Bunting v Gokel [2001] NTSC 24

PARTIES:	WILLIAM JOHN BUNTING
	v
	NOEL JOHN GOKEL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	Appellate
FILE NO:	JA90/2000 (9923882)
DELIVERED:	12 April 2001
HEARING DATES:	7 March 2001
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Appellant:	M. Carter
Respondent:	R. Noble

Solicitors:

Appellant:	Withnall Maley & Co
Respondent:	Director Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Bunting v Gokel [2001] NTSC 24
No. JA 90 OF 2000 (9923882)

BETWEEN:

WILLIAM JOHN BUNTING
Appellant

AND:

NOEL JOHN GOKEL
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 12 April 2001)

MILDREN J:

[1] The appellant was convicted by the Court of Summary Jurisdiction of the offence of making a threat to kill one Philip Campbell, contrary to s 166 of the *Criminal Code*, and was sentenced, apparently, to a term of imprisonment. The appellant has appealed to this Court against both his conviction and sentence. I am presently concerned only with the appeal against conviction, the appeal against sentence having been adjourned *sine die* pending the outcome of the appeal against conviction.

[2] The sole ground of appeal is that the finding of guilt is unsafe and unsatisfactory and contrary to the weight of the evidence. There is no

dispute that an appeal to this court lies on that ground: see *JK v Waldron* (1988) 93 FLR 451 at 455-457 per Kearney J.

[3] Certain facts found by the court below are not now in contest and may be briefly stated. On 8 August 1999 the Darwin Sailing Club conducted a race in the afternoon. One of the vessels competing in the race was a 58 feet long 30 ton ferro-cement sailing vessel, the *Balladier II,* which was skippered by a Mr Gibson. Also on board were Mr. Campbell (the owner), and Messrs. Crompton, Brooks, Loftus, Ryan, Miller and Munro. After the completion of the race, the *Balladier II* motored around the harbour from Vestey's Beach to Fisherman's Wharf, arriving at about 5.40pm. Already moored at the wharf were two other vessels, a yacht, *Chapparel* and a vessel called the *Grace II*. The *Chapparel* was moored flush to the wharf on its starboard side. The *Grace II* was moored astern of the *Chapparel*, with its starboard side to the wharf. The appellant, the owner of the *Chapparel* was standing in the stern area of his vessel. Also on board the *Chapparel* was the appellant's *de facto* wife Jillian Corlette, the appellant's son and several friends of the son. There being no room left at the wharf for the *Balladier II* to moor, Campbell moored his vessel to the port side of *Grace II*. During the process of mooring, Campbell went onto the *Grace II* to find what is described by the learned Magistrate as "a mooring site". The appellant, in a manner not untoward, suggested a suitable place. After attending to this, Campbell returned to the *Balladier II* and went below to grease the stern

flange before shutting down the vessel's diesel engine, the exhaust for which is located at the stern. At that time, the prevailing wind blew diesel fumes over the stern area of the *Chapparel* where the appellant was standing. Loftus, who was still on board the *Balladier II* heard the appellant say: "Cut that fucking engine" and communicated the essence of this request to those below. The learned Magistrate was unable to find whether the engine was turned off 5 minutes or 10 minutes later, but the engine was turned off just before Campbell returned to the deck.

[4] What happened thereafter is the subject of some dispute. The learned Magistrate found that the appellant commenced a tirade of abuse directed at those on board the *Balladier II* which commenced whilst Campbell was still below deck and continued after he returned to the deck. It is not necessary to recount this part of the episode in detail; the learned Magistrate found that Campbell ignored this. Whilst Campbell was attending to packing up some items he heard the appellant say "I'll get my 9ml and shoot you," which caused him to look up. He saw the appellant pacing back and forth on the rear deck of the *Chapparel*, and said to him: "If you don't stop yelling and swearing, I'll call the police". The learned Magistrate found that the appellant responded, pointing his finger at Campbell "And I know who you are pretty boy. I'll shoot you in the face with my 9ml pistol. I'll shoot you between the eyes". At this stage the appellant moved away from the rail of his vessel, giving Campbell the impression that he was leaving to get

