Date: 20010209
Docket: CAC164631

NOVA SCOTIA COURT OF APPEAL
[Cite as: *R. v. A.D.G.,* 2001 NSCA 28]

Freeman, Roscoe and Saunders, JJ.A.

BETWEEN:

A. D. G.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondents

REASONS FOR JUDGMENT

Counsel:	Chandra Gosine for the appellant Jim Gumpert, Q.C., Jennifer MacLellan for the respondent
Appeal Heard:	February 5, 2001
Judgment Delivered:	February 9, 2001
THE COURT:	The appeal is dismissed per reasons for judgment of Saunders, J.A.; Freeman and Roscoe, JJ.A., concurring.

Publishers of this case please take note that s.38(1) of the **Young Offenders Act** applies and may require editing of this judgment or its heading before publication. Section 38(1) provides:

> 38(1) No person shall publish by any means any report
> (a) of an offence committed or alleged to have been committed by a young person, unless or order has been made under section 16 with respect thereto, or
>
> (b) of a hearing, adjudication, disposition or appeal concerning a young person who committed an offence
>
> in which the name of the young person, a child or a young person aggrieved by the offence or a child or a person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person, is disclosed."

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Saunders, J.A.

[1] ADG appeals her conviction in Youth Court on charges of assault and uttering death threats. She advances several grounds of appeal which for ease of reference can be restated as constituting an error of law in that the verdict is said to be unreasonable; or her rights guaranteed by the **Canadian Charter of Rights and Freedoms** were violated; or there was a miscarriage of justice.

[2] Our role in reviewing the record for such alleged errors of law was described by the Supreme Court of Canada in **R v. Yebes**, [1987] 2 S.C.R. 168 and subsequently in **R. v. Burns**, [1994] 1 S.C.R. 656, in which latter case McLachlin, J. (as she then was), said at p. 663:

> ... the court of appeal is entitled to review the evidence, re-examining it and re-weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it:
>
> ... Provided this threshold test is met, the court of appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to persuade it to order a new trial.

[3] Further, as noted by Justice Arbour in **R. v. Binnaris**, [2000] S.C.J. No. 16 at §23:

> Whether a conviction can be said to be unreasonable, or not supported by the evidence, imports in every case the application of a legal standard. The process by which this standard is applied inevitably entails a review of the facts of the case. I will say more about the review process below. As a jurisdictional issue of appellate access, the application of that legal standard is enough to make the question a question of law. It is of no import to suggest that it is not a "pure question of law", or that it is not a "question of law alone."

[4] Our role is not to substitute our findings or impression of the evidence simply because we do not share the trial judge's views. Only a grave and critical error in the evidentiary conclusions of a trial judge would warrant our interference.

[5] ADG, was charged in an Information sworn September 28, 1999, that she, being a young person within the meaning of the **Young Offenders Act,** did on or about the 9th day of October, 1998, at or near East Preston, in the County of Halifax, in the Province of Nova Scotia:

1. Commit an assault on K. M., contrary to Section 266(a) of the **Criminal Code**;

2. And ...at the same time and place ... did by word of mouth knowingly utter a threat to cause bodily harm or death to K. M., contrary to Section 264(1)(a) of the **Criminal Code**.

[6] The appellant first appeared in court on these matters on October 19, 1999. The case was adjourned frequently to permit ADG to find a lawyer, to resolve certain disclosure issues, to accommodate other trial commitments, and to dispose of a pre-trial **Charter** application brought by the appellant. The case finally came to trial on June 7, 2000. Six witnesses were called by the Crown, three by the defence. At the conclusion of the trial Justice Legere recessed briefly and then returned to the courtroom to deliver a detailed oral decision, convicting the appellant on both counts.

[7] ADG complains that the trial judge ignored the evidence she presented such that her her "defence" of self-defence was not properly addressed and her conviction is unreasonable. There is no merit to these submissions.

[8] It is trite to say that a trial judge is free to accept some, all or none of a witness's testimony and able to choose what weight to give it. Justice Legere carefully considered all of the material evidence presented by both Crown and the defence. She properly applied it to the issues before her. She specifically addressed the credibility of the witnesses and took into account their trustworthiness in deciding what weight ought to be placed on their evidence. After hearing the accused's mother's evidence, Justice Legere found it to be unbelievable. She carefully explained her reasons for coming to that conclusion. After canvassing in some detail the material evidence presented, she said she accepted the Crown's version of events. She found the Crown's witnesses to be consistent, clear and believable. Any discrepancies were immaterial to the substantive points in their testimony. It was Justice Legere's responsibility to assess the evidence and decide credibility. In my view, she did that admirably.

[9] The appellant also complains that the trial judge erred by not applying the three-part formula concerning reasonable doubt approved by the Supreme Court of Canada in **R. v. W (D)**, [1991] 1 S.C.R. 742. A trial judge, especially one sitting without a jury, is not obliged to "think out loud" and repeat the judgment of Cory, J. in **R. v. W (D)** like a mantra or incantation. Judges, after all, are presumed to know the law. Provided the record before

us demonstrates that the trial judge understood and properly applied appropriate legal principles to each of the essential elements of the alleged crime, the precise chain of reasoning, which may not have been expressed audibly, need not be divined.

