NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. McPherson*, 2020 NSCA 23

Date: 20200312
Docket: CAC 472589
Registry: Halifax

Between:

Drew William McPherson

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Court (Bourgeois, Oland, and Hamilton JJ.A.)
Appeal Heard:	January 23, 2020, in Halifax, Nova Scotia
Subject:	Denial of legal counsel, availability and fitness of probation orders
Summary:	Following a trial by judge and jury, the appellant was found guilty of uttering threats to cause death or bodily harm contrary to s. 264.1(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. The trial judge sentenced the appellant to a six-month term of incarceration, followed by a 24-month term of probation with conditions. At the time of his trial and sentencing, the appellant was incarcerated, serving a term of imprisonment in relation to prior criminal negligence causing death and bodily harm convictions. On appeal, the appellant challenged his conviction and resulting sentence.
Issues:	1. Was the appellant unreasonably denied legal counsel? 2. Was the appellant's trial unfair due to the lack of legal

counsel or due to his mental condition?

3. Does the appellant's allegation regarding the lack of the required mental element demonstrate an error justifying the conviction being set aside, or a finding the verdict was unreasonable?

4. Should this Court interfere with the period of probation imposed by the trial judge?

Result: The appeal was dismissed. The appellant was not unreasonably denied legal counsel for his trial. The record demonstrates the appellant received a fair trial notwithstanding his lack of counsel. He effectively represented himself.

The appellant's allegation that he lacked the requisite mental element to sustain the conviction is without merit. There was ample evidence before the jury to establish the required mental element of the offence charged, and the trial judge made no error in setting out the correct law to be considered.

Finally, it was open to the trial judge to impose a period of probation following the six-month custodial term. It was a fit sentence in the circumstances of this offence and offender.

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Judges:	Bourgeois, Oland, and Hamilton JJ.A.
Appeal Heard:	January 23, 2020, in Halifax, Nova Scotia
Held:	Appeal of conviction dismissed, leave to appeal sentence granted but appeal also dismissed, per reasons for judgment of the Court
Counsel:	Drew William McPherson, appellant in person Mark A. Scott QC, for the respondent

By the Court:

[1] Following a trial by judge and jury, Drew William McPherson was found guilty of uttering threats to cause death or bodily harm contrary to s. 264.1(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. The trial judge, Justice Felix Cacchione, sentenced Mr. McPherson to a six-month term of incarceration, followed by a 24-month term of probation with conditions. At the time of his trial and sentencing, Mr. McPherson was incarcerated, serving a term of imprisonment in relation to prior criminal negligence causing death and bodily harm convictions.

[2] Mr. McPherson challenges both his conviction and resulting sentence. For the reasons to follow, we dismiss the conviction appeal. Although we grant leave to appeal, we also dismiss the sentence appeal.

Background

[3] In November 2016, Mr. McPherson was an inmate at the Central Nova Scotia Correctional Facility. A correctional officer, Rachel Critchley, discovered numerous messages she interpreted as threatening and directed towards her written on cell walls where Mr. McPherson had been housed. Photographs of the writings were taken by correctional officers and described at trial. The nature of the comments was recounted by the trial judge at sentencing:

> The evidence presented at trial shows that in two cells that were occupied by Mr. McPherson there was writing on the wall, and on the floor, I believe, of one cell, and the writings were directed at Ms. Critchley. Things were written such as, "I haven't killed enough," "I will kill Rachel," "I will start with Rachel," "You either kill Rachel now or you die," "Rachel must die," "Rachel is evil," "Killing her is your right." There was also a stick figure drawn with a knife through its head and blood. Other things written were, "God says whoever kills Rachel goes to heaven," and "Don't stop until Rachel is dead."

[4] Mr. McPherson was charged with uttering threats against Correctional Officer Critchley. The Crown proceeded by way of Indictment. Mr. McPherson made it known that he wanted legal representation and eventually made a motion for state-funded counsel (a *Rowbotham* application) in the Provincial Court. The motion was dismissed by Judge Jean Whalen. Mr. McPherson was of the view then, and still is, that as he has autism and ADHD, he cannot obtain a fair trial without legal representation. Mr. McPherson's involvement in the Provincial

Court concluded when a deemed election for trial by Supreme Court judge with jury was made by Judge Whalen.

