Date: 20010524
Docket No.: CAC 165023

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Upson, 2001 NSCA 89]

Roscoe, Flinn and Oland, JJ.A.

BETWEEN:

DONNA MARIE UPSON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel: Terry M. Nickerson, for the appellant
Peter P. Rosinski, for the respondent

Appeal Heard: March 29, 2001

Judgment Delivered: May 24, 2001

THE COURT: Appeal allowed in part as per reasons for judgment of Flinn, J.A.; Roscoe and Oland, JJ.A. concurring.

FLINN, J.A.:

Introduction

[1] Following a trial in Provincial Court before Judge Flora Buchan, the appellant was convicted of three indictable offences of uttering threats contrary to s. 264.1 of the **Criminal Code of Canada** R.S.C. 1985, c. C. 46, s. 1 (the **Code**) as follows:

> 1. to destroy or damage the real property of the Victoria Road United Baptist Church (s. 264.1)(l)(b);
>
> 2. to cause bodily harm or death to Reverend Elias Mutale (s. 264.1(l)(a); and
>
> 3. to cause bodily harm or death to members of the black race (s. 264.l(l)(a).

[2] The appellant was sentenced to eight months imprisonment on each charge, which sentences were ordered to be served consecutively.

[3] The appellant appeals her convictions and, alternatively, applies for leave to appeal and, if granted, appeals the total sentence imposed upon her.

Background Facts

[4] Before dealing with the specific grounds of appeal, I will set out the facts which give rise to the appellant's convictions, including some background facts concerning the appellant herself which are relevant in the context of this particular matter.

[5] The appellant was, at the time of the offences, 22 years of age. She is an avowed white supremacist, and, acknowledges membership in the Ku Klux Klan, the Aryan Nation's Church, and the Nationalist Party of Canada. The appellant was raised in foster homes and group homes in Ontario from the time she was eight years of age. At the age of 18 she was living in Toronto. Approximately six months before the incident which gave rise to these offences she had moved to Moncton, New Brunswick.

[6] The appellant testified that she travelled east from Toronto to recruit people

to join her organizations; and, among other things, her role was to go around to all of the churches, advocating her beliefs, particularly, that black people were not welcome in the Christian churches. As to why the appellant came to Dartmouth, Nova Scotia on April 14, 2000, and attended at the Victoria Road United Baptist Church, the appellant testified:

> A. . . . it had been brought to my attention by a skinhead friend who lives in the Dartmouth area that there are whites who go to that church and which offended me, the fact that because Deuteronomy 23 verse 3 says that blacks and whites should not be in the same congregation and that they cannot enter the Kingdom of God if they are mixed.

[7] The critical evidence with respect to the offences in question was given, at trial, by Reverend Elias Mutale. The appellant gave evidence as well.

[8] Reverend Elias Mutale is a minister presently serving at the Victoria Road United Baptist Church in Dartmouth, a position which he has held since July l998. He is a native of Zambia in South Central Africa. He holds degrees of Bachelor of Theology and Masters of Divinity. Prior to taking up his post at the Victoria Road United Baptist Church he served for eight years at a church in the Annapolis Valley, Nova Scotia.

[9] He testified that the congregation at the Victoria Road United Baptist Church averages 100 people on a Sunday morning. The congregation is predominantly black.

[10] He testified that at about 7:00 o'clock in the evening on Friday, April 14, 2000 a dinner function was being held in the basement hall at the church. He was requested to go upstairs to the church to see someone who wanted to meet the Minister. He was directed to a young lady who was seated on a chair at the back of the church, the appellant, whom he greeted and welcomed. As to what took place on this encounter Reverend Mutale testified as follows:

> A. . . . and I stretched out my hand to greet in customary Zambian style which I often forget is not Canadian. And – but she put her arm behind the back and said, Oh, you are black. And I said, Yes, I'm black and this is a black church. And then she introduced herself as a member of the Ku Klux Klan and that she was going around the churches telling everyone that black people are no longer welcome in the churches. I responded by saying, This is a black church. There is

> no problem, but everyone is welcome. And I mentioned that we have black people, we have white folks in the church. She got up at that point and started to walk out and said that, The Old South will rise again.

