IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Penton*, 2022 NLCA 47
Date: August 2, 2022
Docket Number: 202001H0049

BETWEEN:

HER MAJESTY THE QUEEN APPLICANT/APPELLANT

AND:

JUSTIN PENTON RESPONDENT

Coram: Welsh, O'Brien and Knickle JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201801G1988 (2020 NLSC 98)

Appeal Heard: June 10, 2022
Judgment Rendered: August 2, 2022

Reasons for Judgment by: Welsh J.A.
Concurred in by: O'Brien and Knickle JJ.A.

Counsel for the Applicant/Appellant: Dana E. Sullivan
Counsel for the Respondent: Marianne T. Rennie

Authorities Cited:

CASES CITED: *Newfoundland Recycling Ltd. v. Newfoundland and Labrador (Attorney General)*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Samaniego*, 2022 SCC 9; *R. v. Lohnes*, [1992] 1 S.C.R. 167; *R. v. Gyimah*, 2014 ONCA 592; *R. v. Kukemueller*, 2014 ONCA 295; *R. v. Roy*, 1996 NSCA 110, 150 N.S.R. (2d) 226; *R. v. Williams*, 2003 SCC 41, [2003] 2 S.C.R. 134; *United States of America v. Dynar*, [1997] 2 S.C.R. 462.

STATUTES CONSIDERED: *Criminal Code*, sections 175(1)(a), 839, 24.

Welsh J.A.:

[1] Justin Penton was acquitted of causing a disturbance, or attempting to cause a disturbance in a public place, contrary to section 175 of the *Criminal Code*. He admits that he shouted an obscenity at the complainant, a photo-journalist, as he drove past her in his truck. The complainant had just completed an interview that was conducted outdoors with a City councillor.

[2] The Crown unsuccessfully appealed the acquittals to the summary conviction appeal court. The Crown now seeks leave to appeal, and if granted, appeals against that decision. Consideration of the meaning of disturb and disturbance is central to analyzing the appeal.

BACKGROUND

[3] On April 24, 2017, the complainant conducted an interview with a City of St. John's councillor near the entrance to the City's waste management site on a morning when the site was closed. She had just completed her interview, turned off her camera, and was checking some facts with the councillor when Mr. Penton drove by along the road leading into the waste management site. As he passed by the complainant and the councillor, Mr. Penton shouted an obscenity. There was no one else in the area.

[4] The summary conviction appeal judge (the "appellate judge") summarized relevant findings of fact made by the trial judge: Mr. Penton shouted at the complainant in a public place swear words that were vulgar and insensitive; the complainant felt "humiliated, embarrassed and disgusted"; the City councillor felt uncomfortable, in light of the complainant's embarrassment; Mr. Penton's

shouting an obscenity interfered with the complainant's conversation with the councillor, which the trial judge characterized as a "momentary interruption"; Mr. Penton's words "did not cause an externally manifested disturbance" or interfere with the complainant's, the councillor's, or the public's use of the premises (decision of the appellate judge, 2020 NLSC 98, at paragraph 38). The appellate judge concluded that, while the obscenity was "vile and loathsome", it:

> [41] ... did not cause more than a transitory interference with the work [the complainant] was doing with [the councillor] and [the obscenity] did not affect [the complainant or the councillor] beyond the emotional upset and hurt that each expressed. Mr. Penton did not cause a significant interference for either of the persons to whom he directed his utterance or for any other member of the public in the place where he shouted [the obscenity].

[5] In the result, the appellate judge concluded that the trial judge did not err in determining that Mr. Penton's action did not amount to causing a disturbance, or attempting to cause a disturbance in a public place in violation of section 175 of the *Criminal Code*.

[6] A focus of the Crown's submission is that an offence under section 175(1)(a)(i) of the *Code* is proven on the facts where the shouting of an obscenity causes a person to be distracted from her work.

ISSUES

[7] If the test for leave to appeal is satisfied, at issue on appeal is whether the appellate judge erred in his assessment of the trial judge's conclusion that, based on the interpretation and application of the law, Mr. Penton's conduct did not amount to causing, or attempting to cause a disturbance in a public place.

ANALYSIS

[8] Section 175(1)(a) of the *Criminal Code* provides for the offence of causing a disturbance in a public place:

> Every one who
>
> > (a) not being in a dwelling-house, causes a disturbance in or near a public place,
> >
> > > (i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,
> > >
> > > (ii) by being drunk, or

> (iii) by impeding or molesting other persons,
>
> ...
>
> is guilty of an offence punishable on summary conviction.

