

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Thompson*, 2017 NSPC 7

Date: March 9, 2017

Docket: 2723111

Registry: Halifax

Between:

Her Majesty the Queen

v.

Caitlin Faye Thompson

DECISION – VICTIM IMPACT STATEMENT ISSUE

Judge: The Honourable Judge Anne S. Derrick

Heard: February 8, 2017

Decision: March 9, 2017

Charges: section 140(1)(b) of the *Criminal Code*

Counsel: Erica Koresawa, for the Crown

Luke Craggs for Ms. Thompson

By the Court:*Introduction*

[1] This decision concerns the issue of whether victim impact statements can be prepared for Caitlin Thompson's sentencing on March 9, 2017. The Defence says that public mischief - the offence for which Ms. Thompson has been convicted - as an offence against the administration of justice does not allow for the application of the *Criminal Code* definition of "victim" to people who are affected when police investigators are misled. Victim impact statements can only be filed by persons who qualify as "victims" under the statutory definition.

[2] Ms. Thompson has been convicted of making an intentionally misleading statement to police about Matthew Penney whose homicide they were investigating. (*R. v. Thompson 2016 NSPC 77*) Ms. Thompson's false statement that Mr. Penney left her residence after a New Year's Eve party contributed to police investigators continuing to search for evidence of what had happened to him. During this time, Mr. Penney's family and friends remained as much in the dark about Mr. Penney's homicide as the police.

[3] The police learned the truth from Ms. Thompson when they arrested and interrogated her on March 20, 2014. Had she been truthful with the police when they interviewed her on January 5th, 2014, they would have known then how and when Mr. Penney had died.

[4] Ms. Thompson's sentencing is scheduled for March 9, 2017. The Crown has advised that Matthew Penney's mother, Jane Penney, and his former partner, Rachel Maher, wish to file victim impact statements at the sentencing. Victims Services has informed the Crown that other members of the Penney family may also wish to file victim impact statements.

The Definition of "Victim"

[5] Section 722 of the *Criminal Code* requires the sentencing court to consider "any statement of a victim prepared in accordance with this section and filed with the court describing the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim."

[6] Section 2, the definition section of the *Criminal Code*, now defines “victim” as:

...a person against whom an offence has been committed, or is alleged to have been committed, who has suffered, or is alleged to have suffered, physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of the offence and includes, for the purposes of sections...722..., a person who has suffered physical or emotional harm, property damage or economic loss as the result of the commission of an offence against any other person;

[7] This definition of “victim” post-dates Ms. Thompson’s offence. Crown and Defence agree this is the definition that applies to Ms. Thompson’s sentencing not the definition that was in effect in January 2014.

The Issue

[8] It is Mr. Craggs’ submission that Jane Penney and Rachel Maher do not come within the *Criminal Code* definition of “victim”. If they do not, they have no entitlement to provide victim impact statements about the emotional harm they have experienced as a result of Ms. Thompson misleading the police.

The Position of Crown and Defence

[9] There is agreement between the Crown and Mr. Craggs that the definition of “victim” for the purposes of section 722 victim impact statements is not limited to persons against whom an offence has been perpetrated directly. That is where any consensus ends.

[10] Mr. Craggs submits that Ms. Thompson’s offence was committed against “the abstract concepts of law and justice...the justice system and its administration, not against any individuals.” (*Written submissions, paragraphs 7 and 8*) He argues it was the police who experienced the effects of Ms. Thompson’s lie which misdirected the focus of their time and resources. (*Written submissions, paragraph 6*)

[11] In Mr. Craggs’ submission, Ms. Penney and Ms. Maher are not “victims” of Ms. Thompson’s offence; they are “victims” of the criminal negligence that resulted

in Mr. Penney's death. He says Mr. Penney's homicide is the source of the emotional harm experienced by Ms. Penney and Ms. Maher. He warns of the risk that this tragic loss will leach into anything that might be said in a victim impact statement about Ms. Thompson's offence.

[12] The facts at trial established conclusively that Ms. Thompson had nothing to do with Mr. Penney's homicide. No one disputes that.

Analysis

[13] The *Criminal Code* definition of "victim" describes a victim as a person "against whom an offence has been committed" who has suffered emotional harm (and other forms of harm) as a result of the commission of the offence. Such a person has been offended against directly. Had the criminally negligent shooting of Mr. Penney merely injured him, he would have been a "victim" and eligible to file a victim impact statement. But the fact he was killed has not extinguished the right to file a victim impact statement. The definition of "victim" recognizes that in such a scenario there will be persons who have suffered emotional and other forms of harm "as a result of the commission of an offence against any other person". This enables survivors of a homicide victim to tell a sentencing court through victim impact statements about the harms they have suffered as a result of the killing of their loved one.

[14] The *Criminal Code* had previously located the entitlement to file such victim impact statements within the victim impact statement provisions. The previous section 722(4) of the *Criminal Code* provided that where the victim was dead, the definition of "victim" extended to include "the spouse or common-law partner or any relative of that person" etc. Those survivors were entitled to provide victim impact statements describing their loss.

[15] Section 722(4) as I have just described it no longer exists. The victims it contemplated are now included in the definition of "victim" in section 2 of the *Criminal Code* that I recited earlier. The language of section 2 recognizes as a victim a person who has suffered harms "as a result of the commission of an offence against any other person."

