**IN THE PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** R. v. Burke, 2013 NSPC 42

**Date: 02042013**
**Docket:2456938, 2456939**
**Registry:** Sydney

**Between:**

Her Majesty the Queen

Plaintiff

-and-

Stephanie Burke

Defendant

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# DECISION

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**Judge:** The Honourable Judge Jean M. Whalen, J.P.C.

**Heard:** March 28, 2013

**Charge:** 264.1(1)(a), 145(3) Criminal Code

**Counsel:** Kathy Pentz, Q.C. for the Crown
Don MacLennan, for the Defence

## Introduction

[1.] Ms. Burke and Mr. Wadden dated between 2004 and 2008. As a result of that relationship they have a daughter, Lauren. The couple are separated and have joint custody/access pursuant to a Family Court Order.

[2.] Prior to the date in question Mr. Wadden had learned there had been a drug raid at the home of Ms. Burke. When Ms. Burke called to see when he would be returning Lauren, he refused telling her he had an emergency order.

[3.] Mr. Wadden hung up because the defendant was yelling and called her back five minutes later. It was during this second conversation that the defendant is alleged to have stated, “If this goes through I’ll kill you.”

[4.] Ms. Burke testified she said “If this goes through I’ll kill you in court.”, meaning she would win.

## Issue

[5.] Did Ms. Burke utter threats to cause death and or bodily harm to Mr. Wadden?

**The Law**

[1] The case of *R. v. Clemente*, 86 C.C.C. (3d) 398, discusses the external circumstances of the offence of Section 264.1(1)(a); i.e. comprises the uttering of the threats of death or serious bodily harm. The mental element consists of the words spoken or written as a threat to cause serious bodily harm, i.e. they were meant to intimidate or to be taken seriously.

[1] In the absence of any explanation by the defendant, a determination whether either mental element has been proven involves consideration of:

(1.) Words used;

(2.) The context in which the words were used or spoken;

(3.) The person to whom the words were directed.

[2] The crown has the burden to prove the case beyond a reasonable doubt. The court must also consider the test in *R. v. W.D.* [1991] 1 S.C.R. 742.

[3] As is so often the case in situations such as this, there are few, if any, witnesses, and it often comes down to the testimony of the complainant and the defendant. Credibility is important, but lack of credibility on the part of the defendant does not equate to proof of his/her guilt beyond a reasonable doubt.

## A. Credibility of Witnesses

[4] *R. v. Jaura*, [2006] O.J. No. 4157, at p. 4, para. 12 and 13 states:

> **12** The assessment of credibility is not a science (*R. v. Gagnon, [2006] 1 S.C.R. 621*) nor can it be reduced to legal rules or formulae: *R. v. White (1947), 89 C.C.C. 148 (S.C.C.)*. However, proper credibility assessment is closely related to burden of proof. For this reason, an accused is to be given the benefit of reasonable doubt in credibility assessment: *R. v. W.D. [1991] 1 S.C.R. 742; (1991), 63 C.C.C. (3d) 397*. Credibility must not be assessed in a way that has the effect of ignoring, diluting, or worse, reversing the burden of proof. What must be avoided is an "either/or" approach where the trier of fact chooses between competing versions -- particularly on the basis of mere preference of one over the other: *R. v. Challice (1979), 45 C.C.C. (2d) 546 (Ont. C.A.)* cited with approval *R. v. Morin, [1988] 2 S.C.R. 345;* see also *R. v. Chan (1989), 52 C.C.C. (3d) 184 (Alta. C.A. and authorities cited therein)*. Acceptance of a complainant's version does not resolve the case. The court must still consider and weigh the defendant's version and, if unable to reject it, must consider itself to be in a state of reasonable doubt: *R. v. Riley (1979), 42 C.C.C. (2d) 437 (Ont. C.A.)*.
>
> - The learned trial Judge then proceeded to consider each version in isolation and preferred the version of the complainant to that of the appellant. Having concluded that he preferred the complainant's testimony to that of the appellant, he found that the Crown's case had been proved beyond a reasonable doubt. With respect, we think that he erred in approaching the issue before him in that manner. The issue before him was not which version of the evidence was true, but rather, on the totality of the evidence viewed as a whole, whether the Crown's case had been proved beyond a reasonable doubt.
> - It is not without significance that the trial Judge did not specifically reject the evidence of the appellant nor find his evidence to be incredible. Yet, in this case the appellant could

> not be convicted unless his evidence on the issue of consent was totally rejected.