[9] Section 24 of the *Criminal Code* sets out what is necessary in order to prove an attempt to commit an offence:

> (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
>
> (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

Leave to Appeal

[10] The appeal of a summary conviction matter to this Court is governed by section 839 of the *Criminal Code*, which requires leave in order to proceed with the appeal. The test to be applied is set out in *Newfoundland Recycling Ltd. v. Newfoundland and Labrador (Attorney General)*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153:

> [9] Thus, to obtain leave to appeal pursuant to s. 839(1):
>
> (a) the appeal must "be taken on a ground that involves a question of law alone", and
>
> (b) the ground(s) of appeal must be such that:
>
> (i) either the ground of appeal has a "reasonable possibility of success", or
>
> (ii) "the proposed question of law [has significance] to the administration of justice".

[11] In applying the first criterion, assistance in determining what constitutes a question of law is found in the decision in *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692. Brown and Martin JJ., for the majority, reiterated earlier decisions of the Court:

> [23] ... The application of the law to a given factual matrix, that is, whether a legal standard is met, amounts to a question of law and attracts a correctness standard (*Shepherd* [2009 SCC 35], at para. 20; *Grant* [2009 SCC 32], at para. 43).

See also: *R. v. Samaniego*, 2022 SCC 9, at paragraphs 16 to 18.

[12] In this case, that criterion is satisfied. To determine whether Mr. Penton's conduct constituted causing, or attempting to cause a disturbance in a public place requires application of the relevant legal principles to the facts. It follows that the appeal involves a question of law alone.

[13] Regarding the second criterion, I am satisfied that the question of law raised by this appeal has significance to the administration of justice. There is limited relevant case authority, and, in fact, this appeal involves the interpretation of language from a decision of the Supreme Court of Canada.

[14] Accordingly, I would grant leave to appeal.

The Appeal

Causing a Disturbance

Legal Principles

[15] The interpretation of section 175(1)(a) of the *Criminal Code* is considered in the decision in *R. v. Lohnes*, [1992] 1 S.C.R. 167. McLachlin J., for the Court, concluded, at pages 181 to 182 (paragraph 30):

> The weight of the authorities, the principles of statutory construction and policy considerations, taken together, lead me to the conclusion that the disturbance contemplated by s. 175(1)(a) is something more than mere emotional upset. There must be an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use of the premises by the public. There may be direct evidence of such an effect or interference, or it may be inferred ... . The disturbance may consist of the impugned act itself, as in the case of a fight interfering with the peaceful use of a barroom, or it may flow as a consequence of the impugned act, as where shouting and swearing produce a scuffle. As the cases illustrate, the interference with the ordinary and customary conduct in or near the public place may consist in something as small as being distracted from one's work. But it must be present and it must be externally manifested. In accordance with the principle of legality, the disturbance must be one which may reasonably have been foreseen in the particular circumstances of time and place.
>
> (Emphasis added.)

The Crown relies particularly on the underlined sentence.

[16] In conducting the analysis, McLachlin J. discussed the meaning of "disturb" and "disturbance", at pages 178 to 179 (paragraphs 19 to 22):

> The word "disturbance' is capable of many meanings. The task is to choose the meaning which best accords with the intention of Parliament.
>
> The following arguments support the conclusion that "disturbance" in s. 175(1)(a) involves more than mere mental or emotional annoyance or disruption.
>
> First, the noun "disturbance" may have a different connotation than the verb "to disturb". Not everything that disturbs people results in a disturbance (e.g., smoking). A definition which posits identity between "disturb" and "disturbance" is contrary to ordinary usage, the most fundamental principle of statutory construction. This is not to say that one cannot speak of a purely emotional disturbance, but rather that "disturbance" has a secondary meaning which "disturb" does not possess; a meaning which suggests interference with an ordinary and customary conduct or use.
>
> ... By addressing "disturbance" in the public context, Parliament signalled that its objective was not the protection of individuals from emotional upset, but the protection of the public from disorder calculated to interfere with the public's normal activities.
>
> (Emphasis added.)

[17] McLachlin J. continued in *Lohnes* with a discussion of policy considerations, including, at page 180 (paragraph 28):

> The second consideration is that the narrower "public disturbance" test permits a more sensitive balancing between the countervailing interests at stake. ... [T]he test for a disturbance in or near a public place under s. 175(1)(a) should permit the court to weigh the degree and intensity of the conduct complained of against the degree and nature of the peace which can be expected to prevail in a given place at a given time. ...