[5] Unsuccessful in his pursuit of counsel, Mr. McPherson represented himself at trial. It proceeded on January 8–11, 2018. The record demonstrates he gave an opening statement to the jury, cross-examined the Crown witnesses, testified on his own behalf, and made final submissions. The essence of Mr. McPherson's defence was that, although he acknowledged writing some of the comments found in the cells, he had no expectation Officer Critchley would see them and had no intent to threaten her. He argued the Crown had not established the required mental element to sustain a conviction.

[6] The jury returned a guilty verdict on January 11, 2018 and Mr. McPherson was sentenced on February 20, 2018. He filed a Notice of Appeal on January 25, 2018, which was later amended. The Amended Notice of Appeal, filed December 19, 2018, set out the following grounds of appeal:

> 1. I was improperly denied counsel and the trial was unfair as a result, particularly because of my neurological disability which makes it physically impossible for me to process information in the trial setting. In particular, I failed to process significant portions of the proceedings some of which included crucial misleading testimony that should have and would have been corrected in cross-examination if I had actually perceived the information. I missed many important details because I have untreated ADHD and so I was the only person in the room who didn't get to hear the whole trial even though I'm the only person who should have had a right to hear the whole thing. That is brutally unfair.
>
> 2. The judge's instructions to the jury and summary of the evidence were misleading and biased and contained important errors which affected the outcome adverse to the interests of justice, also certain important things were not mentioned such as the fact that the benefit of the doubt must go to the defendant.
>
> 3. The crown witnesses kept saying highly prejudicial things which is not fair to begin with, and because I'm not a lawyer I didn't know if and/or when I should object especially since I was chastised for interrupting, then I felt like I needed to testify in order to counter all of this prejudicial information that was introduced and that probably seriously harmed the case, and I'm autistic so discrimination plays a significant role when I try to talk to people.
>
> 4. The sentence is illegal. Probation cannot be applied to a person serving a federal sentence.
>
> 5. Other such grounds as to be determined.

Positions on appeal

[7] Mr. McPherson did not file a factum in support of his appeal. We permitted him to make oral argument at the hearing. His submissions were focused on three arguments:

- The trial was unfair because he had been denied legal counsel;
- The conviction constituted a miscarriage of justice because he did not possess an intent to threaten Officer Critchley, thus the required mental element of the offence was not proven beyond a reasonable doubt; and
- The imposition of a term of probation on top of his previous lengthy period of incarceration was unduly harsh.

[8] The Crown argues there is no merit to the complaints regarding the fairness of the trial or the purported absence of the requisite mental element and, as such, the conviction should stand. With respect to sentencing, the Crown conceded it was open for this Court to find an error in principle in relation to the imposition of a period of probation, but submitted the crucial determination was whether, in Mr. McPherson's circumstances, it was manifestly unjust.

[9] We will expand upon the parties' submissions later in our analysis.

Issues

[10] In our view, the issues on appeal should be framed as follows:

1. Was Mr. McPherson unreasonably denied legal counsel?
2. Was Mr. McPherson's trial unfair due to the lack of legal counsel or due to his mental condition?
3. Does Mr. McPherson's allegation regarding the lack of the required mental element demonstrate an error justifying the conviction being set aside, or a finding the verdict was unreasonable?
4. Should this Court interfere with the period of probation imposed by the trial judge?

Analysis

Denial of Counsel and Trial Fairness

[11] The first two issues are interrelated and we will address them together.

[12] We have reviewed the entirety of the record including:

- Judge Whalen's decision regarding the motion for state-funded counsel;
- The trial transcript; and
- The trial judge's charge to the jury.

[13] With respect to Judge Whalen's decision, it is clear she dismissed Mr. McPherson's *Rowbotham* application because, prior to asking the court to appoint counsel, he had not made an application for legal representation through Nova Scotia Legal Aid. Whether an individual has exhausted the reasonable means of securing counsel on their own, which would include making an application to Legal Aid, is an important consideration in a motion for state-funded counsel. Mr. McPherson has not identified any error in Judge Whalen's decision to dismiss the application for state-funded counsel. He did not re-apply in the Provincial Court, or after the election to the Supreme Court. Mr. McPherson was not unreasonably denied counsel for his trial.

[14] With respect to the trial, Mr. McPherson has not pointed to anything in the record that supports his assertion it was unfair. He has not identified any instances where the lack of counsel or his mental status impeded his ability to comprehend or engage meaningfully in the trial process. Instead, he says three newly obtained letters prepared by mental health professionals demonstrate he was unable to represent himself and, as a result, his trial was unfair. The letters had been prepared after the filing of the Amended Notice of Appeal for the purpose of a motion for state-funded counsel for this appeal (pursuant to s. 684 of the *Criminal Code*). That motion was heard in appeal court chambers in July 2019 and dismissed by Justice Beveridge (2019 NSCA 70). Mr. McPherson argues Justice Beveridge, in light of the contents of the letters, was wrong to dismiss his motion.