**13** In assessing the credibility of any witness, including the accused, the existence of evidence that contradicts the witness is obviously highly relevant. For my part I regard it as the single most important factor in most cases, though the relative weight given to this versus other factors -- such as demeanour, contradictions within the witness's evidence itself, potential bias, criminal record or other factors -- varies from case to case. No witness is entitled to an assessment of his credibility in isolation from the rest of the evidence. Rather, his evidence must be considered in the context of the evidence as a whole. In a "she said/he said" case, that necessarily means that the defendant's evidence must be assessed in the context of and be weighed against the evidence of the complainant (and vice versa): *R. v. Hull, [2006] O.J. No. 3177, (Ont. C.A. Aug 4 2006 at Para. 5):*

- W.(D.) and other authorities prohibit triers of fact from treating the standard of proof as a credibility contest. Put another way, they prohibit a trier of fact from concluding that the standard of proof has been met simply because the trier of fact prefers the evidence of Crown witnesses to that of defence witnesses. <u>However, such authorities do not prohibit a trier of fact from assessing an accused's testimony in light of the whole evidence, including the testimony of the complainant, and in so doing comparing the evidence of the witnesses. On the contrary, triers of fact have a positive duty to carry out such an assessment</u> recognizing that one possible outcome of the assessment is that the trier of fact may be left with a reasonable doubt concerning the guilt of the accused (underlining added)

[6.] I am also mindful of *R. v. W.D. supra* which states at para. 27:

In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge

> is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, *supra*, at p. 357.
>
> Ideally, appropriate instructions in the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well [page 758] instruct the jury on the question of credibility along these lines.
>
> - First, if you believe the evidence of the accused, obviously you must acquit.
> - Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> - Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

## IV. Credibility Assessment

[7.] This is a case of domestic violence, one the courts see far too often. And, as is often the case, there are few, if any, witnesses to the incident so the court is left with a "he said/she said" scenario.

[8.] Mr. Wadden's testimony was not a complicated narrative. He did not embellish his testimony and was certain of what he had heard regarding the threat.

[9.] Ms. Burke did not seem to embellish her testimony and was certain she said something different. She denied uttering threats to cause death or bodily harm to Mr. Wadden and said what she "meant" was she would win in court.

[10.] Ms. Burke's denial will have to be examined in relation to all the evidence before the court.

[11.] The only other witness called at trial was Constable MacDonald who testified the nature of the complaint was "over child custody." He had contact with both individuals on May 19th. He described Mr. Wadden's demeanor as "a little bit upset" and Ms. Burke as "irate." She explained it was "over custody." He stated neither appeared to be under the influence of anything and were cooperative with police.

## V. Review of Evidence

[12.] Mr. Wadden testified that on the date in question he had known that there had been a drug raid at the home of Ms. Burke. He had their daughter at the time exercising his access rights. He sought and obtained an "EPO" from the Family Court.

[13.] Ms. Burke did not know until she called to have her daughter returned. He testified she became distraught, upset, “violent” and yelling. He hung up because she was too angry to talk to.

[14.] He stated he subsequently called back and asked if she was calm but she continued to yell, scream and say profane things.

[15.] The last thing she said to him was “If this goes through I’ll kill you.” Mr. Wadden then hung up.

[16.] He immediately phoned police and left the park where he had intended to spend the day with his daughter, his girlfriend and a neighbor’s son. He took a cab home. The police attended his residence and took a statement.

[17.] Mr. Wadden testified he took this seriously because there had been a history of violence between Ms. Burke, he and his family; he had also learned that the defendant had assaulted a woman at Big Ben’s.

[18.] Mr. Wadden testified he could not tell if she was under the influence of anything. “She just screamed a lot, which was not unusual.”

[19.] On cross-examination Mr. Wadden testified they had joint custody but the defendant was the primary custodial parent. Ms. Burke allowed him to keep their daughter an extra day.

[20.] Mr. Wadden confirmed the defendant had no notice of the EPO prior to their first phone call and she was upset by the news. He agreed that up to this point their custody issue had been settled and "they were fine with what was going on."

[21.] Mr. Wadden said he called the defendant back to see if she was calm. "There was not so much arguing as screaming" so he hung up and called police.

[22.] When his statement was put to him he agreed he said he "couldn't understand" what she was saying; "yes, it was all jumbled together." However, he was certain her last words to him was the threat because after that he hung up.

[23.] He testified he was not arguing, he was trying to explain [the situation] to Ms. Burke. He denies Ms. Burke used the words "in court."

[24.] Ms. Burke testified she agreed to allow Mr. Wadden to have their daughter for another day. When she wasn't returned at the usual time she called Mr. Wadden. It was then she learned of the court order. She didn't understand the terms and testified Mr. Wadden said he didn't have to explain and that he wasn't bringing her daughter back.