[18] In addition, in the context of policy considerations, McLachlin J. referred to striking a "balance between the individual interest in liberty and the public interest in going about its affairs in peace and tranquility". And further, "our society has traditionally tolerated a great deal of activity in our streets and byways which can and does disturb and annoy others sharing the public space". On this point, McLachlin J. cautioned that the analysis must take into account "the proper goals and limits of the criminal law". (See *Lohnes*, at pages 180 to 181, paragraphs 28 and 29.) The trial judge succinctly described the latter

policy consideration: “The court is concerned about overreach of the criminal law into areas where free expression, of whatever kind, is limited without sufficient justification” (decision of the trial judge, 2018 N.J. No. 57 (Prov. Ct.), at paragraph 8).

[19] These statutory interpretation and policy considerations inform the application of the summary of principles provided in *Lohnes*, quoted at paragraph 15, above. Mr. Lohnes had shouted obscenities at his neighbour from his veranda. There was no evidence that anyone else heard or that the neighbour’s conduct was affected. On appeal, Mr. Lohnes’ conviction under section 175 was overturned because his conduct did not interfere with the common and ordinary use of the place by the public. It was not enough that a reasonable person would be disturbed by such language being shouted in a public place.

Application of the Legal Principles

[20] As applied to this case, the Crown submits that the test for causing a disturbance is satisfied based on the evidence of the complainant and the City councillor that their conversation, which was business in nature, was “derailed” and they started talking about what had just happened, rather than continuing with their business. Counsel points to the comment in *Lohnes* that “something as small as being distracted from one’s work” as a result of the shouted obscenity may be sufficient to constitute interference with ordinary and customary conduct in a public place, thereby causing a disturbance contrary to section 175(1) of the *Criminal Code*. The Crown emphasizes the nature of the complainant’s employment, which requires her to engage in conversation with persons being interviewed in a public place.

[21] Judicial decisions provided by the Crown are of limited assistance. In *R. v. Gyimah*, 2014 ONCA 592, the Court summarized:

> [3] The appellant was shouting on a residential street late at night and one resident eventually came to his balcony and said “knock it off”. In our view, it was open to the trial judge to find the offence of causing a disturbance had been made out.

[22] By contrast in this case, the trial judge found on the particular facts that Mr. Penton’s shouting an obscenity as he drove past the complainant and the councillor during the day did not result in an interference in the ordinary and customary use of the road leading to the waste management site. Mr. Penton shouted one obscenity. There was no one else in the area. This was not a case

similar to creating interference with the public peace by continuously shouting in a residential neighbourhood late at night.

[23] In *R. v. Roy*, 1996 NSCA 110, 150 N.S.R. (2d) 226, the appellant's conviction was upheld on the basis that, "the disturbance consisted of the impugned act itself, a fight [involving the appellant outside a pub], witnessed by a crowd of people, interfering with the peaceful use of the parking lot" (paragraph 21).

[24] In *R. v. Kukemueller*, 2014 ONCA 295, on appeal, the Court set aside a conviction under section 175 of the *Criminal Code* on the basis that there "was no evidence and no finding that the appellant's conduct interfered with the public's normal activities or with the ordinary and customary use by the public of the place in question" (paragraph 25). Mr. Kukemueller had taunted the police and contributed "to raising the tension at the scene of an interaction between the police and the public" (paragraph 25). In setting aside the conviction, Sharpe J.A., for the Court, explained:

> [27] While I certainly do not condone yelling obscenities at the police, the issue for this court is not whether the conduct of the appellant was obnoxious or deplorable but whether it was criminal. In my view, it was not and it follows that this appeal should be allowed and the conviction for causing a disturbance set aside. ...

[25] These cases are similar to this appeal insofar as they raise the question of whether shouting an obscenity in a public place may result in a conviction under section 175 of the *Code*. Each must be read in context in assessing whether there was interference in the ordinary and customary use of the place. Here, the Crown relies on the comment in *Lohnes* that something as small as being distracted from one's work may be sufficient to ground a conviction.

[26] Both the trial and appellate judges considered this factor. The appellate judge found no error in the trial judge's assessment that there was no externally manifested disturbance as discussed in *Lohnes*. In summarizing the trial judge's findings of fact, the appellate judge referenced the fact that Mr. Penton's shouting an obscenity did interfere with the complainant's conversation with the councillor. However, the trial judge characterized the interference as a "momentary interruption" of the conversation. In addition, the obscenity did not affect the complainant or the councillor "beyond the emotional upset and hurt that each expressed". Relying on the trial judge's findings of fact and the inferences he drew, the appellate judge found no error in the trial judge's

conclusion that the shouted obscenity "did not cause more than a transitory interference with the [complainant's] work". (See paragraph 4, above.)

