Citation: *R. v. Bunbury*, 2008 YKTC 15 Date: 20080226
Docket: 07-11012
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

R e g i n a

v.

Keith Derek Bunbury

Appearances:
David McWhinnie Counsel for Crown
Emily Hill Counsel for Defence

REASONS FOR JUDGMENT

[1] Keith Bunbury faces two counts of uttering threats to cause bodily harm to Marianne Chudy and her brother. The words described by Ms. Chudy do not amount to an explicit threat to cause bodily harm. Accordingly, the primary issue in this case is whether the words uttered can be said to amount to a threat given the context in which they were uttered, and, if so, whether they amount to a threat to cause bodily harm as required by section 264.1.

Facts:

[2] While the Crown called three witnesses, the core of its case was presented through the evidence of the complainant, Marianne Chudy. Ms. Chudy lives across the street from the residence of Clara Ann Mason, Mr. Bunbury's common law spouse.

[3] Ms. Chudy testified that, on June 4, 2007, she was in her home watching the hockey game when she heard a disturbance. She looked out the window to see an individual by the name of Terry Taylor exiting Ms. Mason's residence. Mr. Taylor was yelling and screaming about having been "suckered". Mr. Bunbury exited the residence some 30 to 45 seconds later, followed shortly thereafter by Ms. Mason and Georgina Mierau.

[4] Mr. Bunbury and Mr. Taylor were observed to be yelling at each other with their fists up. The two began a physical altercation, ultimately falling to the ground out of Ms. Chudy's line of sight.

[5] Ms. Chudy went outside to find that both individuals were still on the ground fighting and yelling. She could tell that all four individuals, Mr. Bunbury, Mr. Taylor, Ms. Mason and Ms. Mierau, had been consuming alcohol, and described all of them as being drunk.

[6] Eventually, Mr. Bunbury got off of Mr. Taylor, and the two got to their feet, still swearing at each other. Ms. Mierau handed Mr. Taylor back his hat, and as he reached for it, Mr. Bunbury grabbed him by the shoulders and head butted him three times.

[7] At this point, Ms. Chudy intervened, telling Mr. Bunbury that was enough. The two then engaged in a brief verbal altercation with Ms. Chudy telling Mr. Bunbury he should go back to Whitehorse as he was not wanted there. Mr. Bunbury asked where Ms. Chudy's brother was, and said he was going to deal with her brother and then come back and deal with her. Ms. Chudy describes Mr. Bunbury as loud and threatening when making this statement to her. She further indicated that she had been told that Mr. Bunbury had assaulted her brother a few weeks before, though she fairly agreed that she had no direct knowledge of any such incident.

[8] Carl Jonas, Ms. Chudy's common law spouse, arrived during the verbal altercation between Ms. Chudy and Mr. Bunbury. By and large, his evidence was consistent with Ms. Chudy's. He testified that both Ms. Chudy and Mr. Bunbury were visibly upset, both were swearing and both were speaking in loud voices. He describes Mr. Bunbury's manner as aggressive, and indicates that he heard Mr. Bunbury tell Ms. Chudy that he was going to finish dealing with her brother, Rick, and then he'd be back.

[9] The defence called Ms. Mierau to counter the Crown's evidence. Ms. Mierau indicated that there was a mutual altercation between Mr. Bunbury and Mr. Taylor, but denies seeing any head butting as described by Ms. Chudy. She then described Ms. Chudy as provoking Mr. Bunbury, but Mr. Bunbury responded only by telling Ms. Chudy to shut her fat mouth. Ms. Mierau maintained that Mr. Bunbury did not say any words to the effect described by Ms. Chudy and Mr. Jonas.

[10] In considering all of the evidence before me, I am satisfied that the evidence of Ms. Mierau ought to be discounted. In terms of demeanour, on cross-examination, Ms. Mierau was argumentative and visibly angry when challenged, even on relatively minor points. Her evidence was lacking in detail and she was remarkably unobservant, frequently responding to questions by saying that she didn't notice. Lastly, I take the view that Ms. Mierau's admitted consumption of six beer calls into question the reliability of her evidence.

[11] In contrast, neither Ms. Chudy nor Mr. Jonas had consumed any alcohol on the date in question. Both testified in a straightforward and clear fashion, and the evidence of each, by and large, corroborates the other without being so similar as to raise suspicion of collaboration. For example, their evidence as to the actual words uttered by Mr. Bunbury differs somewhat, but still has the same general sense.