[16] Under either the old definition – the section 722(4) definition - or the one that has replaced it – the section 2 definition - Ms. Penney and Ms. Maher would qualify as victims entitled to provide victim impact statements about the harms they have suffered as a result of the criminal negligence that took Mr. Penney's life.

[17] But does the entitlement of Ms. Penney and Ms. Maher to provide victim impact statements stop there? Are they confined to being victims only of the criminal negligence that killed Mr. Penney? Can the current definition of “victim” which includes persons who have suffered emotional harm “as a result of the commission of an offence against any other person” include them within its scope?

[18] The particular context of this case is highly relevant to the assessment of whether Ms. Penney and Ms. Maher can be considered victims of Ms. Thompson's failure to be truthful with police. Ms. Thompson's false statement was made in relation to Mr. Penney's homicide which she knew about. When Ms. Thompson misled police, Ms. Penney and Ms. Maher knew Mr. Penney was dead. What they did not know was why he had died or in what circumstances. Common sense tells me that would have compounded the emotional suffering they were experiencing.

[19] The emotional harm sustained by Ms. Penney and Ms. Maher was not confined to Mr. Penney's death. Ms. Thompson's offence of misleading the police had a direct and consequential effect on them. While investigators tried to unravel the mystery of what had happened to Mr. Penney, Ms. Penney and Ms. Maher were deprived of the facts about his death. Ms. Thompson's false statement added a further dimension to their suffering as victims of Mr. Penney's homicide.

[20] Mr. Penney's homicide and the mis-directed police investigation are inextricably connected. If not for the homicide there would have been no police investigation, an investigation that was protracted by the misleading information Ms. Thompson provided. The commission of the offence against Mr. Penney and the false statement about how it was perpetrated cannot be disaggregated.

[21] Mr. Craggs cautions against creating meaning in the statutory provisions that is not supported by Parliament's language. He is right to urge the exercise of restraint in interpreting the definition of “victim” in the *Criminal Code*. However, the facts in this case require me to consider more broadly Parliament's intentions with respect to victims in the criminal justice system.

[22] As I said in *R. v. B.P.*, 2015 NSPC 34, victim impact statements have been a feature of a more responsive criminal justice system. They inform the sentencing process and lend it greater legitimacy. The court hears directly from the persons who have suffered the harm or loss, the consequences of the crime are brought home to the offender, and respect for the justice system is enhanced. (*R. v. Gabriel*, [1999] O.J. No. 2579 (S.C.J.), paragraph 19)

[23] It would be unreasonable in this case to adopt an inflexible interpretation of the definition of victim and exclude Ms. Penney and Ms. Maher from participating in Ms. Thompson's sentencing through the filing of victim impact statements. This would be contrary to the *Victims' Bill of Rights Act* ("VBRA") that, notwithstanding its redundant and ambiguous aspects, reflects Parliament's support for the informational and participatory rights of victims in the criminal justice system. (*B.P.*, paragraph 45)

[24] I am satisfied that in the circumstances of this case Ms. Penney and Ms. Maher come within the definition of "victim" in the *Criminal Code*. And in addition to what I have said in the preceding paragraphs, I find support for my view in the decision of Ehrcke, J. of the British Columbia Supreme Court in *R. v. Millington*, 2015 BCSC 1612, whose judgment I came across while writing these reasons. *Millington* was a sentencing for perjury. Kwesi Millington, an RCMP officer, was convicted for knowingly making false statements under oath at the Braidwood Inquiry into the death of Robert Dziekanski at the Vancouver airport. Ehrcke, J. was asked by the Crown to consider a victim impact statement from Mr. Dziekanski's mother. The Defence objected to the admission of the statement submitting that Ms. Dziekanski was not a victim. In the submission of the Defence, "the true victim in a case of perjury is the administration of justice, not an individual." (paragraph 4)

[25] Ehrcke, J. was not persuaded by this argument. He agreed that "the administration of justice as a whole is a victim of the crime of perjury" but held that "it does not follow that there cannot be other victims that come within the definition of victim in s. 722(4) of the *Criminal Code*." He found that Mr. Dziekanski's mother "is a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence of perjury by Kwesi Millington when he knowingly made false statements under oath at the Braidwood Inquiry..." (paragraph 8)

[26] I recognize that Ehrcke, J. was considering the issue of Ms. Dziekanski's victim impact statement under the previous *Criminal Code* definition of "victim" in section 722(4). I find that does not make his reasoning any less applicable. If anything, the section 722(4) definition could be said to have been more restrictive than the current definition.

[27] Just as Ehrcke, J. found in a case involving perjury, I am satisfied that in the circumstances of this administration of justice offence – public mischief – there are individual victims - Ms. Penney and Ms. Maher - who are entitled to share their experiences of emotional harm at sentencing.

Conclusion

[28] I find that Ms. Penney and Ms. Maher come within the *Criminal Code* definition of "victim" for the purpose of the victim impact provisions under section 722. But I want to be clear that the description of the emotional harm they have suffered must be confined to the police investigation. As I noted earlier, Ms. Thompson bears no responsibility for Mr. Penney losing his life or the gruesome attempt to dispose of his body. She is not accountable for the greatest suffering endured by Jane Penney and Rachel Maher, and the other members of Mr. Penney's family – Mr. Penney's homicide. She lied to the police and it is that offence for which she is being sentenced and to which the victim impact statements are to be directed. Ms. Thompson is accountable only for giving the police a false story, nothing more. The victim impact statements must strictly respect this distinction. Statements that do not comply will be edited. (*R. v. B.P.*, 2015 NSPC 34)