Date: 2014 04 17
Docket: T1-CR- 2013-001464

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

DIANE MARIE KOYINA

REASONS FOR JUDGMENT

of the

HONOURABLE CHIEF JUDGE ROBERT D. GORIN

Heard at:	Behchoko, Northwest Territories March 19, 2014.
Reasons Filed:	April 17, 2014
Counsel for the Crown:	B. MacPherson, L.Wheeler
Counsel for the Accused:	S. Fix, N. Homberg

[Charged under s. 264.1 (1) (a) of the *Criminal Code*]

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Introduction

[1] The accused stands charged that she knowingly uttered a threat to the complainant to cause bodily harm to him, contrary to s. 264.1(1)(a) of the *Criminal Code*. The accused's trial was heard on March 19th of this year. All of the evidence in this case was presented through an agreed statement of facts presented by both the Crown and defence. After receiving these facts and hearing the submissions of counsel, I adjourned the matter to today's date to deliver my judgment.

[2] As is the case with all criminal charges, before the accused can be found guilty, all of the essential elements of the offence must be proved beyond a reasonable doubt. Both the physical element and the mental element must be established to that standard of proof. Because the accused is charged with uttering a threat to cause bodily harm, before she can be convicted I must find that it has been proved beyond a reasonable doubt that:

a) the accused's words, "I'm going to beat you up fucking faggot", objectively constituted a threat to cause bodily harm, given the context in which they were uttered; and

b) the accused intended to threaten or have her words taken seriously, at the time she uttered them.

[3] After having considered the evidence and the submissions of counsel, I find that it has been established beyond a reasonable doubt, that the words in question constituted a threat to cause bodily harm, and that they were seriously intended to convey a threat to cause bodily harm. I find the accused guilty as charged.

Analysis

[4] The agreed facts concerning the relevant interaction between the accused and Corporal L., a male member of the RCMP, are relatively brief and are set out in the following paragraphs:

Agreed Statement of Facts

a) On August 21, 2013 in the Hamlet of Behchoko in the Northwest Territories, Diane Koyina (the Accused) was passed out outside in a public place due to alcohol consumption.

b) Corporal [L.] of the RCMP awoke the accused and arrested her for being intoxicated in public as he believed that she could not care for herself. He placed her in the back of the police vehicle.

c) Cpl. [L.] observed that the accused had a strong odour of liquor on her breath, her eyes were bloodshot, her speech was slurred and her balance was uneven.

d) Only the accused and Cpl. [L.]. were at the scene.

e) Cpl. [L.] did not place handcuffs on the accused.

f) The accused realized that she was going to be lodged in cells. She became enraged. She replied to the reading of her rights by saying: "Faggot, faggot, faggot"; and "Fucking mother fucker."

g) She replied to the police warning by saying: "I'm going to beat you up fucking faggot."

h) The accused began kicking the silent patrolman, which bowed inward from the force of her kicks.

i) The accused then said: "I'm going to fucking fight you."

j) Cpl. [L.] drove the accused to the police detachment.

k) Cpl. [L.] opened the back door to the police vehicle. The accused lunged at Cpl. L, pushing him and then pulling away hard. Cpl. [L.] brought the accused to the ground with an arm bar takedown.

l) The accused continued to fight with Cpl. [L.] on the ground.

m) The accused suffered a scratch to her forehead.

n) Cst. [F.], who was off duty, ran over and assisted Cpl. [L.] with handcuffing the accused who continued to resist.

o) Cpl.[L.] and Cst. [F.] brought the accused into the detachment and lodged her in cells.

p) Once in cells, the accused continued to direct verbally abusive language towards Cpl. [L.]. She called Cpl. [L.] "faggot" approximately 60 times.

q) Cpl. [L.] is married to a man from Behchoko.

> *r) On March 21, 2013 Cpl. [L]. arrested the accused. On this occasion, the accused made derogatory remarks about Cpl. [L.'s] sexual orientation.*

Actus Reus

[5] As stated, the first issue to be determined is whether or not the words in question, "I'm going to beat you up fucking faggot", constituted a threat to cause bodily harm. Clearly, they made out a threat. However, more at issue is whether the words threatened actual bodily harm.

[6] S. 2 of the *Criminal Code* defines "*bodily harm*" as being *"any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature"*. Put another way, if it is established that the threat was to interfere with the health or comfort of the complainant in a manner that was either not transient or not trifling, the requirement of bodily harm is made out.

[7] The term *"beat up"* is defined in the *Canadian Oxford Dictionary* (Don Mills, University Press, 1998), as *"give a beating to, esp. with punches and kicks." "Beating"* in turn is defined as *"a physical punishment or assault".* It is therefore at least arguable that in isolation the words uttered by the accused were not necessarily a threat to cause bodily harm.

