SC CR 94 001

CR 02411

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

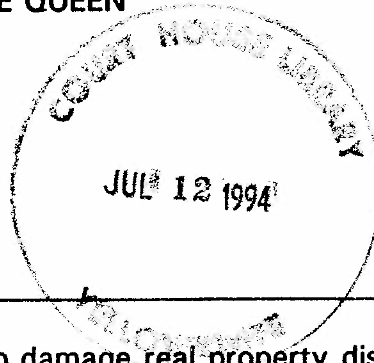
GAIL LOUISE DANIS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent



Appeal against conviction of uttering a threat to damage real property dismissed. No costs.

Heard at Yellowknife on April 7th 1994

Judgment filed: April 12th 1994

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Appellant: Austin F. Marshall, Esq.

Counsel for the Respondent: Dennis N. Claxton, Esq.

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REASONS FOR JUDGMENT

The appellant asks the Court to set aside her conviction of knowingly uttering a threat to damage real property, being the dwelling house of Tracey Neill, contrary to s.264.1(1)(b) of the **Criminal Code.**

Two grounds of appeal were argued:

1. The conviction should not be allowed to stand since the trial judge made no finding of fact that the appellant uttered a threat to damage real property, being the dwelling house of Tracey Neill.

2. Evidence of threatening remarks allegedly made by Tracey Neill's husband, which would have amplified the context of the appellant's remarks was wrongly excluded by the trial judge, leading him to find that the appellant's remarks were intended as a threat when the excluded evidence could have raised a reasonable doubt on that essential element of the offence charged.

I. Background

3 The events giving rise to the prosecution in this case occurred at Yellowknife on August 5th 1992. A labour dispute was then in its third month at Giant mine, and feelings were running high between members of the employees' trade union who had ceased working there, on one hand, and the employer and those who were employed there at the time, on the other hand. One of the chief points in contention was the employment of replacement workers by the employer during the dispute. The epithet "scab" was commonly used by union supporters when referring to those workers.

4 The trial judge summarised his factual findings as follows, referring to Tracey Neill as "the victim" and to the appellant as "the accused":

> The accused is the wife of an employee of Giant Yellowknife Mines who was involved in a labour dispute, who was on strike during the time of this incident. The victim was also the wife of an employee of the mine and a member of the union. The victim's husband had crossed the picket line and returned to work prior to the 5th of August, 1992.
>
> It's clear that there were hostile emotions and anger between the union members on strike and those union members who had returned to work and non-union replacement workers.
>
> In the present case, the accused was with the spouses of two other strikers, had gone for a drive to view some graffiti which had been spraypainted on a house and vacation trailer of an employee who had returned to work. They had heard about the vandalism at the union hall and drove out to Finlayson Drive in the City of Yellowknife in the Northwest Territories.
>
> They drove by the residence in question and viewed the word "scab" spraypainted on the vacation trailer and garage door in large letters. They proceeded down the street, turned around, and drove back slowly.

> In the interim, the victim and her husband had pulled into the driveway of the residence in question. The victim and her husband had got out of their vehicle, a white Cadillac, and were looking at the graffiti when the victim heard the accused shout out, "your place is next, scab." The accused indicates she shouted out "Scab, your Cadillac is next." Other defence witnesses indicate similar words relating to the vehicle of the victim and her husband. After the words were shouted out, the accused and her companions continued to drive on and laughed about the incident.
>
> The victim gave evidence she felt threatened that her property would be damaged by hostile strikers and their supporters. In fact, she and her husband went into the residence and contacted the R.C.M.P. immediately and advised them of the incident.
>
> The accused, in her evidence, indicates she never really thought about what she had said; that it was impulsive and humorous -- sort of a joke.
>
> The evidence, without question, discloses this incident occurred on the 5th of August, 1992 at the City of Yellowknife, in the Northwest Territories, and that it was the accused who shouted the words in question and I so find.

5 Later, in the course of discussing the relevant law, the trial judge referred to "the words stated by the accused" (at p.104 of the trial transcript) without quoting the words in question, simply describing them as "directed towards the victim's property." This description could apply to either the appellant's version of what she said or to the victim's version of what the appellant had said. Either alternative is consistent with the trial judge's finding that "the words constitute a threat in law."

6 At page 106 of the transcript, the trial judge is reported as continuing in the following vein:

> When one looks at the context and surrounding

> circumstances, there is no doubt the accused intended to speak the words and she in fact spoke the words that amount to a threat. Where the accused was a supporter of a group that was using debate, intimidation, and threats to support their position over a period of time prior to the date in question, it is hard to accept that an intention had not been formed on the part of the accused. She was a supporter of a group that used such tactics intentionally, and the evidence of the accused and the defence witnesses does not persuade me that there is a reasonable doubt as to her intention being otherwise than to intimidate by use of a threat. What other reasonable purpose could the words, "Scab, your Cadillac is next" or "Your place is next scab" be shouted under these circumstances.