something. Campbell felt sick; his stomach turned and he had a sense of *déjà vu* pertaining to an incident that he did not identify in evidence. The court found that he was frightened by the words spoken and the body movements of the appellant, and that the words were spoken with intent to cause fear in the appellant. The learned Magistrate found that Campbell, who was a Sergeant in the Northern Territory Police, was a person of reasonable firmness and courage, and that the threat was of such a nature to cause fear to any person of reasonable firmness and courage, and amounted to a threat to kill. Campbell responded: "Calm down, stop your swearing or I'll call the police," and continued to clean up the vessel. Later, as he left the vessel, the Court found that Campbell heard the appellant say "I'll get my 9ml and shoot you bastards in the face." These findings were principally based on the evidence of Campbell and Loftus.

[5] The prosecution also called three other witnesses who had been aboard the *Balladier II* and who the learned Magistrate said had heard "varying parts of the defendant's tirade from varying positions." Importantly, the learned Magistrate found, based on the evidence of Brooks, that at a time when Campbell was still on board the *Balladier II* Campbell moved towards the appellant, who said "If you bastards board this boat, I'll fucking blow you away. I've got a gun and I'm prepared to use it." However, the learned Magistrate was unable to say when this was said in the context of the words "I'll shoot you in the face" and "I'll shoot you between the eyes." There is

no evidence that the appellant had a weapon on his person or within sight of Campbell or anyone else at any time.

[6] The appellant's case at trial was that he lost his temper, and was yelling and raving about the diesel fumes, but the words constituting the alleged threat were: "If you come aboard this boat I'll shoot you", and that this was said in response to Campbell saying "I'll fix you, sunshine," and his coming on board the *Chapparel*. The learned Magistrate rejected the evidence of the appellant and that of his wife Ms. Corlette. It is not now suggested that his Worship erred in doing so.

[7] The appellant's argument before me was that on his Worship's findings, and on the evidence which was either not challenged or was accepted by the Court below, there was a reasonable hypothesis consistent with the appellant's innocence which had not been excluded beyond reasonable doubt, *viz*., that the threats found to have been made were conditional upon Campbell coming aboard the *Chapparel*: "If you come aboard……" It was submitted that if his Worship's finding as to what Brooks heard is accepted, given that his Worship could not say when those words were uttered, it had not been shown that a conditional threat had not been made first and that therefore the later threats had not been shown to have been unconditional.

[8] Mr. Carter, Counsel for the appellant, referred to *R v Leece* (1995) 78 A Crim R 531. In that case Higgins J considered a number of authorities

bearing on the question of what amounts to a threat to kill. After considering those authorities, Higgins J said, at p. 536:

> One may infer from these quotations that to be a threat to kill, the relevant utterance or communication must convey, objectively, to the hypothetical reasonable person in the position of the listener or recipient that the publisher proposes to kill the listener or recipient or another person. If it conveys a merely hypothetical proposal that will not suffice, but a conditional threat, particularly when the person threatened is entitled not to meet such conditions, will suffice as "a threat". There may, of course, be a fine line between such a conditional threat and a merely hypothetical one.

[9] Some further light is cast on what is meant by a 'merely hypothetical proposal' by reference to a Canadian decision referred to by Higgins J thus:

> In *Ross* (1986) 26 CCC (3rd) 413 the respondent told an assistant bank manager, who had told him that his bank account was frozen by court order, that he was going home to get his gun. He would then go to see the sheriff and return to the bank. He later rang the police station to threaten that, if a police officer did not leave the vicinity of his residence, that police officer would be "shot". It was unnecessary for the purpose of the [Canadian Criminal] Code to decide whether that threat was a threat to cause death or merely to cause "serious bodily harm."
>
> The trial judge found that the officer had been "warned" rather than threatened. The Appeal Court (Morden, Grange and Finlayson JJA), held that a conditional statement as uttered by the accused may be a "threat" of the relevant kind.

[10] The point of distinction, according to Mr Carter's argument, is that the threat in this case was "conditional" (I take him to mean hypothetical) because it was premised upon Campbell coming aboard the *Chapparel* which Campbell had no right to do, i.e. that Campbell was not "a person entitled

not to meet the condition" despite the fact that he was an off-duty police officer.