[8] However, in determining whether or not the physical element of an offence of uttering threats is made out, an examination of the words in isolation is inadequate. They must be examined in the context of the entire circumstances in which they were uttered. As stated by the Supreme Court of Canada in *R. v. McCraw*, [1991] 3 SCR 72 SCC at paras. 26 – 27:

> *The Approach That Should be Taken to Determine if Words Contravene Section 264.1(1)(a)*
>
> 26 At the outset I should state that in my view the decision as to whether the written or spoken words in question constitutes a threat to cause serious bodily harm is an issue of law and not of

> fact. How then should a court approach the issue? The structure and wording of s. 264.1(1)(a) indicate that the nature of the threat must be looked at objectively; that is, as it would be by the ordinary reasonable person. The words which are said to constitute a threat must be looked at in light of various factors. They must be considered objectively and within the context of all the written words or conversation in which they occurred. As well, some thought must be given to the situation of the recipient of the threat.
>
> 27 The question to be resolved may be put in the following way. Looked at objectively, in the context of all the words written or spoken and having regard to the person to whom they were directed, would the questioned words convey a threat of serious bodily harm to a reasonable person?

[9] It should be noted that in *McCraw*, an earlier version of s. 264.1(1)(a), which required *"serious bodily harm"*, applied. S. 264.1(1)(a) was amended in 1994 to delete the word "*serious"*. Given that amendment, the question now is whether the questioned words would convey a threat of simple bodily harm, as defined in s.2, to a reasonable person.

[10] The numerous insults which the accused directed at Corporal L. both before and during the incident, the vast majority of which had to do with his sexual orientation, are evidence of the strong degree of animus which she obviously felt towards him. They are also evidence of the accused's level of anger, which I find to have been very high. The accused's actions in repeatedly kicking the silent patrolman with considerable force following the words in question are, to some extent, evidence of her demeanor throughout the relevant time period. I think it clear that she was in a rage at the time she uttered the threat.

[11] I find that under all of the circumstances, the words constituted a threat to cause bodily harm. I conclude that a reasonable person in Corporal L.'s position would have concluded that the accused was threatening to cause him bodily harm. I find this to have been proved beyond a reasonable doubt.

Mens Rea

[12] In order for the *mens rea* to be present the words must be intended to convey a threat to cause death or bodily harm; that is they must be intended to intimidate or be taken seriously.

[13] In *R. v. Clemente*, [1994] 2 SCR 758, the Supreme Court of Canada stated:

> 6 At issue is the *mens rea* that is required by s. 264.1(1)(a). The appellant alleges that it must be established that the words were uttered with the intent to intimidate or instill fear. The respondent contends that it is sufficient if it is shown that the threat was uttered with the intent that it be taken seriously. In the Court of Appeal both the majority and minority proceeded on the basis that the words must be uttered with the intent to intimidate or instill fear. The majority concluded that the trial judge had found the requisite intent had been established. The minority thought his findings did not support the requisite mens rea.
>
> 7 The requisite intent can be framed in either manner. The aim of the section is to prevent "threats". In The Shorter Oxford English Dictionary (3rd ed. 1987), "threat" is defined in this way:
>
> A denunciation to a person of ill to befall him; esp. a declaration of hostile determination or of loss, pain, punishment or damage to be inflicted in retribution for or conditionally upon some course; a menace.
>
> Under the section the threat must be of death or serious bodily harm. It is impossible to think that anyone threatening death or serious bodily harm in a manner that was meant to be taken seriously would not intend to intimidate or cause fear. That is to say, a serious threat to kill or cause serious bodily harm must have been uttered with the intent to intimidate or instill fear. Conversely, a threat uttered with the intent to intimidate or cause fear must have been uttered with the intent that it be taken seriously. Both of these formulations of the *mens rea* constitute an intention to threaten and comply with the aim of the section.
>
> . . .
>
> 14 Obviously words spoken in jest or in such a manner that they could not be taken seriously could not lead a reasonable person to conclude that the words conveyed a threat.

[14] Because, the offence of uttering a threat contrary to s. 264.1(1)(a) requires more than the intent to merely utter the threatening words, it is an offence of specific intent. The distinction between general intent and specific intent was explained by Fauteaux, J. A. in the case of *R. v. George*, [1960] SCR 877 (at p. 877):

> In considering the question of *mens rea*, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.