7 Here, however, the reasoning is expressed so as to leave open to real doubt what the accused was found by the trial judge to have actually said or shouted. Initially, the trial judge seems to have accepted the victim's version of this, in declaring: "... the victim heard the accused shout out 'Your place is next scab'." What follows immediately is no more than a reference to the appellant's version, as given in her testimony, without words that reflect acceptance or rejection of that version. It is the further reference, at the end, to both versions that creates doubt as to which version, if any, the trial judge accepted as fact.

II. The Offence Charged

8 As amended at or before trial, the charge against the appellant reads in part as follows:

> This is the information of Terrance Zeniuk ... a member of the Royal Canadian Mounted Police, hereinafter called the informant.

> The informant has reasonable and probable grounds to believe and does believe that Gail Louise DANIS on or about the fifth day of August 1992, at or near the City of Yellowknife in the Northwest Territories, did by yelling, knowingly utter a threat to Tracey NEILL to damage real property of, to wit: her dwelling house, contrary to Section 264.1(1)(b) of the Criminal Code.

9 No amendment was sought by the Crown at trial to have the charge conform to the evidence given by the appellant or her witnesses, as the Crown might have requested pursuant to s.601 of the **Criminal Code**. And it was only in the course of argument on this appeal that Crown counsel drew attention to the possibility that such an amendment might now still be made, relying upon s.822 and s.686 of the Criminal Code. No motion to amend was however made, even at this late stage. The question raised by Crown counsel, therefore, in effect invites the Court to make an appropriate amendment now, of its own motion.

10 In considering this, reference may be made to the relevant language of s.264.1(1)(b) of the **Criminal Code**, that is to say:

> 264.1(1) Every one commits an offence who, in any manner, knowingly utters a threat ...
>
> (b) to ... damage real or personal property ...

11 The amendment suggested by Crown counsel would thus require the following words to be inserted immediately after "her dwelling house" in the information of Constable Zeniuk:

or her personal property, to wit: her Cadillac motor vehicle.

III. Discussion

12 It is apparent that the trial judge was satisfied beyond a reasonable doubt that the appellant uttered words which in the context of the existing circumstances amounted to a threat to damage real or personal property, in the sense required by s.264.1(1)(b) of the **Criminal Code.**

13 In giving his reasons for that conclusion of mixed law and fact, the trial judge omitted to specify what those words were, in effect saying that the words were offensive in the sense of s.264.1(1)(b) whether he accepted the appellant's version of them or that of Tracey Neill. And while he referred to the latter version without making any adverse comment on Tracey Neill's credibility, he was equally silent as to the credibility of the appellant. In effect, he seems to have concluded that there was credible evidence to support the charge whichever of the two versions was correct.

14 The charge, however, specifies a threat of damage to real property, that is to say Tracey Neill's dwelling; and the only evidence of that threat is in the testimony given by Tracey Neill. Both her version and that of the defence witnesses, including the appellant, cannot be correct as to the words uttered by the appellant. If both versions were equally credible in the ears of the trial judge, so that he did not know whom to believe on that point, a reasonable doubt clearly arose on which the appellant was entitled, in the absence of an appropriate amendment to the particulars of the charge, to be acquitted of the specific offence charged: **Cox and Paton v. The Queen,** [1963] S.C.R.

500, [1963] 2 C.C.C. 148; **Morozuk v. R.,** [1986] 1 S.C.R. 31, 24 C.C.C. (3d) 357, 50 C.R. (3d) 179, 25 D.L.R. (4th) 560, [1986] 2 W.W.R. 385, 68 A.R. 241, 42 Alta. L.R. (2d) 257, 64 N.R. 189; **R. v. Saunders,** [1990] 1 S.C.R. 1020, 56 C.C.C. (3d) 220, 46 B.C.L.R. (2d) 145; and see F.X. Fay, "The Extent to Which the Crown is Bound by Particulars" (1969), 6 C.R.N.S. 23.

15 An acquittal on the foregoing basis or on this appeal would of course leave it open to Tracey Neill or the Crown to bring a fresh charge under s.264.1(1)(b) of the **Criminal Code** alleging a threat to damage her Cadillac, which was her personal property. The time limitation for summary conviction proceedings could, at least in theory, be overcome by proceeding by indictment, an option which is provided by s.264.1(3)(a) of the Code. And the Crown could call on the defence witnesses other than the appellant in support of this fresh charge, using the appellant's evidence for purposes of cross-examination as to credit should she give contrary testimony at her fresh trial: **R. v. Kuldip,** [1990] 3 S.C.R. 618, 61 C.C.C. (3d) 185, 1 C.R. (4th) 285. The fresh charge would be immune to a plea of *autrefois acquit* since it would not be identical, as to its particulars, with the charge now under discussion.

16 Had the Crown, however, moved the trial judge to amend the charge as earlier mentioned, that motion would presumably not have been made until at least after the appellant had given her version of the threat in the course of her testimony, she being the first witness for the defence. At that stage, or possibly not until all the evidence had been adduced at trial, the trial judge would have had to consider the evidence then before him, the circumstances of the case and whether the appellant had been misled or

prejudiced in her defence by the variance between the particulars of the offence charged and her evidence as to what words she uttered in making the threat, all as required by s.601(4) of the Code. In addition, as required by paragraph 601(4)(e), he would have had to consider whether, having regard to the merits of the case, the proposed amendment could be made without injustice being done.