[11] Reverend Mutale testified that this first encounter with the appellant lasted approximately three minutes. He testified that the appellant did not seem upset or particularly agitated. Further, he testified, that while he did report the incident to one of the members of the congregation, he did not, at the time, take seriously what the appellant had said to him that evening.

[12] On the following day, Saturday, April 15, 2000 Reverend Mutale was present at a meeting in the downstairs hall of the church. He was called from that meeting by one of the trustees, to go upstairs to meet a lady. He testified that when he went upstairs he saw that it was the appellant who had returned. On this occasion she had a bible in her hand, which was open. Reverend Mutale testified that the appellant told him that she came to "tell him that black people were cursed in the bible." She indicated that she wanted to show him, from the bible, that black people were not supposed to be in the kingdom. He testified that the appellant said "We, the Ku Klux Klan, are going to get rid of you." Following that statement Reverend Mutale indicated to the appellant that he would be pleased to sit down with her, or whoever her leaders were, to try and demonstrate to her that the bible does not support such a position. Reverend Mutale's testimony continued on as follows:

> A. When I suggested to her that I will be glad to talk this matter over, she said to me that, My leaders will tell you the same thing I am telling you, that you people are not welcome in the churches. And that's the point at which she looked fairly angry, saying that, and looked straight at me and started to walk out. And I followed her, continuing a little bit of the discussion that the Bible does not say anything to that effect. God loves all people.
>
> By the time she got outside, she said that, I want to warn you that you people are not supposed to be in the Kingdom and if you continue to meet in this place, you're going to be sorry for what will happen. And don't say I never warned you, and finished off with the "N" word that was her very last word.
>
> Q. Okay. Reverend, I appreciate, sir, that this is a fairly vile epithet you're referring to, the "N" word, in your evidence but just so there's no doubt, can you repeat the word she used, sir?

> A. She said, “If you continue to meet in this place, you’re going to be sorry for what’ll happen here. And don’t say I never warned you, nigger.”

[13] Reverend Mutale testified that as the appellant started to walk away he mentioned to her that he considered what the appellant had said to be a threat which he would have to report to the police. The appellant did not respond.

[14] Reverend Mutale then instructed one of the church trustees to follow the appellant, because he was intending to report the matter to the police. The trustee did follow the appellant to another church in Dartmouth, and Reverend Mutale reported the matter to the Dartmouth police. Shortly thereafter the appellant was detained and arrested.

[15] As to his concerns with respect to the appellant’s remarks, Reverend Mutale testified as follows:

> A. For a moment, I was extremely frightened. I wondered what this was about. My mind immediately flashed back to the burning of churches in the southern United States. And I was wondering whether this was the same group. And I was also worried because that was a week – we were going to be having meetings all week. I wondered whether the people were safe, whether my family was in danger.
>
> So I called my wife and told her what had just happened and she was even more frightened, saying to me, You better cancel church immediately. I said, no. I didn’t want to do that. But I did begin to call the other leaders of the church and one of them arrived at the church before I had called him and he said, You better call the other two. And of the two, one was occupied and one was able to come. And we sat down and started to discuss that.
>
> . . .
>
> Q. Did it cause you to reconsider the events of Friday?
>
> A. Yes. I felt that this may be an individual with a real plan to do something disastrous. And I began to worry that even if I felt that perhaps she wasn’t in the best frame of mind on Friday, that sometimes that’s when people will do things and not think something of it.

[16] While Reverend Mutale testified that when he first met the appellant on Friday evening she did not seem upset or particularly agitated, he testified with respect to his Saturday conversation with the appellant:

> . . . she looked fairly upset, angry, very uncompromising mood. As I made the offer that, I'll be glad to sit down and talk this over and try to show from the Bible that the Bible does not support such a position, and she looked at me with a very angry stare and said, My leaders will tell you the same thing that I am telling you.

[17] In her testimony the appellant did not dispute Reverend Mutale's evidence as to what the appellant said to him, with two exceptions:

(i) Firstly, as to Reverend Mutale's evidence that the appellant said "If you continue to meet in this place, you're going to be sorry for what will happen here. And don't say I never warned you, nigger." The appellant testified "I never said he'd be sorry."