[11] No other authorities were referred to on this point, and counsel for the respondent did not argue that the *obiter dictum* of Higgins J in *Leece* was wrong and ought not be followed. I note that an appeal against the decision in *Leece* was allowed by a majority (see (1996) 65 FCR 544; 86 A Crim R 494), but the appeal succeeded on a different aspect of the case, not on his Honour's view as to what amounted to a threat to kill. I have been unable to locate any other authorities on the point.

[12] Counsel for the respondent, Mr. Noble did not argue that the words found to have been heard by Brooks could not amount to a conditional threat. The thrust of Mr. Noble's submission was that the offence was complete before the words heard by Brooks were said, and that the threat found to have been made by the learned Magistrate was unconditional. I do not think that this argument can be sustained. The words used by the appellant cannot be looked at in isolation, but must be construed in the context of all the words spoken, as well in the context of his actions, and posturing: see *Leece* (1995) 78 A. Crim R 531 at 536 per Higgins J; *Leece* (1996) 86 A Crim R 494 at 498 per Gallop and Hill JJ. In *R v Rich* (unreported, Court of Appeal, Supreme Court of Victoria, 17 December 1997, per Winneke P. and Brooking and Buchanan JJA at p 9) their Honours said:

> But where, as in this case, it is alleged that a series of statements, made repetitively to the one person at the one place, constitutes a

> threat to kill made with a particular intent, common sense dictates that the whole of the conduct of the accused, including the nature of the statements and the context and manner in which they were spoken, must be considered by the tribunal before it can be determined whether a threat to kill within the meaning of s 20 of the *Crimes Act 1958* has been made. It would be a barren exercise for the jury to consider each utterance in isolation and out of context of the others. So regarded each of the utterances might lose the impact and meaning which, in proper context, the totality of the conduct might otherwise bear. Indeed, it is difficult to conceive, in the circumstances of this case, how the jury could have made any adequate assessment of the intent with which the accused made the threat unless they were to look at the entirety of his conduct, as distinct from "snap-shots" of it, during what was clearly a continuous episode.

[13] It was not suggested that the learned Magistrate did not consider all of the appellant's utterances and conduct, and the manner and context in which they were spoken, but that having regard to the words heard by the witness Brooks (which were also heard by another witness) there was a reasonable possibility which had not been excluded that the threat was a hypothetical one.

[14] Section 166 (1) of the Criminal Code provides:

> Any person who, with intent to cause fear, makes, or causes a person to receive, a threat to kill any person which threat is of such a nature as to cause fear to any person of reasonable firmness and courage, is guilty of a crime and liable to imprisonment for 7 years.

[15] As the case of *Rich* shows, the nature of the threat made is clearly relevant to the necessary intent. It may be that a hypothetical or conditional threat to kill is one which does not enable a court to infer beyond reasonable doubt, that the defendant's intent was to cause fear, but was merely intended to

insult particularly if the suggested threat is made in the context of a tirade of personal abuse and insulting language.

[16] The evidence of Campbell was that he did not hear all of the words spoken by the appellant at times, and he did not recall the appellant say words to the effect "I don't want anyone coming on my boat or I'll shoot you". According to Campbell, the witness Crompton was on the vessel nearby when the alleged threats were made.

[17] According to the witness Crompton, who was an off-duty detective sergeant of police, he heard the appellant say "You come on board my boat, I'll – I'll – I'll shoot you – I've got a gun and I'll shoot you." This was the only threat he heard of this nature. At the time he heard these words spoken, he was no longer on board the *Balladier II* but was on the wharf loading a couple of vehicles.

[18] The witness Loftus's evidence, was that, before Campbell came on deck the appellant said "Dinah Beach fucking scum"; "dole bludgers" and some other words in the same vein, and "I'll get a 9 millimetre and shoot you in the face". Loftus could not say that those words were directed to anyone in particular because there were others around him. Loftus said that the appellant said this in a loud and aggressive voice, and that the tone used was menacing. After Campbell came on deck the appellant said "You're the ex-fucking harbour master from Gove". These words were directed at Gibson. After Loftus said that he *thought* that the appellant used the words "I'll

shoot you between the eyes" and there was reference to doing it with a 9 millimetre. At that stage Campbell was near him, and Loftus heard him say "Calm down, stop your swearing or I'll call the police." After that the abuse continued along the same lines as before: "Dinah Beach scum and that sort of thing." After this, Loftus and others packed up and climbed up onto the wharf, and whilst this was being done "the words were still coming from this man on the back of the *Chapparel*; abuse." In cross examination Loftus denied that the appellant had at any time said words to the effect "If you come on my boat, I'll shoot you between the eyes" or "If you come on my boat, I'll shoot you with a 9 millimetre" or words to that effect.