17 Given the nature of the particularized offence charged, the evidence and the absence of anything to suggest that the appellant would have been misled or prejudiced in her defence, which focussed essentially on her denial of any intent to utter a threat of any kind, the trial judge could well have amended the charge as this Court is now invited by the Crown to do, either on motion or of his own motion pursuant to s.601 of the **Criminal Code.**

18 No motion to amend having been made, at trial, I am now invited by Crown counsel to make the amendment earlier described, in the interests of justice, having regard to the provisions of s.822 of the **Criminal Code.** This provision includes, in s.822(1), a declaration that s.683 of the Code applies to an appeal such as the present, with such modifications as the circumstances require. And s.683(1) provides in part as follows:

> 683. (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice, ...
>
> (g) amend the indictment, unless it is of the opinion that the accused has been misled or prejudiced in his defence or appeal.

19 Section 2 of the **Criminal Code** defines "indictment" to include an

"information or a count therein" and a "plea, replication or other pleading" and "any record". This definition, given the qualifying words of s.822(1) of the Code, is ample enough to allow the Court on this appeal to consider the suggested amendment in accordance with s.683(1).

20 The defence in this case rested on two simple propositions: (1) that the words uttered by the appellant did not refer to Tracey Neill's dwelling (real property) but only to her Cadillac (personal property); and (2) that the words were not intended as a threat and so did not constitute a threat to damage property of any kind, being merely banter of a sort then being exchanged by both sides in the labour dispute.

21 Reliance upon this defence clearly required the appellant to testify. And, given the evidence for the Crown, it was only after the appellant had given her evidence as to what words she uttered that there could be any question on that point, the evidence for the Crown (Tracey Neill, the Crown's sole witness) being apparently credible. Had the charge been framed from the outset to include reference to a threat to personal property (in the form of the Cadillac), the appellant would still have been obliged, in a practical sense, to testify as to her intent and as to the atmosphere in which she uttered what she sought to show was only banter. In other words, it was immaterial whether the charge included any reference to the Cadillac or not, from the standpoint of this defence, which was that there was nothing uttered in the nature of a threat, and that the trial judge should at least have found a reasonable doubt on that point entitling the defendant to an acquittal.

22 No finding of credibility adverse to either Tracey Neill or the appellant having

been made by the trial judge, and this Court not being in a position to make any such finding on the evidence in the trial record, I am unable to perceive any prejudice to the appellant in the suggested amendment, even here on appeal, to make the charge conform with the appellant's own version as to what words she uttered. The trial judge clearly held that those words did amount to a threat within the intendment of the s.264.1(1)(b) of the **Criminal Code**; and, on the whole of the evidence, that conclusion is one which admits of no reasonable doubt.

23 In **Morozuk v. R.** ***(supra)*** it was held that the charge should have been amended so that its particulars conformed to the evidence, the offence charged being particularized in the indictment so as to give rise to a variance between the particulars charged and the evidence at trial. That is precisely the situation in the matter now before the Court. And, as held in that case so in this case, there is nothing to show that the appellant was or would have been in any way misled or prejudiced by that variance. Having regard to the merits of the case, the suggested amendment should therefore have been made and may accordingly now be made without any injustice being done.

24 It being, in my respectful view, in the interests of justice to do so, the charge is consequently amended as mentioned earlier, to conform to the evidence. On that basis, the first ground of appeal fails, given the finding of the trial judge that a threat of the kind charged had been made, whatever the words used may have been.

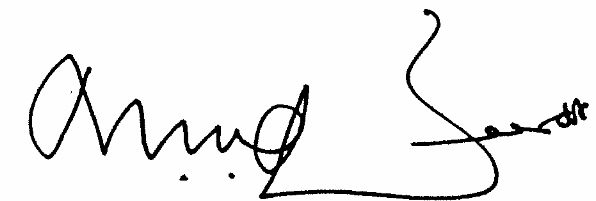
25 As to the second ground of appeal, it is apparent that no substantial wrong or miscarriage of justice occurred as a result of the trial judge's exclusion of evidence of threatening remarks allegedly made by Tracey Neill's husband, since the trial judge fully

took into account the general context of the labour dispute and hostilities to which it gave rise, as well as the graffiti which had directly occasioned the threat uttered by the appellant in the present case. Even if the trial judge may have erred in law by making that exclusion, this ground of appeal must therefore also fail.

IV. Conclusion

26 The appeal is dismissed and the record shall show that the appellant is convicted on the amended charge above mentioned.

27 Costs were not spoken to. In view of the position taken by the Crown regarding the amendment, both at trial and on this appeal, no costs shall be awarded.



M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
April 12th 1994

Counsel for the Appellant: Austin F. Marshall, Esq.

Counsel for the Respondent: Dennis N. Claxton, Esq.

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