(ii) Secondly, with respect to Reverend Mutale's testimony as to what the appellant said after telling Reverend Mutale that black people were cursed in the bible, that "We the Ku Klux Klan are going to get rid of you." The appellant testified "I never said the Klan would take care of it. I never said anything about we the Klan would do anything." She denied saying that the Ku Klux Klan are going to get rid of blacks.

[18] The appellant testified that her only purpose of engaging Reverend Mutale was to have a "private, peaceful discussion." While the appellant acknowledged that she intended her views to be taken seriously by Dr. Mutale, those views were not intended to intimidate or threaten Reverend Mutale.

[19] As to the words of warning testified to by Reverend Mutale, namely:

> . . . I want to warn you that you people are not supposed to be in the Kingdom and if you continue to meet in this place, you're going to be sorry for what will happen. And don't say I never warned you, nigger.

the appellant testified that the warning was not from her or the Ku Klux Klan. She testified that it was from God. Further, as to the words "what will happen" she testified that the event will take place at God's second coming, in another lifetime.

[20] As to her reference, on the Friday evening encounter, that "the Old South will rise again." The appellant testified:

> . . . the Old South has a reputation of hanging blacks and – but I did not mean in that way. What I meant by "the Old South will rise again," which means we will bring back the old sense of segregation that was once there before Mr. Luther King decided to sit on the first integrated bus and destroy our segregation laws.

[21] There is no evidence that the appellant's interpretations of her words, above noted, were communicated to Reverend Mutale on the Friday evening, or Saturday, in question.

[22] In her decision, the trial judge made the following findings:

> Having had the opportunity of observing the witnesses and hearing their testimony in this case, where the evidence conflicts, I would accept the testimony of Reverend Mutale over that of Ms. Upson.
>
> In particular, I accept that Ms. Upson told Reverend Mutale that the KKK would get rid of the blacks in the churches when she was having her discussions with him.

and further:

> I find on the evidence that the whole purpose of Ms. Upson's visits, and I would say that she went repeatedly, more than once as defined as repeatedly, was to frighten, intimidate, upset and threaten Reverend Mutale and the congregation in the church.

[23] In finding the appellant guilty on all three charges, the trial judge concluded:

> In the mind of Reverend Mutale, a black minister of a black congregation or basically black congregation, Ms. Upson's utterances and attendance on the second day, coupled with her first visit, the historical and well-known history of black oppression, and which I would find that I can certainly take judicial notice of, the action of Reverend Mutale following Ms. Upson's parting remarks, along with the whole, taking into account the whole circumstances of the situation - where it took place, by whom, to whom, Reverend Mutale's immediate concern of the church members, it was a busy week, his immediate thought of the church burnings in the south, his belief that Ms. Upson was someone who could do something drastic, in his own words, are all very supportive of someone taking threats seriously.
>
> That he, the church, the congregation were potentially, and I believe that he believed that they were potentially at great risk of some very menacing behaviour

> directed their way as a result of Ms. Upson's words of warning, specifically as Ms. Upson came and announced herself to be so a member of an organization and other affiliation with groups historically connected to the promotion and preservation of racism.
>
> Therefore, I would find that Reverend Mutale's reaction to the words was absolutely reasonable under the circumstances. Therefore, I would find that Ms. Upson is guilty as charged on all three counts.

<u>Grounds of Appeal</u>

[24] On this appeal counsel for the appellant submits that the trial judge, in finding the appellant guilty of all three charges:

(i) did not apply the proper test for determining whether the appellant's words constituted threats within the meaning of s. 264.1 of the **Code**;

(ii) in any event, did not separately analyze each charge and make a separate determination as to what words constituted the threat with respect to each of the three charges;

(iii) did not subject the words which formed the basis for each of the three charges to the separate scrutiny of the test for determining whether the appellant's words were threats at law.

[25] Counsel submits that when the charges are properly and separately analyzed, in accordance with the appropriate test, a properly instructed jury, acting judicially, could not reasonably convict the appellant of any of the charges. As such, the trial judge's decision is unreasonable and must be set aside.

[26] Counsel for the appellant also raises the freedom of expression provisions of the **Canadian Charter of Rights and Freedoms**. However, he acknowledges that if the appellant's words constitute a threat within the meaning of s. 264.1 of the **Code**, the provisions of the **Charter** are of no benefit to the appellant.