[12] On all of the evidence, I am satisfied that I can and I hereby do accept the evidence of Ms. Chudy and Mr. Jonas as to the events of June 4, 2007. Accordingly, I find as a fact that following what is perhaps best described as a consentual fight, Mr. Bunbury did indeed head butt Mr. Taylor three times, and, when Ms. Chudy verbally intervened, Mr. Bunbury told her that he was going to deal with her brother, or finish dealing with her brother, and was going to return to deal with her.

Issues:

[13] As noted, the issue for me to determine is whether the words which I have found were uttered by Mr. Bunbury amount to a threat, and if so, whether they amount to a threat to cause bodily harm sufficient to support a conviction on the offences as charged.

Case Law:

[14] In considering these issues, I have reviewed a number of cases including those filed by counsel.

[15] The test for whether a communication constitutes a threat is set out in *R*. v. *McCraw* [1991], 3 S.C.R. 72 and *R.* v. *Clemente* [1994], 2 S.C.R. 758 both decisions out of the Supreme Court of Canada. In *Clemente*, Cory J. relies on *R.* v. *McCraw* in noting that the test to be applied is an objective one which he describes as follows:

> Under the present section, the actus reus of the offence is the uttering of threats of death or serious bodily harm. 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.
>
> To determine if a reasonable person would consider that the words were uttered as a threat the court must regard them objectively; and review them in light of the circumstances in which they were uttered, the manner in which they were spoken, and the person to whom they were addressed.

[16] In the case at bar, when one objectively considers the context in which the words were uttered, following as they did Ms. Chudy's intervention into the altercation between Mr. Taylor and Mr. Bunbury, and considering Mr. Bunbury's aggressive demeanour when uttering the words and his failure to offer an alternate explanation, I have no doubt that Mr. Bunbury intended the words to be intimidating, and that a reasonable person standing in the place of Ms. Chudy would have interpreted the words uttered as threatening in nature.

[17] This does not, however, end the question. Section 264.1 requires that the words uttered constitute not just a threat, but a threat to cause death or bodily harm. In this case, the charge is particularized as a threat to cause bodily harm. Hence, the much more difficult question in this case is whether the words uttered by Mr. Bunbury can be said to amount not just to a threat but a threat to cause bodily harm.

[18] There are a number of cases which have addressed the issue of whether ambiguous wording can amount to a threat to cause bodily harm (or serious bodily harm as was required in the predecessor 264.1 section).

[19] Defence counsel relies on *R.* v. *Abdallah* (2002), A.B.P.C. 126, a decision out of the Alberta Provincial Court in which an accused who uttered the phrase "I'm going to get you for ratting me out" was acquitted on the basis that the phrase did not expressly contain a threat to cause death or bodily harm and the court was unprepared to draw the necessary inference in the circumstances in which the phrase was uttered.

[20] In coming to this conclusion, Semenuk J., in turn, relied on *R.* v. *Gingras* (1986) 16 W.C.B. 399, an Ontario Provincial Court decision, in which an accused was acquitted on a charge of uttering a threat to cause serious bodily harm by uttering the words "I'll get you" and "let me get my hands on him". In that case, Stortini J. found that while the words implied a threat to physically interfere with

someone, they were equivocal in leading to an inference that serious bodily harm would be caused by that physical interference.

[21] Similarly, in the *R.* v. *G.P.*, [1994] O.J. No. 167 decision out of the Ontario General Division, the accused young person told another young person not to tell anyone about their meetings “or else”. The judge found that to the extent the words “or else” were ambiguous the accused was entitled to the benefit of that ambiguity. Moreover, even if the words did imply an intention to hurt the complainant, there was no indication that this would amount to the type of serious physical interference contemplated by the predecessor 264.1 section.

[22] Finally, in *R.* v. *Mobarakizadeh*, [1994] A.Q. no 320, the Quebec Court of Appeal overturned a conviction for uttering a threat to cause death or serious bodily harm. The appellant, while being removed from an unrelated court proceeding for causing a scene, had told the sheriff “I’ll fix you up” and added “I’ll get someone higher than me to fix you up”. While the court was of the view that the appellant was threatening physical violence with his words, they found that “fix you up” could refer to anything from a simple slap to serious injury, and therefore could not support a conviction on a charge of uttering a threat to cause serious bodily harm.