[27] People conducting a conversation or business in a public place may be distracted for any number of reasons, including someone shouting an obscenity at them or at a stranger. They may interrupt their conversation and chat about the distraction. However, without something more, that kind of distraction is not such as to constitute an interference with the ordinary and common use of the public place. As stated by the trial judge, "Something more than emotional upset and a momentary interruption in a conversation is needed to constitute the criminal offence of causing a disturbance in a public place" (decision of the trial judge, at paragraph 10). As noted by McLachlin J. in *Lohnes*, society tolerates activity in our streets that may disturb and annoy those using a public place.

[28] In summary, to disturb a user of a public place does not amount to a disturbance unless there is an interference with the ordinary and customary conduct or use of the place. In short, while Mr. Penton's shouted obscenity disturbed the complainant and the City councillor, it did not cause a disturbance that would support a conviction under section 175.

Attempt to Cause a Disturbance

[29] The Crown also submitted at trial that, if commission of the offence was not made out, Mr. Penton's conduct amounted to an attempt to cause a disturbance in a public place. This proposition was rejected by both the trial and appellate judges. The trial judge found that, "The vulgar comment was not an attempt to interfere with the public peace" (decision of the trial judge, at paragraph 11). The appellate judge concluded that, "the trial judge properly interpreted and applied the law on attempt to cause a disturbance to the facts of this case" (decision of the appellate judge, at paragraph 59).

[30] In *R. v. Williams*, 2003 SCC 41, [2003] 2 S.C.R. 134, Binnie J., for the Court, discussed the law regarding attempt to commit an offence:

> [65] These facts, established in the evidence, are sufficient to prove the attempt. As the Court explained in the *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at paras. 73-74, *per* Cory and Iacobucci JJ.:
>
> > An accused is guilty of an attempt if he intends to commit a crime and takes legally sufficient steps towards its commission. Because an attempt is in its very nature an incomplete substantive offence, it will always be the case that

> the *actus reus* of the completed offence will be deficient, and sometimes this will be because an attendant circumstance is lacking. ...
>
> ... The law of attempt is engaged only when, as in this case, the *mens rea* of the completed offence is present entirely and the *actus reus* of it is present in an incomplete but more-than-merely-preparatory way.

[31] It follows that having an intent to commit the offence is a necessary element in proving the attempt to commit it (see also, section 24 of the *Criminal Code*). In this case, the trial judge found that there was no evidence from which to conclude or infer that Mr. Penton intended to cause a disturbance in a public place by shouting the obscenity as he passed by the complainant and the councillor; that is, there is no evidence that Mr. Penton intended to cause a disturbance, but failed to achieve his goal.

[32] The appellate judge found no error in the trial judge's determination that the Crown had not proven the offence of attempt to cause a disturbance in a public place. However, in reaching his conclusion, the appellate judge relied on case law that pre-dates both *Williams* and *United States of America v. Dynar*, [1997] 2 S.C.R. 462, which is referenced in *Williams*. The approach discussed and adopted in those decisions is the applicable law. The four-step approach set out in the decision of the appellate judge, at paragraph 20, and the case law relied upon by the Crown in this appeal have been overtaken by the law set out in the more recent decisions of the Supreme Court of Canada. It follows that the appellate judge erred in the analytical approach that he applied in assessing the trial judge's decision.

[33] However, the trial judge, in fact, applied the correct law when he found that it was not proven that Mr. Penton had the requisite intention to cause a disturbance of the peace when he shouted the obscenity. In the result, the attempt to commit the offence was not proven.

SUMMARY AND DISPOSITION

[34] I would grant leave to appeal, the test for leave having been satisfied.

[35] Regarding commission of the offence, the appellate judge did not err in his conclusion that the trial judge correctly interpreted and applied the law in determining that Mr. Penton's conduct did not amount to causing a disturbance of the peace in a public place contrary to section 175 of the *Criminal Code*.

[36] Finally, while the appellate judge applied the incorrect analysis to the question of attempt to commit the offence, the trial judge applied the correct law in concluding that the Crown had not proven the attempt to commit the offence.

[37] Accordingly, I would grant leave to appeal, but dismiss the appeal.

_____

B.G. Welsh J.A.

I concur: _____

F.P. O'Brien J.A.

I concur: _____

F.J. Knickle J.A.