



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Churchill*, 2023 NLCA 26

Date: September 1, 2023

Docket Number: 202201H0021

BETWEEN:

HIS MAJESTY THE KING

APPELLANT

AND:

KURT CHURCHILL

RESPONDENT

Coram: F.P. O'Brien, W.H. Goodridge and D.M. Boone JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 202001G5364 (2022 NLSC
56)

Appeal Heard: May 8, 2023

Judgment Rendered: September 1, 2023

Reasons for Judgment by: W.H. Goodridge J.A.

Concurred in by: F.P. O'Brien and D.M. Boone JJ.A.

Corrected Decision: The text of the original judgment was corrected on September 6, 2023. A description of the correction is appended.

Counsel for the Appellant: Sheldon B.J. Steeves
Counsel for the Respondent: Robby D. Ash and Frank Addario

Authorities Cited:

CASES CITED: *R. v. McCraw*, [1991] 3 S.C.R. 72; *R. v. Clemente*, [1994] 2 S.C.R. 758; *R. v. O'Brien*, 2013 SCC 2, [2013] 1 S.C.R. 7; *R. v. McRae*, 2013 SCC 68, [2013] 3 S.C.R. 931; *R. v. Burry*, 2022 NLCA 11; *R. v. Newfoundland Recycling Ltd.*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153; and *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692.

STATUTES CONSIDERED: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 264.1 and 839(1); and *Detention of Intoxicated Persons Act*, RSNL 1990, c. D-21.

W.H. Goodridge J.A.:

INTRODUCTION

[1] The Crown seeks leave to appeal, and if granted, appeals a decision of the Summary Conviction Appeal Court (SCAC) judge setting aside the conviction of Kurt Churchill on a charge of uttering a threat to cause bodily harm (s. 264.1 of the *Criminal Code*).

[2] It is not contentious that Mr. Churchill, while detained in the back seat of a police car, uttered words to Constable Cody Dunphy along the lines: “I’m going to put my f---ing boot in your head”.

[3] On a charge of uttering a threat to cause bodily harm, the Crown must prove two essential elements: (1) that the accused uttered the threatening words (*actus reus*), and (2) that the words were intended to intimidate or be taken seriously (*mens rea*) – see *R. v. McCraw*, [1991] 3 S.C.R. 72, *R. v. Clemente*, [1994] 2 S.C.R. 758, *R. v. O'Brien*, 2013 SCC 2, [2013] 1 S.C.R. 7 and *R. v. McRae*, 2013 SCC 68, [2013] 3 S.C.R. 931, paras. 9-10, 17.

[4] The first element, as noted above, was not contested at trial. On the second element, the SCAC judge determined that the trial judge erred in addressing the *mens rea* because of “the failure to consider the entire contextual circumstances” (SCAC Decision, at para. 72).

[5] The Crown appeals on the basis that the SCAC judge erred in law:

(1) By finding that the trial judge failed to consider the contextual circumstances surrounding the threat in assessing Mr. Churchill's intent; and

(2) In his interpretation and application of the law on the *mens rea* for uttering threats.

[6] For the reasons that follow, I would allow the appeal and restore the conviction. The trial judge's decision reveals no error of law.

ISSUE

[7] The two grounds of appeal are closely related. The issue is whether the SCAC judge erred in reviewing, and finding error in, the trial judge's *mens rea* analysis.

BACKGROUND

[8] Mr. Churchill's encounter with Cst. Dunphy began shortly after 3:00 a.m. on March 24, 2019. Cst. Dunphy received a complaint of a physical confrontation in progress on the steps of a bar in downtown St. John's. He was nearby in a marked police car and responded immediately. Cst. Dunphy broke up the fight and took Mr. Churchill (who was one of the combatants) into custody, placing him in the rear seat of the police car. While seated in the police car Mr. Churchill was advised that he would be held in custody under the *Detention of Intoxicated Persons Act*, RSNL 1990, c. D-21.

[9] During the short drive from the bar to the city lockup, Mr. Churchill became aggressive and verbally abusive. He kicked at the safety glass barrier separating the front and rear seats and engaged in a tirade that included insults and veiled threats that he would see Cst. Dunphy again, that he knew people, that he would do things, and that he would have his day. The uttered words that led to this criminal charge – "I'm going to put my f---ing boot in your head" – were spoken after arrival at the lockup while the handcuffed Mr. Churchill was still detained in the locked rear seat of the police car.

