Retaliation against judicial officer – s 119B

Commentary

Extracts from *R v Enright* [2020] QCA 6

COURT: District Court at Maryborough – Date of Conviction: 8 June 2018 (Farr SC DCJ)

CORAM: Philippides and McMurdo JJA and Boddice J

ORDERS:

1. The appeal be allowed.
2. The convictions be set aside.
3. There be a new trial in respect of each of counts 2, 3, 5 and 6.

RESULT AT FIRST INSTANCE:

On 8 June 2018, the defendant, Enright, was found:

- guilty of 4 x retaliation against a judicial officer; and
- not guilty of 1 x retaliation against a judicial officer.

He was sentenced to 12 months on each count, to be served concurrently.

Context

Whilst incarcerated in Maryborough Correctional Centre, the appellant had telephone conversations with his mother and grandmother which were recorded (as is the advertised practice in Correctional Centres).

The Crown case was that each of those telephone calls contained a threat to cause injury to the acting Magistrate in retaliation for having imposed imprisonment upon the appellant.

Relevant legislation

[15] s 119B of the Code provides:

> "A person who, without reasonable cause, causes, or threatens to cause, any injury or detriment to a judicial officer … for the purpose of retaliation or intimidation because of – (a) anything lawfully done or omitted to be done or that may be lawfully done or omitted to be done by the judicial officer as a judicial officer … is guilty of a crime."

Summing up

[20] The trial judge directed the jury that there were four elements to each offence and that the prosecution must prove each element beyond reasonable doubt. Those elements were:

1. Threaten to cause injury;

2. To a judicial officer;

3. Without reasonable cause;

4. In retaliation because of something lawfully done by a judicial officer as a judicial officer, namely imposing a sentence of imprisonment on the appellant.

[21] The trial Judge directed the jury in respect of these elements as follows:

"Now, injury in this context means a bodily injury. **Threatened is a common word used in everyday language, it means to utter a threat against someone. It is a question for your determination whether you accept, beyond reasonable doubt, that the comments made by the defendant that formed the basis of each of these charges constitutes a threat.** In so far as the term judicial officer is concerned, there is no dispute in this matter that the Acting Magistrate was a judicial officer.

The third element is, of course, without reasonable cause. Now, in so far as that element is concerned, this is an objective test based upon the state of mind of the defendant at the time the comments were made. So you have to determine, beyond reasonable doubt, whether a reasonable person, holding the defendant's beliefs, would have been justified in making the threat or threats in question. If you are satisfied, beyond reasonable doubt, that such a reasonable person would not have been justified in making the threat, then that element would have been proved. If you are not so satisfied, then it has not.

And, of course, if any one or more elements are not proved beyond reasonable doubt then the defendant is entitled to be acquitted of that charge. All elements must be proved beyond reasonable doubt before conviction can take place.

Now, in so far as the element without reasonable cause is concerned, the precise wording of the threat is relevant to, and perhaps determinative of, the issue of reasonable cause. You are entitled to take in to account the wording of the threat itself. You may well take the view that there cannot be a reasonable cause when the threat of injury would involve the commission of a criminal offence but, ultimately, that is a matter for yourselves.

The final element is in retaliation for the imposition of a sentence of imprisonment. Now, I direct you, as a matter of law, that the imposition of a sentence of imprisonment was a lawful act by a judicial officer, as a judicial officer. Retaliation implies a causal connection between the lawful act of the judicial officer and the threat that is made. And, in the context of these charges, retaliation might mean something like an act of revenge, or out of vengeance or reprisal, something of that nature. The element of retaliation requires you, the jury, to conduct a subjective assessment. That is, you would need to look into the mind of the defendant by reference to those surrounding circumstances and facts which you do accept, so that would include all relevant circumstances as you find them to be, including the nature of the threats themselves, the circumstances in which he found himself at the time, and you do that to determine if that element has been proved to the requisite standard."

Discussion

[26] A central issue at trial was the circumstances in which the appellant uttered the words in the conversations with his mother and grandmother. The appellant's evidence raised whether the appellant's utterances were, in fact, threats to cause injury or mere venting in his incarcerated circumstances.

[27] This central issue was not dealt with, however, on the basis that those circumstances were matters for the jury to consider in determining whether, as a matter of fact, the jury was satisfied beyond reasonable doubt that the words uttered by the appellant "threatens to cause injury". Defence counsel focused on those circumstances in the context of the jury's

consideration of the element of "without reasonable cause". This focus was an error. There is no reasonable basis to conclude that it was part of a forensic decision.

[28] Not surprisingly, the trial Judge, consistent with the conduct of the trial, specifically directed the jury to consider the circumstances of the telephone conversations in respect of the elements of without reasonable cause and retaliation. As a consequence, **the jury was not specifically directed to consider those circumstances when determining satisfaction beyond reasonable doubt as to the first element, namely, threatens to cause injury, in respect of each count. That was an error**.

[29] Although correctly directed that it was a factual determination for them whether they accepted that each of the statements made by the appellant constituted a threat, **the trial Judge ought to have specifically directed the jury of the need to consider the tone and circumstances in which the words were said by the appellant in order to determine whether the jury was satisfied beyond reasonable doubt that the particular words uttered by the appellant established the element "threaten to cause injury".**

[30] It was insufficient to merely direct the jury that "threaten" means "to utter a threat against someone". The words, by their very content, may be said to constitute a threat. The issue for the jury was not whether the words constituted a threat but whether the words, as uttered by the appellant in the context of the particular circumstances in which the appellant found himself, amounted to a threat to cause injury intended to be taken seriously, or were words said in temper.

