C.A.C. No. 104296

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Hynes, 1994 NSCA 159

Matthews, Jones and Freeman, JJ.A.

BETWEEN:

TERRY LEE PHILIP HYNES	)	
	)	the appellant appeared
	)	in person
Appellant	)	
	)	
- and -	)	
	)	Robert C. Hagell
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	September 21, 1994
	)	
	)	
	)	Judgment Delivered:
	)	September 23, 1994
	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	

THE COURT: Leave to appeal denied against sentence per reasons for judgment of Matthews, J.A. Jones and Freeman, JJ.A. concurring.

MATTHEWS, J.A.:

The appellant was charged that he:

> On or about the 23rd day of October, 1992 at or near Gardiner Mines, in the County of Cape Breton, Province of Nova Scotia, did in committing an assault against Joseph Lackie cause bodily harm to him contrary to Section 267(1)(b) of the **Criminal Code**.
>
> Furthermore did by directly speaking knowingly utter a threat to Joseph Lackie to cause death to Joseph Lackie contrary to Section 264.1(1) of the **Criminal Code**.

After a trial before a Supreme Court judge he was acquitted of the first charge and found guilty of the second. He was sentenced to a term of six months consecutive to any term he was then serving.

He now appeals from both conviction and sentence.

On October 23, 1992, the appellant was incarcerated at the Cape Breton Correctional Centre. Joseph Lackie was, at that time, a correctional officer at that institution. There is no need to set out all of the facts leading up to the charges. The trial judge found that the charges arose out of the same incident; that "It is clear that the accused committed the physical assault"; and that the accused threatened the life of Lackie.

After reviewing the pertinent evidence, particularly concerning the assertion of the accused that he had blacked out due to a fall prior to the alleged offences the trial judge expressed his "considerable suspicions" about the "black out defence" but concluded:

> In spite of the fact that the accused is a person who I presently know has a criminal record, I still must threat him in the same way as I would any citizen and I find that I do not - that I do have a reasonable doubt as to his mental element of the offence of assault and I find him not guilty.

As to the threat, the trial judge commented:

> The only defence raised is that it was not said, that the accused does not recall saying it.

There were some inconsistencies in the testimony of the witnesses regarding the assault which did not give the trial judge concern: "after a year and a half it would not be unusual to have inconsistencies of that nature". There were no inconsistencies in the

testimony concerning the thrust or the words used:

> I'm going to blow your fucking face off and don't think I'm not capable of doing it.

The trial judge rejected the submission by accused's counsel who contrasted the inconsistencies in the testimony respecting the assault with consistency as to the threat in this fashion:

> The suggestion is made if they were so inconsistent in their other evidence why would they be so consistent in the exact wording of a threat after a year and a half. The answer, of course, is that when a person remembers an incident, they do not remember all the details of the incident. They remember the details of the incident that they particularly feel is significant, outstanding or relevant. In this case you have three experienced correctional officers who that night immediately recognized that a serious threat had been made. Their reports were made shortly thereafter to an R.C.M.P. officer investigating the matter. The threat was written therefore quickly or shortly thereafter and obviously since that time the officers would have refreshed their memory so that they have the exact words. If they hadn't taken it as a serious matter and recollected it as a serious matter and written it down, they would not remember them identically today but I do not find suspicious under these circumstances the fact that they all recollect almost identically the words of the threat for those reasons.

He found that:

> ...A reasonable person observing the situation on the night in question if the threat was made, as the three officers said it was, would have no difficulty concluding that it was a serious threat and a threat of serious bodily harm, i.e., death.

He concluded:

> I therefore find that the threat was made, that it was made to Mr. Lackie and that it constitutes all of the elements that I have reviewed in the law and that it constitutes all of the required elements of the offence and I find the accused guilty of that offence.

The appellant was represented by counsel at trial, but appeared in person before

this Court. He raises four grounds of appeal. Those concerning the alleged admission of inadmissible evidence; respecting the inconsistencies in the testimony surrounding the assault and death threats; and the appellant's lack of ability "to form the **mens rea** necessary to commit the offence" are, in my opinion, without merit.

The fourth ground bears some comment. It is:

> The learned trial Judge erred in law and in fact in finding the appellant guilty of uttering death threats by considering the evidence of the appellant's state of mind on one charge, namely an assault charged and ignoring such evidence on the "uttering charge" though both alleged offences were alleged to have occurred contemporaneously.

The issue alleges inconsistent verdicts.

The onus is upon the appellant to satisfy this Court that the two verdicts cannot stand together. "The fact that verdicts may be inconsistent does not mean that in all cases the Court of Appeal **ex necessitate** must quash the conviction or grant a new trial". **R. v. McLaughlin** (1974), 15 C.C.C. (2d) 562.

See also **R. v. McLaughlan** (1974) 20 C.C.C. (2d) 59 and Ewaschuk p. 16-66.6.

As mentioned, the trial judge voiced his "considerable suspicions concerning the "blackout defence", but nonetheless concluded that he had a reasonable doubt as to the appellant's guilt respecting the assault. By his own admission, the appellant although claiming he was blacked out at the time of the assault, that was not the case at the time of uttering the threat:

> I can't remember none of that (i.e., the assault). When I come to, Joe had me up against the wall in a choke hold and I was -- I couldn't breathe and I was cursing, swearing and kicking up a fuss. But as for uttering a death threat, I am almost positive that I didn't utter a death threat to him. I remember specifically who I had uttered a death threat to and what I had said but I know I didn't utter it to Joe.

That is, the blackout was over at the time the threat was uttered. The appellant

asserts that he made the threat to another officer, not to Joseph Lackie. He remembers making that threat but not the one to Lackie. Three officers, including Lackie, testified that he did threaten Lackie and that testimony was accepted by the trial judge. The threat was described in specific terms by the officers. They had no doubt that it was made to Lackie. The trial judge concluded, in effect, that in the circumstances, he accepted the blackout defence in respect to the assault but not as to the threat. Viewed in this manner the verdicts are not inconsistent.

See Ewaschuk p. 16-66; 16-66.1:

> Inconsistent verdicts are verdicts which in logic are so mutually contradictory or violently at odds in relation to the indictment or to the evidence which is so inextricably interwoven between the counts in issue that the verdicts cannot stand together in the sense that no reasonable jury, who had applied their minds to the facts in the case, could have arrived at the same conclusion. (authorities cited)
>
> In determining whether the verdicts are necessarily inconsistent, an appellate court must keep in mind that a jury is entitled to accept only *part of a witness' testimony.* Thus, a jury may convict an accused of a prior charge and acquit him of a subsequent charge even though both charges depend mainly on the identification evidence of the same witness.

I would dismiss the appeal against conviction.

The appellant was 26 years old at the time of sentencing. Unfortunately he has a considerable record for a person his age. Shortly after this offence, he was convicted of armed robbery. The trial judge properly considered the present offence

to be serious. The appeal from sentence has no merit. I would deny leave to appeal against sentence.

J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.

C.A.C. No.104296

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

TERRY LEE PHILIP HYNES	)	
Appellant	)	
- and -	)	R E A S O N S
FOR	)	JUDGMENT
BY:		
HER MAJESTY THE QUEEN	)	
	)	MATTHEWS,
	)	J.A.
Respondent	)	