C.A.C. No. 129503

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Chipman and Roscoe, JJ.A.
Cite as: R. v. S.D.R., 1996 NSCA 264

BETWEEN:	)	
	)	
S. D. R.	)	Ann M. Copeland
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	Robert E. Lutes, Q.C.
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	December 3, 1996
	)	
	)	
	)	Judgment Delivered:
	)	December 10, 1996

THE COURT: The appeal is dismissed as per reasons for judgment of Roscoe, J.A.; Clarke, C.J.N.S. and Chipman, J.A., concurring.

ROSCOE, J.A.:

This is an appeal from a decision of a Youth Court judge who found the appellant guilty of sexual assault and uttering a threat. The sexual assault conviction has

not been appealed. The issue is whether the Youth Court judge exceeded her jurisdiction by amending the threat charge from one of threatening to cause death to one of threatening to cause bodily harm. The trial judge made the amendment on her own motion during the course of her oral decision.

The information alleged that on or about October 10th, 1995, the appellant did:

> commit a sexual assault on [A.B.], contrary to Section 271 of the **Criminal Code of Canada**;
>
> AND FURTHERMORE at or near Bedford in the County of Halifax, Nova Scotia on or about the 10th day of October, 1995 did in person knowingly utter a threat to [A.B.] to cause death to [A.B.], contrary to Section 264.1(1)(a) of the **Criminal Code of Canada**.

Section 264.1 of the **Criminal Code** provides:

> **264.1** (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat
>
> (a) to cause death or bodily harm to any person;
>
> . . .

The only evidence respecting the threat was that given by the complainant in her direct testimony:

> . . . And then I started to get dressed and I just . . . and then just as I was about to get up he turned around and he said that he would hurt me and my friends if I told anybody and he just went away . . .

No questions were asked of the complainant on cross-examination regarding the threat. The appellant did not testify and no other witness overheard the threat. All other evidence related only to the sexual assault. In summation, the Crown concentrated on a review of the evidence on the sexual assault charge and then concluded by saying:

> With regards to the uttering death threats, I believe that the evidence from Ms.[B.] on that matter was, I think she used the words that he threatened to hurt her. I don't know that she said

> kill. I'll leave that to Your Honour. I didn't make note of it. She may have said indeed that he had threatened to kill her. I didn't make note of it. Your Honour, I wasn't directing my mind to it I must confess. But he did, there were circumstances which caused her to fear and the words that were being spoken that she was being threatened. And if she said that what he said was I will kill you then that count has been made out as well. The Crown would be asking for a conviction there as well.
>
> The trial judge then commented:
>
> My notes show that he said, that she said he turned and said, "He would hurt me and my friends if I told."
>
> Defence counsel then proceeded with her address as follows:
>
> Your Honour, your notes agree with my notes and I won't go any further on that point.

The balance of the defence summation considered the sexual assault charge exclusively and the defence theory that the complainant's evidence was a complete fabrication, that the assault could not have happened in the place and manner described without someone else hearing or seeing and that the complainant told the story in order to get attention.

In the decision the trial judge also concentrated on the sexual assault charge, giving extended reasons for accepting the evidence of the complainant and the finding of guilt. Her only remarks about the threat charge were:

> The second charge will be amended to read cause bodily harm rather than cause death, and the Defendant is guilty on both counts, on the second count as amended.

The provisions of the **Code** respecting the power to amend an information are contained in s. 601. Section 601(2) grants the jurisdiction used by the trial judge in this case, that is, to use her discretion to amend the information to conform with the evidence. That subsection provides:

> (2) Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where

> there is a variance between the evidence and
>
> (a) a count in the indictment as preferred; or
>
> (b) a count in the indictment
>
> (i) as amended, or
>
> (ii) as it would have been if it had been amended in conformity with any particular that has been furnished pursuant to section 587.

A trial judge has wide jurisdiction to amend an information, including the jurisdiction to do so on his or her own motion. See for example **R. v. W.S.L** (1991), 105 N.S.R. (2d) 343 (C.A.).

When considering whether to amend an information a trial judge must take into account any prejudice to the defendant that may result as provided in s. 601(5):

> (5) Where, in the opinion of the court, the accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment or a count therein, the court may, if it is of the opinion that the misleading or prejudice may be removed by an adjournment, adjourn the proceedings to a specified day or sittings of the court and may make such an order with respect to the payment of costs resulting from the necessity for amendment as it considers desirable.

The Supreme Court of Canada in interpreting s. 601 has ruled that the applicable standard is whether, as a result of the proposed amendment, the accused would suffer "irreparable prejudice." See: **R. v. Côté**, [1996] S.C.J. No. 93 (Q.L.); **R. v. P. (M.B.)**, [1994] 1 S.C.R. 555; **R. v. Tremblay**, [1993] 2 S.C.R. 932; **Vézina and Côté v. The Queen**, [1986] 1 S.C.R. 2; **Morozuk v. The Queen**, [1986] 1 S.C.R. 31.

The appellant submits that as a result of the amendment, and the manner in which it was made, he was denied the right to have an adjournment, and the right to make a full answer and defence and that he has suffered prejudice.

There is no evidence whatsoever that the appellant was prejudiced by the manner in which the amendment was made. There is, for example, no suggestion that the appellant would have presented some evidence or cross-examined differently, in defence of the charge of uttering a threat to harm as opposed to a charge of threatening to kill. According to **R. v. McCraw** (1991), 66 C.C.C. (3d) 517 (S.C.C.) for the purposes of s. 264.1 of the **Code**, serious bodily harm means any hurt or injury that interferes with the integrity health or well-being of a victim. The section has since been amended to remove the word “serious”.

The appellant has not shown that the trial judge exceeded her jurisdiction or that there was any prejudice suffered by him as a result of the amendment and accordingly, the appeal should be dismissed.

Roscoe, J.A.

Concurred in:

Clarke, C.J.N.S.

Chipman, J.A.