[31] In this respect, the observations of Olsson J in *Carter v R* were apposite:

> "… in the setting of this case, it was incumbent on the trial judge to make it clear to the jury that … if it remained a reasonable possibility that, in speaking as he did, the appellant was doing no more than merely unburden his feelings … the offence was not made out".

[32] In the present case, the jury ought specifically to have been directed that words, which interpreted literally would amount to a threat to cause injury, are frequently made in jest or temper and in a context where they are not to be taken seriously. The issue for the jury to determine was whether those words, in the context in which they were used, satisfied the element "threatens to cause injury".

[33] That obligation arose notwithstanding the manner in which the trial was conducted by defence counsel. It was a factual issue for determination by the jury, on each count.

[34] As satisfaction of the first element of each offence was specifically in contention, and the jury were inadequately directed in relation to that aspect, there has been a material misdirection. That material misdirection related to a specific factual matter for determination by the jury.

[35] In the circumstances of this trial, the material misdirection constitutes a miscarriage of justice, notwithstanding that there was no request by defence counsel for such a direction, or further redirection. The failure to properly direct the jury in respect of that element deprived the appellant of a fair chance of acquittal.

Retaliation Direction - s 119B

Legislation

Section 119B

(1) A person who, without reasonable cause, causes, or threatens to cause, any injury or detriment to a judicial officer, juror, witness or member of a community justice group, or a member of the family of a judicial officer, juror, witness or member of a community justice group, for the purpose of retaliation or intimidation because of—

(a) anything lawfully done or omitted to be done or that may be lawfully done or omitted to be done by the judicial officer as a judicial officer; or

(b) anything lawfully done or omitted to be done or that may be lawfully done or omitted to be done by the juror or witness in any judicial proceeding; or

(c) anything lawfully done or omitted to be done or that may be lawfully done or omitted to be done by any member of the community justice group a representative of which makes or may make a submission—

(i) to a court or police officer under the *Bail Act 1980* about a defendant who is an Aboriginal or Torres Strait Islander person; or

(ii) to a court or police officer under the *Youth Justice Act 1992* about a child who is an Aboriginal or Torres Strait Islander person; or

(iii) to a court under the *Penalties and Sentences Act 1992* about an offender who is an Aboriginal or Torres Strait Islander person;

is guilty of a crime.

Sample direction[1]

This offence has several elements or parts and the prosecution must prove each of them, beyond reasonable doubt, for you to convict the defendant.

The elements of the offence may be broken down as follows:

The defendant –

1. **caused or threatened to cause;**
2. **injury or detriment**;
3. **to a [judicial officer, juror, witness or member of a community justice group, or a member of the family of a judicial officer, juror, witness or member of a community justice group];**
4. **without reasonable cause**;

[1] Based in part on the decision in ***R v Enright*** **[2020] QCA 6.**

5. in retaliation because of something lawfully done by a [judicial officer as a judicial officer/ juror or witness/ any member of the community justice group], namely [describe alleged action of defendant, e.g. imposing a sentence of imprisonment on the defendant].

Taking those elements slightly out of turn, you must be satisfied, beyond reasonable doubt that:

(1) An injury or detriment was caused or threatened.

The prosecution relies upon [X] as the injury/detriment;

Note that the section defines an "injury or detriment" as including "intimidation"; and "intimidation" as including "harassment".

Depending on the way on which the case is argued, there may be an issue as to whether what is relied upon by the prosecution is in fact an injury or detriment, or whether it was merely trifling.

(2) The defendant caused or threatened to cause the injury or detriment.

'To cause' means to produce an effect: the question is whether the acts or omissions of the defendant were a substantial cause of the injury or detriment suffered by the complainant;

As to 'threaten to cause' – the question is whether the words spoken by the defendant amounted to a threat to cause injury or detriment.

In addition to taking into account the content of the statements said to amount to a threat, you must consider matters such as –

- **the *tone* used by the defendant; and**
- **the *circumstances* in which he/she used the words.**

You must determine whether, in the context of the particular circumstances in which he/she found themselves, the words uttered amounted to a threat to cause injury or detriment intended to be taken seriously, or whether he/she spoke in temper or in humour or otherwise without an intention that their words be taken seriously as a threat to cause injury or detriment.

Words, which interpreted literally would amount to a threat to cause injury, are frequently made in jest or temper and in a context where they are not to be taken seriously.

(3) The injury or detriment was caused or threatened to [any of the persons listed in section 119B(1)].

(4) The defendant had no reasonable cause to cause, or threaten to cause, injury or detriment.

This is an objective test based upon the state of mind of the defendant at the time the comments were made.

You have to determine whether you are satisfied, beyond reasonable doubt, that a reasonable person, holding the defendant's beliefs, would have been justified in making the threat or threats in question.

You are entitled to take in to account the wording of the threat itself. You may well take the view that there cannot be *reasonable cause* when the threat of injury would involve the commission of a criminal offence but, ultimately, that is a matter for yourselves.

(5) The injury or detriment was threatened or caused <u>in retaliation or intimidation</u> because of [any of the matters listed in 119B(1)(a), (b) or (c)].

The injury or detriment will be caused or threatened *in retaliation* where there is a causal connection between [e.g. the lawful act of the judicial officer] and the causing or threatening of the injury or detriment.

Determining whether the injury or detriment was caused or threatened in retaliation requires you to look into the mind of the defendant – that is, to conduct a subjective assessment – to determine whether you are satisfied that the injury or detriment was caused or threatened as an act or revenge, or out of vengeance or as an act of reprisal or something of that nature.

You are to consider all of the relevant circumstances, as you find them to be, including the nature of the threats themselves and the circumstances in which the defendant found himself/herself at the time.