[15] Two observations are in order:

- Contrary to Mr. McPherson's belief, we are unable to re-consider Justice Beveridge's decision and to order that he be provided with legal counsel on this appeal. That is not our function.
- Although portions are referenced in Justice Beveridge's chambers decision, the letters Mr. McPherson seeks to rely upon to establish the

> unfairness of his trial are not part of the record before us. No motion to adduce fresh evidence on this appeal has been made.

[16] It is clear from the trial transcript that Mr. McPherson grasped the issues before the court and the case the Crown was advancing. His own conduct at trial demonstrates he understood the process, was able to advance a plausible defence, and cross-examined witnesses in support of it. Further, it is clear the trial judge provided appropriate assistance to Mr. McPherson given his status as a self-represented accused.

[17] Mr. McPherson has not established he was improperly denied legal counsel, or that the lack thereof gave rise to trial unfairness. We cannot conclude Mr. McPherson's mental status impeded his ability to receive a fair trial.

The Mental Element

[18] In his submissions before us, Mr. McPherson repeats the same argument he made at trial. He says that given the large extent of graffiti on cell walls at the institution, he could not have expected what he wrote would be seen by Officer Critchley. Further, he says he had no intent to threaten her.

[19] It is helpful to set out the offence for which Mr. McPherson was found guilty. Section 264.1(1)(a) provides:

> Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat … to cause death or bodily harm to any person;

[20] In order for the jury to have properly returned a finding of guilt, they had to be satisfied beyond a reasonable doubt Mr. McPherson made a threat; the threat was to cause bodily harm or death; and he had made the threat "knowingly". It is only the third element that Mr. McPherson questions on this appeal.

[21] In his charge to the jury, the trial judge described the mental element of the offence as follows:

> [I]f you are satisfied beyond a reasonable doubt that the threat made was to cause death or bodily harm to Ms. Critchley, you must then go on to consider whether Mr. [Mc]Pherson knowingly made the threat. The burden is on the Crown to prove beyond a reasonable doubt that Mr. [Mc]Pherson made the threat knowingly.

> The word "knowingly" refers to Mr. [Mc]Pherson's state of mind. A person makes a threat knowingly if, when making the threat, he means to intimidate someone or means it to be taken seriously by someone. Either state of mind is sufficient to prove this essential element. The Crown is not required to prove both. It is not an essential element of this offence that the Crown prove that the recipient of the threat or threats uttered felt intimidated by them or be shown to have taken them seriously. All that needs to be proven is that they were intended by the accused to have that effect. The Crown does not have to prove that Ms. Critchley was actually threatened or made afraid by the words used. As well, it does not matter whether Mr. [Mc]Pherson meant to carry out the threat.

[22] The trial judge then referred to the evidence relating to the mental element:

> In addition to the evidence that I previously referred to, you should also consider Mr. [Mc]Pherson's evidence that some of the writings were made by him and that nothing written was meant to be taken seriously. Consider his evidence that he did not intend to intimidate anyone by the things he wrote and that he did not think he wrote anything that was intimidating.
>
> In deciding whether Mr. [Mc]Pherson made the threat knowingly, you should consider the words used and the context in which the words were used and Mr. [Mc]Pherson's mental state at the time the words were used. You may conclude, as a matter of common sense, that a sane and sober person usually knows the predictable consequences of his conduct and means to bring them about. This is one way for you to determine a person's actual state of mind, what he actually knew or meant.
>
> However, you are not required to reach that conclusion about Mr. [Mc]Pherson. Indeed, you must not do so if, on the whole of the evidence, you have a reasonable doubt whether Mr. [Mc]Pherson made the threat knowingly. It is for you to decide whether Mr. [Mc]Pherson made the threat and whether he made it knowingly. In deciding this, use your good common sense.
>
> You should consider all of the evidence when determining whether a threat was made knowingly. If you are not satisfied beyond a reasonable doubt that Mr. [Mc]Pherson uttered the threat knowingly, you must find him not guilty of this offence. On the other hand, if you are satisfied beyond a reasonable doubt that Mr. [Mc]Pherson uttered the threat knowingly, you must find him guilty of the offence as charged.