<u>Legal Principles</u>

[27] In **Queen v. McCraw**, [1991] 3 S.C.R. 72 Justice Cory said the following concerning the aim of s. 264.1(1)(a) of the **Code** at § 24:

> Parliament, in creating this offence recognized that the act of threatening permits a person uttering the threat to use intimidation in order to achieve his or her objects. The threat need not be carried out; the offence is completed when the threat is made. It is designed to facilitate the achievement of the goal sought by the issuer of the threat. A threat is a tool of intimidation which is designed to instill a sense of fear in its recipient. The aim and purpose of the offence is to protect against fear and intimidation. In enacting the section Parliament was moving to protect personal freedom of choice and action, a matter of fundamental importance to members of a democratic society.

[28] Justice Cory continued at § 26 and indicated that it is a question of law whether the written or spoken word constitutes a threat within the meaning of s. 264.1(1)(a). He then set out the test to be applied to those words:

> 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 conversations in which they occurred. As well, some thought must be given to the situation of the recipient of the threat.
>
> 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?

[29] More recently in **Queen v. Clemente**, [1994] 2 S.C.R. 758 Justice Cory said the following at § 9 concerning the *mens rea* of an offence under s. 264.1:

> Thus, the question of whether the accused had the intent to intimidate, or that his words were meant to be taken seriously will, in the absence of any explanation by the accused, usually be determined by the words used, the context in which they were spoken, and the person to whom they were directed.

And further at § 12:

> . . . Under the present section the *actus reus* of the offence is the uttering of threats of death or serious bodily harm. The *mens rea* is that the words be spoken

> or written as a <u>threat</u> to cause death or serious bodily harm; that is, they were meant to intimidate or to be taken seriously.

[30] Section 264.1(1)(a) of the **Code** provides as follows:

> 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 <u>any person</u>;
>
> (Emphasis Added)

[31] Although counsel for the appellant does not argue otherwise, it is clear that a threat to cause death or bodily harm to an ascertained group of citizens contravenes this section, and it is not necessary that the victims' specific identity be proven. See **R. v. Remy** (1993), 82 C.C.C. (3d) 176 (Que. C.A.) - leave to appeal to the Supreme Court of Canada refused (1993), 84 C.C.C. (3d) vi.

<u>The Issue</u>

[32] In the matter before this court, the trial judge accepted the evidence of Reverend Mutale where his evidence conflicted with the evidence of the appellant. This finding of the trial judge, on credibility, is not challenged on this appeal. Therefore, for the purposes of this appeal, there can be no dispute as to the words which the appellant spoke, and which form the basis of the charges in this matter.

[33] It is acknowledged by counsel that the offending words, spoken by the appellant, are:

(i) We the Ku Klux Klan are going to get rid of you; and

(ii) I want to warn you that you people are not supposed to be in the Kingdom and if you continue to meet in this place, you're going to be sorry for what will happen here. And don't say I never warned you, nigger.

I will refer to these two statements, individually and collectively, throughout these reasons as the offending words.

[34] Further, as I will demonstrate later in these reasons, there was ample evidence in support of the trial judge's factual conclusion that the whole purpose of the appellant's visits to Reverend Mutale's church was "to frighten, intimidate, upset and threaten Reverend Mutale and the congregation in the church."

[35] The only issue, then, for this appeal from the appellant's convictions is whether, as a matter of law, the trial judge erred in determining that the offending words, under the circumstances, constituted three separate offences under s. 264.1 of the **Code**; namely:

(i) Uttering a threat to cause bodily harm or death to members of the black race (s. 264.1(1)(a)); and

(ii) Uttering a threat to cause bodily harm or death to Reverend Mutale (s. 264.1(1)(a)); and

(iii) Uttering a threat to destroy or damage the real property of the Victoria Road United Baptist Church (s. 264.1(1)(b)).

<u>Analysis</u>

[36] The trial judge, in her reasons for judgment, referred to the decision of the Supreme Court of Canada in **McCraw** and the test enunciated by Justice Cory, which I have set out in § 28, for determining whether written or spoken words constitute a threat within the meaning of s. 264.1 of the **Code**. However, the trial judge appears to have grouped the three charges together, as one, without a separate analysis of each of the three charges.

