencing Guidelines in the UK

15. Mr. Richardson referred the Court to Section 16 of the Offences Against the Persons Act 1861 (OAP), which is the UK offence of threatening to kill:

“A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, to kill that other or a third person shall be guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years.”

16. Section 16 of the OAP is an either way offence while section 290 out the Criminal Code is an indictable only offence.

17. Defence Counsel relied on an extract from the Magistrates' Court Sentencing Guidelines (effective from 4 August 2008) which reported:

Examples of nature of activity	Starting point	Range
One threat uttered in the heat of the moment, no more than fleeting impact on victim	Medium level community order	Low level community order to high level community order
Single calculated threat or victim fears that threat will be carried out	12 weeks custody	6 to 26 weeks custody
Repeated threats or visible weapon	Crown Court	Crown Court

18. Mr. Richardson submitted that this case falls somewhere between the first two categories and would otherwise be disposed of summarily in the UK.

19. Mr. Richardson also relied on *R v James Edward Tyas [2013] EWCA Crim 2291*, to which I have also had regard. This was a domestic-type matter where the Accused threatened to kill his former partner with whom he shared a home and children. The Accused entered an early guilty plea and his sentence was reduced on appeal from 30 months imprisonment to 20 months. The aggravating factors included the brandishing of a knife to the Complainant's throat before the Accused stood over their baby's cot threatening to kill himself.

Sentencing Rulings in Australia

20. Mr. Richardson also referred the Court to a summary sentencing table of Western Australian cases involving the offence of threatening to kill. Counsel did not place the contravening section before the Court which reads:

Section 338B of the Western Australian Criminal Code:

Any person who makes a threat to unlawfully do anything mentioned in section 338(a),(b),(c) or (d) is guilty of a crime and is liable-

(a) Where the threat is to kill a person, to imprisonment for 7 years or, if the offence is committed in circumstances of racial aggravation, to imprisonment for 14 years;

(b) In the case of any other threat, to imprisonment for 3 years or, if the offence is committed in circumstances of racial aggravation, to imprisonment for 6 years.

Summary conviction penalty in a case to which paragraph (b) applies: imprisonment for 18 months and a fine of \$18,000.

21. In Western Australia, where the threat is to kill, the maximum penalty is 7 years imprisonment and is indictable only, as is the case in Bermuda.
22. Section 308 of the Australian Queensland Code reads:
- 308 Any person who, knowing the contents thereof, directly or indirectly causes any person to receive any document threatening to kill any person, is guilty of a crime, and is liable to imprisonment for 7 years.*
23. The statutory maximum sentence is equivalent to section 290 of the Criminal Code and is also indictable only.
24. Counsel referred the Court to *Pureau v The State of Western Australia [2017] WASCA 115* as an example of the more serious cases which resulted in 3 years imprisonment after trial. *Pureau* was a domestic case where the threat was coupled with the brandishing of a knife and the other charges on the indictment were of a violent nature. Further, the victim in that case was pregnant and thereby vulnerable. It is noted in the extract placed before the Court, “*The judge found appellant’s overall offending constituted a very serious example of domestic violence and the real seriousness of the offence was his threats to unlawfully kill M and the deprivation of liberty. The real harm was psychological.*” The Accused, a 24 year old, also had previous criminal convictions for offences including a domestic assault occasioning bodily harm. *Cleminson v The State of Western Australia [2017] WASCA 58*; *FWB v The State of Western Australia [2016] WASCA 118*; and *Bloomfield v The State of Western Australia [2017] WASCA 10* were cited as further examples of the more serious cases. In each of those cases, a 2 year custodial sentence was imposed after a guilty plea.
25. *MacCauley v The State of Western Australia [2017] WASCA 65* was put before the Court as an example of the lesser serious cases. The Accused, a 23 year old substance abuser, was diagnosed with panic disorder, social anxiety and stress/adjustment disorder. Here, the threats to kill were made after a heated dispute between the Accused and the two victims over the ownership of a vehicle. The Accused, MacCauley, also picked up a shard of glass when making the threats. The sentence imposed was 12 months imprisonment.
26. In *Fletcher v The State of Western Australia [2014] WASCA 65* the Accused was sentenced to 8 months imprisonment after a trial. The facts were of a domestic nature and the Accused had a lengthy criminal record of convictions for violent offences. Furthermore, the threats were of an explicit nature in that the Accused threatened to tie up and set fire to his partner. (*Fletcher* pre-dates *MacCauley* and each of the other Australian cases cited.)