[15] Also, since s. 264.1(1)(a) requires specific intent, s. 33.1(1) of the *Criminal Code*, which eliminates the "defence" of intoxication for some crimes of violence, is inapplicable. S. 33.1(1) provides:

> 33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

and therefore applies only to crimes of general intent.

[16] Strictly speaking, intoxication is not a true "defence" to a criminal charge. Rather, it is a factor relevant in determining whether the Crown has established the necessary element of *mens rea*. As stated, by Twaddle J.A. in *R. v. Bone* (1993), 81 CCC 3(d) 389 (Man. C.A.) (at p. 389):

> Drunkenness is never a defence to a criminal charge. It may, however, render the perpetrator of what otherwise would be a crime incapable of forming the intent. Or, if the perpetrator had capacity, it may be a factor in determining whether he actually formed the intent: see *R. v. Crane* (Man. C.A., judgment delivered April 27, 1993.) The governing factor is the nature of the intent required.

[17] In determining whether an accused has the specific intent necessary for the offence of uttering a threat, his degree of intoxication must be considered. The court in *Bone* (supra) further stated (at p. 392):

> Although no express purpose is required for the offence of uttering a threat, the offence must be committed knowingly. The mere use of words which constitute a threat is not consequently enough. The accused must also intend the words to instill fear in someone: see *R. v. McCraw*, [1991] 3 S.C.R. 72 at p. 82.
>
> As was pointed out by Cory, J. in *R. v. McCraw* (at p. 82), "[T]he determination as to whether there was such a subjective intent will often have to be based to a large extent upon a consideration of the words used by the accused." Nonetheless, a trier of fact must find the accused to have had the subjective intent, an intent which goes beyond the mere utterance of the words.
>
> Although an inference can be drawn from the words used that the accused intended to instill fear in someone, they must be considered in the context of the circumstances in which they were uttered. The specific intent to instill fear can only be inferred if the circumstances permit. The drunkenness of the person making the utterance is a circumstance which must be considered.
>
> The learned trial judge erred in treating both offences as ones of general intent. The accused's drunkenness was a factor which should have been taken into account. The failure of the trial judge to do so necessitated at least a new trial.
>
> The Crown's concession that the accused did not have the subjective mens rea required for the commission of either offence saved us from having to decide whether a new trial should be ordered or an acquittal entered. In the circumstances, the only course was to set aside the convictions and direct that acquittals be entered in their place.

[18] I have considered the accused's level of intoxication. I find that she was highly intoxicated. However, I am satisfied that it has been established beyond a reasonable doubt that she possessed the necessary *mens rea*. Under the circumstances, including her prior involvement with the victim when he arrested her on another matter, it is clear that she knew of and could remember

the victim's sexual orientation when she repeatedly insulted him using the word "faggot". I conclude that her mind was operating at a level where she knew she was uttering a threat to cause bodily harm and intended her words to be taken seriously. The degree of animus towards the victim, which she exhibited both on and prior to the date charged, is also strong evidence that supports this conclusion. I find that in this case, the prior occasion on which she made derogatory comments about the victim's sexual orientation can properly be considered as evidence of her animus towards him on the date charged.

[19] The accused's kicking of the silent patrolman following the threat is also evidence relevant to her animus towards the victim and therefore to her level of intent. I find that the accused did so to lend emphasis to the threats that she had just uttered. The kicks were powerful enough to cause the silent patrolman to bow inward. I note as well that she was so angry with the complainant that she initiated a physical altercation with him when she later exited the police vehicle.

[20] In arriving at my conclusion, I have considered defence counsel's submission that the accused was considerably smaller and lighter than the victim. Defence counsel suggested that the accused did not have the ability to carry out her threats. The relevant jurisprudence provides that the ability to carry out the threats is not required for the offence to be made out. Neither is the intent to carry them out. That said, I recognize that an accused's obvious inability to carry out a threat may be something that is relevant when determining whether or not the words in question were spoken seriously or in jest – or for that matter, whether they objectively constitute a threat. I have considered the fact that it was unlikely that the accused would have been in a position to hurt Corporal L. However, after having considered all of the facts, it is abundantly clear to me that her words were not uttered in jest and that she intended them as a threat to be taken seriously.

Conclusion

[21] A conviction will be entered. I thank counsel for their assistance.

[22] I note that s. 718.2(a)(i) of the *Criminal Code* states:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> >
> > > (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, . . .

[23] When counsel are prepared to deal with sentencing, I would invite them to provide submissions on whether it has been proved beyond a reasonable doubt that the aggravating factor set out in s. 718.2(a)(i) applies.

R.D. Gorin, C.J.T.C.

Dated at Yellowknife, Northwest Territories
this 17th day of April, 2014

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