[37] As set out in § 33 of these reasons, the trial judge - in considering whether the offending words could reasonably be construed as threats - does make reference to what was "in the mind of Reverend Mutale" and to "his immediate thought." Therefore, while the trial judge makes reference to what was in Reverend Mutale's mind, subjectively, there is no objective analysis, at least in the written reasons, in accordance with the test set out in **McCraw**.

[38] I will, therefore, examine each of the three charges to determine if, <u>as a matter of law</u>, the appellant's convictions should stand.

(i) Threat to cause death or bodily harm to members of the black race

[39] The general submission of counsel for the appellant with respect to this offence is that the appellant was engaging in a religious discussion with Reverend Mutale on the days in question. He submits that while the appellant's stated beliefs may be repugnant to many, it is not a criminal offence to hold, or to advocate, those beliefs. Further, he submits, the utterance of those beliefs, in the context of a religious discussion, does not support a finding of "criminal threat".

[40] It is important, firstly, to look at the overall context in which the offending words were spoken. From my review of the evidence, the following matters are relevant in considering this overall context:

1. According to the appellant's own testimony her purpose in coming to Nova Scotia was to advocate her beliefs that black people were not welcome in the Christian churches;

2. Reverend Mutale was a complete stranger to the appellant when she first met him, yet the appellant introduced herself to Reverend Mutale, a black man, as a member of the Ku Klux Klan;

3. After the appellant's first brief encounter with Reverend Mutale on the Friday evening in question, she left Reverend Mutale's church and proclaimed "The Old South will rise again". The appellant knew (because she acknowledged such in her testimony) that such a reference to the "Old South" conjures up images of hanging black people. She testified that she did not mean any reference to hanging black people when she used the expression "Old South", yet she did not disclose that to Reverend Mutale at the time. The appellant used the expression "The Old South will rise again" being fully aware of its import to a black person like Reverend Mutale;

4. On the following day, in the context of telling Reverend Mutale that black people were cursed in the bible, and that black people were not supposed to be in the Kingdom, the appellant said "We, the Ku Klux Klan, are going to get rid of you." Given the overall context in which these words were spoken, it is apparent that by "getting rid of <u>you</u>" the appellant was speaking of getting rid of the black people who

comprised the congregation of Reverend Mutale's church. Reverend Mutale would have been included within the meaning of the word "you", but only because he was a black person himself;

5. The appellant testified that she intended the views she expressed to Reverend Mutale to be taken seriously;

6. When the appellant encountered Reverend Mutale on the Saturday in question she was upset, angry, and in an uncompromising mood;

7. When Reverend Mutale offered to "talk over" with the appellant her views that black people were not welcome in the churches, the appellant gave Reverend Mutale an angry stare, and stated: "I want to warn you that you people are not supposed to be in the Kingdom and if you continue to meet in this place, you're going to be sorry for what will happen here. And don't say I never warned you, nigger." Considering the context in which this statement was made, it is apparent that the reference to "you people", the word "you" and the contraction "you're", in "... you people are not supposed to be in the Kingdom, and if you continue to meet in this place you're going to be sorry ..." all refer to the black persons who comprised the congregation of Reverend Mutale's church, including Reverend Mutale himself as a black person. Further, the concluding comment: "And don't say I never warned you, nigger" is a clear indication that the appellant was serious about her "warning";

8. While Reverend Mutale testified that on the Friday evening in question he did not take the appellant seriously, following his encounter with the appellant on Saturday he became "extremely frightened", and it caused him to reconsider the events of the Friday in question. He felt that the appellant may be an individual "with a real plan to do something disastrous". He further testified that he was "worried" because during the following week (the week before Easter), there were meetings planned in the church all week. He wondered "whether the people were safe" and whether his family was in danger. He testified that he did not cancel church, however, he called the other leaders of the church to advise them. Finally, Reverend Mutale reported the matter to the police;

9. Reverend Mutale testified that as the appellant was leaving the church, on the Saturday in question, he told the appellant that he considered what the appellant had said to be a threat which he would have to report to the police. The appellant did not respond, in any way, to Reverend Mutale.