Analysis:

27. Having seen the Summary of Evidence and the Victim Impact Statement (and in the absence of evidence to contradict the Crown's pleaded case), I am satisfied that the emotional and psychological impact on the victim is significant and long-lasting. I do not agree, as submitted by Mr. Richardson, that physical injury should automatically be treated more seriously than emotional and/or psychological injury. The measure of injury, whether physical or emotional will vary case to case according to the facts.
28. I also accept that the victim feared that the threat would be carried out. Where, after a guilty plea, the Defence seek to challenge any of the facts alleged by the Crown for the purpose of sentencing, it should be done formally and by way of a Newton Hearing. This is particularly so where the factual dispute is significant and unresolvable without the Court's intervention.
29. Having heard the Crown's Summary of Evidence and having carefully read the Victim Impact Statement, I find that is the genre of case which, if in the UK, would be tried summarily but sentenced at the upper range. This does not mean that this Court is confined and bound to sentence within the guideline ranges applicable to the UK. If that were so, this Court would be restricted to pass a summary-like sentence for an offence which the Bermuda Parliament, unlike the UK, has determined to be indictable only. That cannot be the correct approach.
30. Further, while I agree that this case is not, on its facts, to be compared to the more serious Australian cases cited, I find little assistance from the case of *MacCauley v The State of Western Australia [2017] WASCA 65* which was not reported to be a domestic dispute but rather a dispute over the ownership of a vehicle. *Fletcher v The State of Western Australia [2014] WASCA 65*, on its brief summary description of the facts seems to come the closest to this case. However, it is unknown to this Court whether a ruling arose out of that decision on sentence. It is not clear how the Court came to impose a sentence of 8 months imprisonment in *Fletcher*.
31. I have, of course, carefully looked to the previous decisions on sentence from this Court, which is most persuasive. All of the previous cases of record are domestic in nature. On each recorded case, the threats to kill were made by a young man to a young woman after the end of a romantic relationship. In four out of the seven reported sentences the Accused and the victim shared a young child. In many if not most of these cases, it is also noted that the Accused remarked or implied that he was prepared to go to jail.
32. A clear message of deterrence must be sent to all persons who undermine the seriousness of threatening to kill someone in writing. The message is aimed at those who feel prepared to

commit this offence on the misguided notion that the consequences will be minimal. Domestic violence against women and the threat of it must be taken and treated seriously. Women who are prey to such circumstances must be encouraged to report these offences and to cooperate with the Prosecution in seeing it through to the Courts.

33. The proper punishment of a threat to kill is intended to deter all relevant persons from repeating or executing such threats. Further consideration is warranted for the inevitable emotional harm inflicted on the child of the victim and the Accused. In this case, in threatening to kill his son's mother, the Accused made explicit derogatory remarks about his own 4 year old son. This Court is not only entitled but duty-bound to consider the tenor of the threatening remarks made as a whole.
34. In the circumstances of this case, I have had careful regard to Part IV of the Criminal Code as it relates to the purpose and principles of sentencing. I have considered the objectives of sentencing under section 53 and the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
35. I have also considered all lawful sanctions other than imprisonment as the Court is required to do by section 55 of the Criminal Code.
36. I have also taken into consideration that this is an indictable-only offence punishable by a maximum term of 7 years imprisonment and the previous sentences passed by this Court for an offence under this section.
37. Only an immediate custodial sentence is appropriate for such offences as a measure of both punishment to the offender and deterrence to other potential offenders.
38. For a case of this nature, I think the starting point is a custodial sentence of 18 months imprisonment. While the Accused plead guilty on the first day of the fixed trial (presumably after the Complainant would have prepared to give her evidence and to be cross-examined), I will nevertheless give him the full benefit of a guilty plea. I also take into consideration his expression of remorse and his youthful age. The Accused however, does not have a clean record, having been previously found guilty of riotous behavior.

Conclusion

39. For the reasons outlined herein, I impose a sentence of 12 months imprisonment + 3 years probation. Time spent in custody taken into consideration.
40. As a mandatory condition of his probation, the Accused must participate in Anger Management and Family Counselling Programs and such other programs as may be directed or approved by the Department of Court Services in addition to the usual conditions of Probation.
41. A further condition of his probation shall be that the Accused may not attend or go within 100 feet of the Complainant's residence or place of employment.
42. All access to the Accused's and Complainant's son shall be permitted only by order of the Family Court.

Dated this 9th day of October 2017

SHADE SUBAIR WILLIAMS
ACTING PUISNE JUDGE OF THE SUPREME COURT