[23] In his submissions before us, Mr. McPherson does not identify any error on the trial judge's part in relation to the directions given to the jury. Our own review satisfies us there is no error in principle justifying our intervention. The trial judge correctly identified the relevant legal principles, including the Crown's burden to establish all elements of the offence beyond a reasonable doubt, that Mr. McPherson carried no burden, and that he was presumed innocent. The trial

judge's charge fairly related the evidence relevant to the jury's determination, including that which supported Mr. McPherson's defence.

[24] Having found no error in the charge, we are further satisfied the evidentiary record was such that the jury could have readily reached a conclusion of guilt. The verdict was one available to the jury on the evidence before it.

[25] Mr. McPherson has failed to establish an error justifying our intervention or that the verdict was unreasonable on the evidentiary record before us.

Sentencing

[26] In the Amended Notice of Appeal, Mr. McPherson claims:

> The sentence is illegal. Probation cannot be applied to a person serving a federal sentence.

[27] When this ground was advanced, Mr. McPherson held the view that because he was already subject to a federal term of incarceration, the remainder of which exceeded two years at the time of his sentencing, a probation order could not be made by the trial judge. This belief found its genesis in s. 731(1)(b) of the *Criminal Code* which provides:

> Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,
>
> …
>
> (b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

[28] In this instance, the trial judge ordered a term of probation that followed a six-month custodial period. We agree with the submission of the Crown that the sentence imposed was not "illegal" nor precluded by the above section. It was an option available to the trial judge. However, in the past, some courts had expressed the same view of the import of s. 731(1)(b) as advanced by Mr. McPherson. In *R. v. Knott*, 2012 SCC 42, Fish J. writing for the Court ended the uncertainty as to the intent of the above provision. He wrote:

> [32] The Crown submits that the phrase "imprisonment for a term not exceeding two years" in s. 731(1)(b) relates only to the actual term of

> imprisonment imposed by a sentencing court at a single sitting. The appellants argue that "term" of imprisonment referred to in that provision is the aggregate of the custodial term imposed by the sentencing court and all other sentences then being served or later imposed on the offender. In my view, the Crown's submission is correct and the appellants' submission fails.
>
> [33] The ordinary meaning of s. 731(1)(b) is perfectly clear: A probation order may not be made where the *sentencing court* imposes a term of imprisonment exceeding two years. In determining whether two years has been exceeded, one looks at the term of imprisonment ordered by *the sentencing court on that occasion* — not at *other* sentences imposed by *other* courts on *other* occasions for *other* matters.
>
> [34] Section 731(1)(b) admits of no ambiguity in this regard. The opening words of s. 731(1) read: "Where a person is convicted of an offence, a court may". The provision authorizes *that court* to make a probation order, "in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years". On a plain reading of this provision, the phrase "imprisonment for a term not exceeding two years" refers to the sentence imposed by the court empowered by s. 731(1) to make the probation order. [Emphasis in original]

[29] If we were to base our analysis solely on the ground as initially advanced by Mr. McPherson, our analysis would be concluded. However, the sentencing appeal became more nuanced in the course of oral submissions. There is a question as to whether the term of probation imposed was appropriate given Mr. McPherson's circumstances.

[30] The Crown says that although the imposition of a period of probation was not contrary to s. 731(1)(b), the record discloses the trial judge may have been inadvertently misinformed by Crown counsel as to the commencement of any period of probation to be served by Mr. McPherson. This, in turn, may have influenced the trial judge in crafting a probationary term of 24 months. Specifically, the trial judge was advised Mr. McPherson was eligible for parole "in the not too distant future" at which time the term of probation would commence.

[31] On appeal, the Crown says the trial judge may have been unintentionally left with a false impression as to when the term of probation would commence. Contrary to what was suggested to him, any term of probation ordered would not commence when parole was granted, but at the expiry of Mr. McPherson's pre-existing warrant period (two and a half years from the date of sentencing) plus any additional term of imprisonment being considered in relation to the new conviction (a further six months). The Crown posits that, given counsel's representation, in

crafting his sentence the trial judge may not have been aware that any period of probation would not commence until three years in the future.