[41] Considering all of the matters referred to in the previous paragraph, and the totality of the evidence before the trial judge, there was ample evidence to support the trial judge's conclusion that the whole purpose of the appellant's visits to Reverend Mutale's church was "to frighten, intimidate, upset and threaten Reverend Mutale and the congregation in the church", a congregation made up almost entirely of black people. Accordingly, there is no merit to the appellant's submission on this appeal that she was merely engaging in a religious discussion with Reverend Mutale on the days in question. Her conduct was far more serious than simply uttering her religious beliefs.

[42] Considering all of the above, and applying the test set out in **McCraw**, it is clear to me, that, looked at objectively, and in the context which I have reviewed, and having regard to Reverend Mutale to whom the offending words were directed, a reasonable person would conclude that the offending words:

(i) We the Ku Klux Klan are going to get rid of you; and
(ii) I want to warn you that you people are not supposed to be in the Kingdom, and if you continue to meet in this place you're going to be sorry for what will happen here. And don't say I never warned you, nigger.

convey a threat to cause bodily harm or death to members of the black race contrary to s. 264.1(1)(a) of the **Code**. Even if it could be said, therefore, that the trial judge erred by not properly articulating, and applying, the objective test set out in **McCraw**, there is no reasonable possibility that, had she done so, the verdict would have been any different.

[43] I would, therefore, dismiss the appellant's appeal from conviction for this particular offence (see s. 686(1)(b)(iii)).

(ii) Threat to cause bodily harm or death to Reverend Elias Mutale

[44] With respect to this separate charge of threat to cause bodily harm or death to Reverend Mutale, the Crown concedes that the same offending words, which support the conviction for threatening members of the black race, are being advanced to support the conviction for threatening Reverend Mutale. As a result, the Crown concedes, the appellant's conviction on this particular charge, would be barred by the rule against multiple convictions for the same delict (see **Kienapple v. The Queen**, [1975] 1 S.C.R. 729).

[45] I agree with the Crown's position on the appellant's conviction for this particular offence. The same analysis and reasoning which I have advanced for upholding the appellant's conviction for threatening members of the black race would, but for the rule against multiple convictions for the same delict, support the conviction of the appellant for threatening Reverend Mutale. Under such circumstances, and in accordance with the recommendation of the Supreme Court of Canada in **R. v. Provo**, [1989] 2 S.C.R. 3, I should order a conditional stay of proceedings on this charge. The condition would be that the stay is only for the period until the charge on which the appellant has been found guilty (uttering a threat to cause bodily harm or death to members of the black race) is finally disposed of on an appeal or by the expiration of time for appeal. Justice Wilson, writing for a unanimous court in **Provo**, said the following concerning the practical advantage of the use of conditional stays at p. 16, [1989] 2 S.C.R.:

> If the accused's appeal from the conviction arising from the same delict is eventually dismissed or the accused does not appeal within the specified times, then the conditional stay becomes a permanent stay and in accordance with this Court's judgment in *R. v. Jewitt*, [1985] 2 S.C.R. 128, that stay becomes tantamount to a judgment or verdict of acquittal for the purpose of an appeal or a plea of *autrefois acquit*. If, on the other hand as is the case here, the accused's appeal from the conviction is successful, the conditional stay dissolves and the appellate courts, while allowing the appeal, can make an order remitting to the trial judge the count or counts which were conditionally stayed by reason of the application of the rule against multiple convictions notwithstanding that no appeal was taken from the conditionally stayed counts.

[46] Therefore, I would allow the appellant's appeal from her conviction for uttering a threat to cause bodily harm or death to Reverend Elias Mutale contrary to s. 264.1(1)(a) of the **Code**, and I would order a conditional stay of the proceedings on this charge.

(iii) Threat to destroy or damage the real property of the Victoria Road United Baptist Church

[47] Section 264.1(1)(b) of the **Code** provides as follows:

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

[48] It is noted, here, that the Crown did not charge the appellant with threatening to "burn" the church property. Only the words "destroy or damage" appear in the charge that the appellant "did knowingly utter a threat to destroy or damage the real property of Victoria Road United Baptist Church situate at 36 Victoria Road, Dartmouth contrary to s. 264.1(1)(b) of the **Criminal Code**." Presumably, then, the Crown was satisfied that it could prove that the appellant threatened to destroy or damage the church property by some means other than burning.