[19] The duty of this court when it is invited to quash a conviction on the ground that it is unsafe or unsatisfactory has been authoritatively laid down by the High Court in a series of cases culminating in *M v The Queen* (1994) 181 CLR 487, *Jones v The Queen* (1997) 191 CLR 439 and *Gipp v The Queen* (1998) 194 CLR 106. The test is whether this Court thinks that upon the whole of the evidence, it was open to the learned Magistrate to be satisfied beyond reasonable doubt that the appellant was guilty. "If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantage enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence": see *M v The Queen* (1994) 181

CLR 487 at 494 per Mason CJ, Deane, Dawson and Toohey JJ. Obviously, the same applies where there is no jury and the trial is conducted before a Magistrate. Although it has been said that this means that the appellate court is required to make its own independent assessment of the whole of the evidence, it is clear that the appellate court is not required to sift through every page of the transcript of evidence or read every document tendered in evidence where the parties to the appeal have not relied on an issue or only on certain of the evidence. As was said by McHugh and Hayne JJ in *Gipp v The Queen*, *supra*, at 125, were it otherwise, courts of criminal appeal would no longer be courts of appeal; they would be tribunals for the judicial review of criminal convictions. The appellate court must rely upon the issues which the parties themselves have identified. Nevertheless an appeal court may consider an argument or ground implicitly raised, although not articulated: see *Gipp v The Queen*, *supra*, at 127-128.

[20] Although the argument pressed by Mr Carter was directed to whether or not the Crown had proved that a threat to kill had been made because the threat was hypothetical, the answer to the question of whether or not a threat to kill of the necessary kind envisaged by the statute was made with intent to cause fear in this case is not to be resolved merely by a consideration of whether or not there was a possibility that the threat was merely hypothetical. In the context of the whole of the circumstances, I do not consider that it can be safely concluded that a threat to kill with intent to cause fear, of the kind envisaged by the section, had been made. The

overriding impression is that the appellant was agitated and upset because the diesel engine had not been cut immediately causing the fumes from the exhaust to foul the air in his vicinity, and that he became abusive and loud mouthed, over a protracted period. The words constituting the alleged threat to kill were merely a part of this general abuse. The appellant did not have a weapon to hand, and made no effort to leave the rear of his vessel as if to get one, although he paced and appeared agitated. The initial threat to use a weapon was not directed to anyone in particular, although the later threat was directed at Campbell. I find that the learned Magistrate failed to properly consider the whole of the context and surrounding circumstances, and relied too much on the words he found constituted the threat to kill, without putting them in their proper context. The fact that the appellant was heard to utter the threat by two witnesses in a conditional form, adds to the impression that the appellant may not have been serious about his threat, and may not have been intending to put Campbell in fear, but may have been merely abusive. I think also, that the learned Magistrate may have been misled when he referred in his reasons to the fact that Campbell, a police officer, was in fact put in fear, when it appears not unlikely that Campbell's fear was contributed to by the sense of *déjà vu* he experienced as a result of some other incident which he did not identify. Counsel for the respondent, Mr. Noble, submitted that the offence was complete once Campbell was put in fear. I do not accept this. Strictly speaking, whether Campbell was put in fear was not relevant, as the test was entirely objective, the question

being – was the threat of such a nature as to cause fear to any person of reasonable firmness and courage? This describes objectively the nature of the threat to kill of which this section speaks, and if, as it seems to me, that the words uttered had been properly considered in the context of the tirade of abusive language directed at Campbell and others on the *Balladier II*, the learned Magistrate ought to have entertained a reasonable doubt and dismissed the charge. Accordingly, the appeal is allowed, and the conviction is quashed and in lieu thereof I substitute a verdict of not guilty.