[10] Although Mr. Churchill was intoxicated, the trial judge found, and the SCAC judge agreed, that he was not so intoxicated as to be outside control of his words and actions.

LEAVE TO APPEAL

[11] Appeals to this Court in summary conviction proceedings are authorized by s. 839(1) of the *Criminal Code* and are limited to questions of law alone. Not all questions of law are entitled to this second level of appeal. The test for determining which questions are granted leave for this second level of appeal was recently stated by Butler, J.A. at para. 6 of *R. v. Burry*, 2022 NLCA 11:

- (1) the appeal must “be taken on a ground that involves a question of law alone”, and
- (2) 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”.

[12] An intended appellant must meet this test, and the test should not be “unduly stringent” (*R. v. Newfoundland Recycling Ltd.*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153, at para. 7).

[13] Alleged errors that engage the application of the law to a given factual matrix – that is, whether a legal standard is met – amount to questions of law (*R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 23). The parties agree that both of the alleged errors in this appeal are questions of law.

[14] The grounds of this appeal, for reasons detailed in the analysis below, have a reasonable possibility of success.

[15] I am satisfied that the test for leave has been met and I would grant leave to appeal.

ANALYSIS

[16] The SCAC judge stated that, in assessing the *mens rea* for this offence, the trial judge’s reasons failed to demonstrate that he considered the entire contextual

circumstances, and that the failure to consider the contextual circumstances was an error of law (SCAC Decision, at para. 72). In particular, the SCAC judge noted that the trial judge erred in failing to demonstrate how the words were perceived by Cst. Dunphy, or how they influenced Cst. Dunphy's actions (SCAC Decision, at paras. 77 and 87).

[17] In his reasons, the trial judge correctly instructed himself on the law for the *mens rea* of uttering threats when he quoted from page 763 of *Clemente*:

The *mens rea* is that the words be spoken or written as a threat to cause death or serious bodily harm; that is, they were meant to intimidate or to be taken seriously.

[18] The trial judge reviewed the evidence and that review reveals that he was alive to the context in which the words were uttered (Trial Transcript, at pages 92-94). In particular, the trial judge noted:

- Mr. Churchill had been involved in a dispute at a bar;
- Mr. Churchill was detained by police;
- Mr. Churchill was aggressive and abusive throughout his contact with police;
- The uttered threat was made following a tirade in the police car in which Mr. Churchill verbally abused the officers; and
- The uttered threat was made while Mr. Churchill was still in the rear seat of the police car, immediately prior to him being escorted into the city lockup.

[19] The tirade that the trial judge referenced included the thinly veiled threats from Mr. Churchill (referenced above) that he would see Cst. Dunphy again, he knew people, he would do things, and he would have his day. That tirade is a significant aspect of the context, because it supports a conclusion that the subsequent threatening utterance was not spoken in jest. The trial judge reasonably inferred from the context that the utterance was intended to intimidate. The trial judge stated, as part of the *mens rea* analysis, that the words uttered by Mr. Churchill were goal-directed and were intended to intimidate:

It's clear his words and actions were ... goal-directed, and it's clear to me that the words that were spoken was an attempt to intimidate the officer....

(Trial Transcript, at page 94)

[20] This finding was a sufficient and proper basis for Mr. Churchill's conviction.

[21] The SCAC judge referred to details of the context raised by Mr. Churchill. He agreed they had merit, and inferred that the trial judge was obliged, as part of the contextual approach to the *mens rea* analysis, to demonstrate in his reasons that these details had been considered (SCAC Decision, at paragraph 71). These details included:

- Cst. Dunphy was a uniformed police officer carrying a weapon;
- Mr. Churchill was handcuffed in the back seat;
- A safety glass barrier separated the front and back seat;
- Cst. Dunphy proceeded normally with Mr. Churchill to the lockup;
- Cst. Dunphy did not ask for assistance; and
- The police had control over Mr. Churchill's movements.