[49] As I have indicated, the trial judge made a finding, on the evidence, that the whole purpose of the appellant's visits to Reverend Mutale's church was "to frighten, intimidate, upset and threaten Reverend Mutale and the congregation in the church." The trial judge did not make a specific finding that the appellant threatened to destroy or damage the church property.

[50] Also, as I have noted earlier in these reasons, and as set out in § 23, the trial judge does make reference, in her conclusions, to what was "in the mind of Reverend Mutale" and to "his immediate thought of the church burnings in the south". The church burnings in the south are what sprang to Reverend Mutale's mind, subjectively. There is, however, no objective analysis as to whether the appellant's words would convey to a reasonable person a threat to destroy or damage the church property within the meaning of s. 264.1(1)(b). Further, the appellant is not charged with threatening to burn the church property.

[51] Counsel for the Crown was asked, on the hearing of this appeal, to identify the words which the appellant used which the Crown is putting forth as amounting to a threat to destroy or damage the church property. The Crown referred to the words:

> I want to warn you that you people are not supposed to be in the Kingdom and if you continue to meet <u>in this place</u>, you're going to be sorry for what will happen <u>here</u>.
> (Emphasis Added)

[52] The Crown refers to the words "in this place" which mean the church and "what will happen <u>here</u>" refers to what will happen in the church. Counsel for the Crown concedes:

(i) that it is difficult to say with precision whether these words identify a threat to destroy or damage church property; and

(ii) that, "this is as strong as the evidence gets" with respect to this charge of threatening to destroy the property of the church; and

(iii) quite candidly, that he does not have a "particularly powerful argument" with respect to this offence of threatening to destroy or damage church property.

[53] When I consider the test set out in **McCraw**, and when I consider that the Crown must establish the guilt of the appellant beyond a reasonable doubt, the evidence with respect to this charge falls far short. Looked at objectively, in the context of all of the words which were exchanged between the appellant and Reverend Mutale, the offending words:

> I want to warn you that you people are not supposed to be in the Kingdom and if you continue to meet <u>in this place</u>, you're going to be sorry for what will happen <u>here</u>.
> (Emphasis Added)

would not convey to a reasonable person a threat to destroy or damage the property of Reverend Mutale's church. That being the case, the Crown did not establish, as a matter of law, that the appellant was guilty of uttering a threat to destroy or damage the real property of the Victoria Road United Baptist Church contrary to s. 264.1(1)(b) of the **Code**, and the trial judge erred in law by deciding otherwise. I would therefore allow the appellant's appeal against conviction for this offence.

[54] In summary, I would allow the appellant's appeal against conviction in part.

I would confirm her conviction for uttering a threat to cause bodily harm or death to members of the black race contrary to s. 264.1(1)(a) of the **Code**. I would order a conditional stay with respect to the charge against the appellant for uttering a threat to cause bodily harm or death to Reverend Elias Mutale contrary to s. 264.1(1)(a). The stay is for the period until the charge on which the appellant has been found guilty (uttering a threat to cause bodily harm or death to members of the black race) is finally disposed of on an appeal, or by the expiration of time for appeal. Finally I would set aside the appellant's conviction for uttering a threat to destroy or damage the property of the Victoria Road United Baptist Church contrary to s. 264.1(1)(b) of the **Code**.

Sentence Appeal

[55] Having found the appellant guilty of all three offences, the trial judge sentenced the appellant, on July 5, 2000, to eight months imprisonment on each charge. The sentences were ordered to be served consecutively, for a total sentence of 24 months. In imposing the sentence, the trial judge indicated that she took into account the fact that the appellant had been on remand. Counsel acknowledged that the appellant had been on remand for 80 days, which equates to a sentence of 160 days.

[56] Further, in imposing the sentence which she did, the trial judge indicated that she took into account the following matters:

(i) The fact that the appellant had six prior convictions, five of which were racially related, and that the appellant was presently under probation pursuant to an Ontario proceeding where she had been found guilty of uttering threats;

(ii) Her finding that the offences had been motivated by hatred based on race, and that pursuant to the provisions of s. 718.2 of the **Code** she was required to take that into account as an aggravating factor;

(iii) The nature of the crimes and the effect which they had on Reverend Mutale;

(iv) According to the pre-sentence report there was, in the words of the trial judge, "absolutely no remorse by the appellant for her actions."