[25.] Ms. Burke testified this first call was about five minutes. She admitted both were upset and yelling at each other.

[26.] In response to a question on direct "What were you telling him?" she answered "I don't really know. I was just questioning him." Ms. Burke testified that Mr. Wadden told her to call the police, she did.

[27.] The police officer told her not to call Mr. Wadden. Then 25 minutes later Mr. Wadden called her back. She stated "I was ready, clearly."

[28.] Ms. Burke testified they started yelling at one another. She was not aware of any court proceedings. The telephone call lasted five minutes

[29.] Ms. Burke denies threatening to kill Mr. Wadden. She testified she told him "If this goes through I will kill him in court" meaning "I'll win in court" because the conversation was about the child.

[30.] Ms. Burke says although the drug raid was in her home she was never charged with anything. She testified Mr. Wadden "wanted to get me charged to make him look better in Family Court."

[31.] Ms. Burke testified they were both irate and yelling and says she didn't mean to threaten him with harm.

[32.] On cross-examination Ms. Burke admitted that up until the day in question the access/custody was working well. The "drug raid" in her house was upsetting. She agreed she was angry when they were talking. She also broke up with her boyfriend three days later.

**Analysis**

[33.] Mr. MacLennan argues that Mr. Wadden heard only what he wanted to hear and given the context Mr. Wadden could be mistaken. It is quite "probable" the words spoken related to Family Court. The defendant's explanation is reasonable and consistent with the context. The parties were engaged in an adversarial system and it is not unusual for people to speak in this manner.

[34.] Ms. Pentz, for the Crown argues that Mr. Wadden was quite definitive in what he heard. The defendant was agitated and upset over the drug raid and now learns of an EPO.

[35.] Why would Mr. Wadden be motivated to use it against her when by the defendant's own admission that up to this point things were going well. Even if the court accepts the defendant's version it is still a threat.

[36.] Based on all of the evidence I find:

(1.) Up until this date the custody/access agreement was working and amicable.

(2.) Despite some reference to previous issues and violence by the defendant towards Mr. Wadden I heard no specifics, but because of that he took what the defendant said seriously.

(3.) There is no evidence of other times/events when Mr. Wadden's "motivation" in the context of the defendant was "to make him look better in Family Court"

(4.) Mr. Wadden after learning of the raid at the defendant's house, where his daughter resided, got an EPO.

(5.) After the second phone call Mr. Wadden immediately left the park and took a cab home.

(6.) Mr. Wadden called Ms. Burke back to see if she was calm and to discuss the matter.

(7.) Ms. Burke told police she did make the threat, it was over custody.

(8.) The police officer described Mr. Wadden's demeanor as "a little bit upset" and the defendant as "irate and upset."

**Conclusion**

[37.] Ms. Burke called to get their daughter returned home. She did not call to tell Mr. Wadden about the drug raid on her home. She kept that from him.

[38.] She became irate when she learned he had gotten an EPO. Mr. Wadden didn't have to do or say anything about Ms. Burke to have things reflect badly in Family Court. Her own behavior; ie. assault charges and a drug raid, would attract a negative impact. And she didn't want that.

[39.] *R. v. MacDonald* (2002) 170 C.C.C. (3d) 46 Ont. C.A. states:

It is not an essential element of threatening that the victim actually fear for his/her safety.

However, it is telling what Mr. Wadden did:

(1.) He called the police;

(2.) He left the park immediately and went home;

(3.) He called his parents; and

(4.) He gave an audio statement the same day.

[40.] *R. v. George* (2002) 162 C.C.C. (3d) 337 (Y.T.C.A.) states:

> A threat must amount to a tool of intimidation designed to instill a sense of fear in the recipient.

[41.] Ms. Burke didn't want the matter to go to court. In her own words "If this goes through I'll kill you, in court."

[42.] I find that Ms. Burke was attempting to intimidate Mr. Wadden into not following through with the proceeding. She didn't need another issue, she didn't want it. Mr. Wadden has every right to protect the welfare of his child and he was taking lawful steps to do that.

[43.] She did not mean she would "win" in court.

[44.] In keeping with *R. v. Clemente, supra* I have considered:

(1.) The words used;

(2.) The context in which he words were used or spoken;

(3.) The person to whom the words were directed.

[45.] Based on all of the above, I find the Crown has proven its case beyond a reasonable doubt. "If this goes through I'll kill you" amounts to a threat contrary to Section 264.1(1)(a) of the *Criminal Code*.

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**The Honourable Judge Jean M. Whalen, J.P.C.**