[22] The failure of the trial judge to demonstrate in his reasons that these details had been considered does not support a conclusion that there was an error in his contextual approach to the *mens rea* analysis. It is true that trial judges, in assessing the *mens rea* for uttering threats, will often have to consider and draw inferences from the surrounding circumstances – the context – in deciding what the accused actually intended. The trial judge adequately did that in this case and it was not necessary to address in his reasons all the details identified by the SCAC judge.

[23] In *McRae*, in discussing the *mens rea* for uttering threats, the Supreme Court of Canada said that determining intent “may” depend on inferences drawn from the context. That comment does not give rise to an obligation on trial judges to consider and discuss every detail of the context, particularly where such detail can be reasonably inferred. The majority in *McRae* stated:

[19] The fault element [*mens rea*] here is subjective; what matters is what the accused actually intended. However, as is generally the case, the decision about what the accused actually intended may depend on inferences drawn from all of the circumstances.

....

[23] To sum up, the fault element of the offence is made out if the accused intended the words uttered or conveyed to intimidate *or* to be taken seriously. It is not necessary to prove an intent that the words be conveyed to the subject of the threat. A subjective standard of fault applies. However, in order to determine what was in the accused's mind, a court will often have to draw reasonable inferences from the words and the circumstances, including how the words were perceived by those hearing them.

[24] Four of the six contextual details which the SCAC judge mentioned relate to Mr. Churchill's lack of ability to execute the threat. These details are, at best, secondary considerations to determining intention, because the crime is not dependent on the ability of an accused to execute the threat. The aim of s. 264.1 is to prevent threats. As stated at page 762 of *Clemente*, "[s. 264.1] makes it a crime to issue threats without any further action being taken beyond the threat itself".

[25] In his reasons, the trial judge did discuss the broader context surrounding the threat, noting that Cst. Dunphy was a police officer and that Mr. Churchill was still detained in the rear seat of the police car when the threat was made. The SCAC judge erred to the extent that he implied that the trial judge overlooked these points: "The fact that Cst. Dunphy was a police officer, detaining Churchill in the manner he was, is a relevant factor that must be considered ..." (SCAC Decision, at paragraph 82). It is clear from the trial judge's reasons that he considered these factors and was aware that Mr. Churchill had no ability to carry out his threat while detained in the back of the police car. Other details of context that SCAC judge referenced – such as Cst. Dunphy being in uniform and carrying the use-of-force equipment – can be reasonably inferred from the broader context. There is no error in the failure of the trial judge to get into this level of detail as part of the *mens rea* analysis.

[26] The remaining two contextual details referenced by the SCAC judge relate to how the uttered words were perceived by Cst. Dunphy.

[27] The perception by the alleged victim can be relevant and can assist in determining the *mens rea* (*McRae*, at para. 20, and *O'Brien*, at para. 13). However, the perception of the alleged victim is not an essential consideration and the SCAC judge erred in stating, "An essential consideration is Churchill's state of mind from the perspective of how the words were perceived by the officer" (SCAC Decision, at paragraph 64). The error was compounded by the SCAC judge suggesting that Cst. Dunphy did not perceive the words as threatening: "There was no evidence in this case that Cst. Dunphy felt intimidated" (SCAC Decision, at paragraph 73).

The tenor of Cst. Dunphy's evidence was the opposite. He testified that Mr. Churchill was "very belligerent, verbally abusive toward me" and "I was concerned because of his aggression" (Trial Transcript, at page 5). These extracts from Cst. Dunphy's evidence would indicate that Cst. Dunphy perceived a threat and viewed it as a serious threat.

DISPOSITION

[28] The trial judge adequately considered the contextual circumstances in which the threat was uttered, and made no error in interpreting and applying the law with respect to the *mens rea* for uttering threats.

[29] The SCAC judge erred in finding that the trial judge failed to consider the relevant contextual circumstances in which the threat was uttered and erred to the extent that he suggested that it was essential to consider, as part of the *mens rea* analysis, Cst. Dunphy's perception.

[30] I would allow the appeal and reinstate the conviction and sentence of the trial judge.

W.H. Goodridge J.A.

I Concur: _____

F.P. O'Brien J.A.

I Concur: _____

D.M. Boone J.A.

Correction Notice

Correction made on September 6, 2023:

1. Paragraph [30], page 8, is changed to read:

[30] I would allow the appeal and reinstate the finding of guilt and sentence of the trial judge.