The trial judge considered this lack of remorse as an aggravating factor. I note, here, that it is clearly wrong at law for the trial judge to have considered lack of remorse as an aggravating factor;

(v) The fact that the appellant's beliefs were so ingrained that there was no chance of rehabilitation. Because of this, the trial judge felt no need to emphasize specific deterrence nor rehabilitation;

(vi) That crimes of this nature motivated by racial hatred must be adamantly deterred and that her sentence must reflect society's abhorrence to such crimes.

[57] It became apparent during the hearing of this appeal that the court had concerns with the appellant's conviction for threatening to destroy or damage the church property. In addition, the Crown had conceded that a conditional stay should be granted with respect to the charge of threatening Reverend Mutale. This left the possibility of only one conviction surviving the appeal. Counsel were asked to address the issue as to what this court should do with the sentence imposed by the trial judge if that were to be the result of the appeal.

[58] Initially, counsel for the Crown took the position that the total sentence of two years imprisonment should be upheld, even if the result of the appeal is that the appellant is only convicted of the offence of threatening bodily harm or death to members of the black race. The Crown argued that offence of threatening members of the black race was the most serious of the three charges. Further, that it, as well as the charge of threatening Reverend Mutale, carried maximum penalties under the **Code** of five years imprisonment; whereas the charge of threatening to destroy or damage the church property carried a maximum sentence of only two years.

[59] Counsel for the Crown did not cite any authority where a two year sentence was imposed for one offence of uttering a threat.

[60] While each case must, of necessity, be determined by its own circumstances, a general review of the cases dealing with sentences for uttering threats, not surprisingly, show a wide range of sentences from probation through to imprisonment or 30 days, three months, six months, one year, etc. Neither counsel nor I have found a case of uttering threats which was aggravated because of the

fact that the threat involved racial hatred.

[61] The most recent decision of this court dealing with sentence for an offence of uttering threats is **R. v. B.F.R.** (1995), 139 N.S.R. (2d) 215. The accused pleaded guilty to possession of a weapon and two offences of uttering threats. The accused, intoxicated, attempted to seize his infant daughter from a babysitter. He threatened to kill his estranged common-law wife's friend while holding a knife to the child's face. His later involvement with the police that evening led to more threats, and the recovery by the police of three knives from the accused's car. With respect to a sentence on the two charges of uttering threats, this court upheld the decision of the trial judge of six months imprisonment on each charge, to run concurrently.

[62] **R. v. Andrews et al.** (1989), 43 C.C.C. (3d) 193 (Ont. C.A.) while not a case involving uttering threats, is a case of wilful promotion of hatred. The two accused men distributed a publication in which "non-whites and non-Aryan groups" were portrayed as inferior and unclean. The publication was anti-Semitic, and anti-members of the black race. Cory, J.A. (as he then was) described the material as "rubbish and offal". He said:

> Some excerpts will serve to show the malodorous, malicious and evil nature of the writings.

The main thrust of this case was related to arguments on the **Charter** right to freedom on expression. One of the accused was sentenced to imprisonment for one year, the other for seven months. Each followed by a period of probation. Mainly because of the conduct of the accused men since the crime, both sentences were reduced, by the Ontario Court of Appeal, to three months' imprisonment followed by a period of probation.

[63] During the course of oral argument on this appeal, counsel for the Crown conceded:

(i) taking into account the credit which must be given to the appellant for her remand time (a credit of just over five months); and

(b) an eight month sentence in addition to the remand time, for a total of just over 13 months

that he would have a difficult time submitting that this was an unfit sentence if the result of the appeal was that the appellant was convicted of only one of the three offences; namely, threatening members of the black race.

[64] On this issue counsel for the appellant takes the position that if only the one conviction survives this appeal then the appellant has served her time.

[65] The appellant has been in custody since April 2000. By the time these reasons for judgment are filed, the appellant will have served over 13 months imprisonment. Having considered the submissions of counsel, and the decision of the trial judge on sentencing, it is my opinion that a fit sentence for the appellant under these circumstances is time served.

Flinn, J.A.

Concurred in:

Roscoe, J.A.

Oland, J.A.