[23] In contrast to these cases, in *R.* v. *Brouilette*, [1994] M.J. No. 420, the Manitoba Court of Queen’s Bench convicted the accused pimp who in response to one of his prostitutes indicating she could not work said he would “do her in and her children in”. While the words were acknowledged to be ambiguous, the court found that the nature of the accused’s relationship to the complainant was one of power and control, and despite the imprecise language, the trial judge found this to be a threat to cause serious bodily harm from an objective perspective.

[24] In *R.* v. *Grellette*, [2005] O.J. No. 3801, the Ontario Superior Court convicted the accused of uttering a threat to cause bodily harm to a former girlfriend as a result of a drunken phone call in which he uttered “you got something coming to you”. The conviction was upheld by the Court of Appeal who noted the context including the accused’s subsequent attempt to break into the complainant’s apartment and a history of angry confrontations by the accused towards the complainant while under the influence of alcohol.

[25] Similarly, in *R.* v. *Lowry*, [2002] O.J. No. 3954, the accused was convicted of uttering a threat for telling his common law partner “if you do not stop bugging me, you will get it”. The conviction was upheld by the majority on appeal who noted the accused’s intoxicated state and his history of assaulting the complainant while under the influence.

[26] All of the cases reviewed make it clear that context is everything in determining whether ambiguous words can support a conviction for uttering threats to cause bodily harm. The latter line of cases suggest that the nature of the relationship between the accused and complainant, in particular, a history of physical or psychological abuse of the complainant by the accused, has considerable bearing on whether ambiguous words ought to be interpreted by the court as a threat to cause bodily harm.

[27] It is important to note that there is no such historical relationship between Ms. Chudy and Mr. Bunbury. The closest that can be said in this regard is the evidence of Ms. Chudy that she had been advised by her brother’s spouse that Mr. Bunbury had assaulted her brother. Unfortunately, this evidence is entirely hearsay, and cannot be relied upon for the truth of its contents. It does not, therefore, get me to the point where a past relationship elevates otherwise ambiguous words to a threat to cause bodily harm.

[28] The words uttered by Mr. Bunbury, namely to “deal with” both Ms. Chudy and her brother, are words capable of several meanings, from verbal responses to taking legal steps to interfering with property to interfering physically with behaviour insufficient to cause bodily harm. To interpret the words as a threat to cause bodily harm is certainly a potential interpretation, but is the context in which the words were uttered in this case such that a reasonable person would conclude that the words were intended to be interpreted in this way?

[29] In considering the verbal altercation between Ms. Chudy and Mr. Bunbury, I would note the absence of any threatening gestures accompanying the words, and the absence of any subsequent behaviour which would tend to support the inference that the words were intended to be not just a threat but a threat to cause bodily harm.

[30] This leaves me with the question of whether the physical altercation between Mr. Taylor and Mr. Bunbury provides a sufficient context from which to draw the necessary inference.

[31] Of concern to me is the fact that the physical altercation between Mr. Taylor and Mr. Bunbury was largely consentual in nature. Both individuals were yelling and swearing; both raised their fists; and both began swinging at the other. Clearly, Mr. Bunbury, in head butting Mr. Taylor, did not leave off when Mr. Taylor had abandoned the fight, causing Ms. Chudy to intervene, but this does not change the fact that Mr. Taylor, by all appearances was, at least up to that point, a perfectly willing participant. This is a dramatically different situation from an unprovoked assault on an innocent bystander.

[32] While the altercation between Mr. Taylor and Mr. Bunbury may lend some credence to an interpretation of the words “I’ll deal with you” to mean at least some kind of physical interference, it simply does not, in my view, as a result of the largely consentual nature of the exchange, provide a sufficiently clear context

from which to conclude that the interpretation of the words to be a threat to cause bodily harm is the interpretation established on the evidence. There remains ambiguity with respect to interpretation, and Mr. Bunbury is entitled to have that ambiguity resolved in his favour. Accordingly, I must find that I am not satisfied beyond a reasonable doubt on all of the evidence that the words uttered amount to a threat to cause bodily harm, and both counts are hereby dismissed.

Ruddy T.C.J.