[10] This was not a long or complicated trial. The judge's reasons for judgment did not have to be detailed or lengthy and were more than ample in the circumstances (**R. v. Burns** (1994), 89 C.C.C. (3rd) 193). Contrary to the appellant's submission, Justice Legere specifically referred to and then rejected ADG's defence of self-defence. In doing so, the trial judge observed that the circumstances did not allow for any credible conclusion that the appellant acted in self-defence. We agree.

[11] The appellant also complains that her rights under ss. 7 and 11 of the **Charter** were violated. The appellant argues that the charge(s) against her ought to have been laid by December 1, 1998; that is, two months after the alleged disturbance, with the result that she ought to have been charged summarily rather than by indictment. She says Justice Legere erred in finding there was no evidence to support her pre-trial **Charter** application for a stay due to alleged pre-charge delay.

[12] We reject this submission. In a well-reasoned decision, Justice Legere carefully expressed the factors that led her to reject ADG's application.

> The motion herein is devoid of a specific factual foundation. It is an argument in principle without establishing any fact. The incidents of prejudice which attach to the young person as described by counsel in his brief relate to generic conclusions of prejudice should delay occur. ...
>
> As to the reasonableness of the delay between the alleged incident and the Information, the Court has no evidence on which to base a finding of fact. As to the argument...that the delay to the a (sic) person could cause psychological harm, the Court has no evidence . . .
>
> . . .
>
> With respect to the Accused's ability to recall, I have no evidentiary foundation that would allow me to conclude that in this particular circumstance, the Accused is prejudiced as a result of the delay.
>
> Further, I have no evidence in which to conclude that the delay could be determined to be unreasonable.

> I have no information to allow me to conclude that the police chose to proceed by indictment as a result of the delay.
>
> The exposure of the Accused should she be found guilty relates specifically to a finding of guilt and similar prejudice would be arrived at by the Accused had the trial proceeded immediately after the alleged incident. I have no information to allow me to conclude or connect that the consequences of a finding of guilt as a result of the delay more severely prejudiced the Accused than would a finding of guilt immediately after the incident.
>
> . . .
>
> Finally, the Defence argues abuse of process. The circumstances before me would not make even a *prima facie* case to stay proceedings. . . There is no factual foundation that would allow me to even consider this.

[13] We approve of her conclusion and her reasons. During argument, counsel for the appellant argued that proceeding against his client by indictment "put her under an immense psychological burden". When asked to provide specific examples from the record showing objective, factual indicia of such "psychological" trauma, no examples were forthcoming in response. Instead, counsel urged that we could "impute damage" simply by virtue of the fact that there was "delay affecting a young person" beyond the six-month period incidental to a summary prosecution. We can hardly agree. A young person might be a seasoned or dangerous offender for whom process may mean nothing, and delay of little consequence, psychological or otherwise. For any number of reasons, a young person could be pleased with the delay between an incident and the charge. Evidence is required before any inferences can be drawn.

[14] We note that in this case the Crown did not change its election as it had, for example, in **R. v. Boutilier** considered by this court at (1995), 147 N.S.R. (2^{nd}) 200. Rather, it immediately proceeded by indictment against ADG when the charges were first laid. It was also clear from the evidence that the police investigation into ADG's conduct was still on-going a full year after the alleged incident on October 9, 1998. On these facts, Justice Legere was correct in holding that no basis existed for judicial review of alleged "flagrant impropriety". There is not a whit of evidence in this case

suggesting that the Crown's conduct amounted to an abuse of process or such as would otherwise cause us to interfere with the Crown's exercise of its prosecutorial discretion.

[15] The appellant complains that the words she is said to have uttered could not, objectively, amount to the crime of uttering since, so it is argued, the victim did not testify that the words aroused any fear in her. Thus, it is suggested that the threat could not be taken seriously and was not, in fact, ever taken seriously by the complainant. We cannot agree. When dealing with a s. 264.1(1)(a) offence, the court must determine if a reasonable person would consider the words uttered to be a threat. All of the circumstances must be looked at objectively. The words are to be considered in the context of what happened between the participants (**R. v. Clemente** (1994), 91 C.C.C. (3rd) 1).

[16] In this case, the complainant described being threatened by ADG in the course of being assaulted by her and another person. At the same time, other members of the appellant's crowd were assaulting friends of the complainant. Witnesses spoke of a stick or bat used to assault members of the victim's party. The complainant's group was outnumbered and their vehicle was blocked from escape by other vehicles. Justice Legere accepted the complainant's version of events. Thus, the circumstances of the assaults and the threats depicted a terrifying situation and established, objectively, a real threat within the meaning of s. 264.1(1)(a). The circumstances also showed, objectively, that the words used were meant to be taken seriously.

[17] Finally, ADG complains that there was a miscarriage of justice. We reject that submission. There was ample evidence to support all of Legere, J.'s findings. While she did not specifically recite each element of the offence of uttering threats, it was not necessary for her to do so. As stated in **Burns, supra**, a trial judge is not obliged to verbally demonstrate that she knows the law or has minutely considered each and every piece of the evidence.

Disposition

[18] The appeal against conviction is dismissed.

Saunders, J.A.

Concurred in:

Freeman, J.A.