[32] In addressing this concern, we return to *Knott*. Fish J., although ultimately dismissing the appeal, rejected the British Columbia Court of Appeal's view that where a new sentence is imposed on an individual serving a current term of imprisonment, a probation order should not be ordered if the remnant sentence and new sentence exceed two years. However, Fish J. made clear that in such instances, a sentencing judge should be mindful of unexpired prior sentences. He wrote:

> [61] But probation orders permitted by s. 731(1)(b) are, like other elements of a sentence, subject to review for their fitness. Courts are precluded by the relevant sentencing principles from making a probation order that is clearly unreasonable in the circumstances (*R. v. Shropshire*, [1995] 4 S.C.R. 227). Put differently, a probation order that is manifestly inappropriate in itself or that renders unfit the sentence of which it is a part will be set aside on appeal.
>
> [62] **In considering whether a fresh probation order is appropriate, the sentencing court must thus take into account the particular circumstances of the offence, the character and needs of the offender, and the purpose and relevant principles of sentencing** (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 43).
>
> [63] In short, **unexpired prior sentences remain an important consideration, though not necessarily decisive, in determining whether a probation order is appropriate.** [Emphasis added]

[33] From a review of the sentencing decision, it is unclear if the trial judge was alerted to the extent of Mr. McPherson's unexpired prior sentence and whether it impacted on the crafting of his disposition. The Crown says it is open to this Court to consider whether the imposition of an additional 24-month term of probation, commencing three years in the future, was a fit sentence when imposed.

[34] Although Mr. McPherson will, following expiry of his warrants (in September 2021) be subject to probation for a further period of 24 months, we do not find that results in a manifestly unfit or excessive sentence. We reach that conclusion primarily due to the nature of Mr. McPherson's historically documented mental health issues. We are of the view the conditions of the probation order imposed have the potential to improve his ability to access treatment and to reduce his risk of re-offending.

[35] In imposing sentence, the trial judge had the benefit of a pre-sentence report and Mr. McPherson's submissions. He noted:

> The presentence report, first prepared in January of 2015, and an update prepared in July of the same year, indicate that he has had no contact with his parents for several years, nor has he had any contact with his sibling. At trial Mr. [Mc]Pherson testified that his mother was part of a global conspiracy of child abusers and was out to have him assassinated. He repeated those assertions this morning.
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> He described his upbringing in the January 2015 report as being tortuously abusive. He alleged that he was a victim of neglect during his youth, and that he was locked in a room as a form of discipline. At age 10 he began self harming by cutting himself.
>
> Mr. [Mc]Pherson is a highly intelligent individual. He graduated from the University of Waterloo with distinction. He obtained a bachelor's degree in mathematics with a double major in computer science and electrical engineering, and he has also advised, and I believe his evidence, that he is a member of Mensa, which is a high IQ society.
>
> …
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> As indicated, in 2011 he was involved in a motor vehicle accident which led to criminal negligence causing death charges and his present incarceration.
>
> In 2013 he was assessed by Dr. Neilson, a psychiatrist at the East Coast Forensic Hospital. The assessment showed him as having a personality disorder, as well as a psychotic illness, together with antisocial and narcissistic personality traits. Mr. [Mc]Pherson does not agree with these findings but reported that he has developed serious psychiatric issues since his incarceration.
>
> Dr. Neilson's testing confirmed Mr. [Mc]Pherson's high intelligence. His score on the IQ test was in the range of 135. Although he presented as a bright and articulate individual, Dr. Neilson found him to be paranoid. That paranoia is evident from his submissions today.
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> He was also assessed by Dr. Theriault, who found that he appeared to suffer from Asperger's/autism spectrum disorder, having features of narcissistic paranoia and schizotypal personality traits.
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> …
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> The presentence report states what is obvious: Mr. [Mc]Pherson is in need of significant mental health treatment.
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> …
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> This is a difficult and unfortunate situation. Mr. [Mc]Pherson is definitely in need of some major psychiatric intervention. …

[36] The probation order contained a number of conditions. The trial judge noted the most important were those requiring Mr. McPherson to, as directed by his probation officer, attend for mental health assessment and counselling, attend for anger management assessment and counselling, and attend such other assessments, counselling or programs as might be directed.

[37] Before this Court, Mr. McPherson was articulate and respectful. He is clearly highly intelligent, but also continues to experience significant mental illness. If left untreated, it is highly probable he will continue to have conflict with the criminal justice system. We are satisfied the period of probation imposed by the trial judge, in these circumstances, is not unfit and should not be disturbed on appeal.

Disposition

[38] For the reasons above, the appeal is dismissed.

Bourgeois J.A.

Oland J.A.

Hamilton J.A.