SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Phillips*, 2015 NSSC 192

Date: 2015-06-24
Docket: CRH 437560
Registry: Halifax

Between:

Her Majesty the Queen

v.

Christopher Phillips

Judge:	The Honourable Justice A. David MacAdam
Heard:	June 1, 2, 4, 5, 11, 12, 2015, in Halifax, Nova Scotia
Written Decision:	June 30, 2015
Counsel:	Karen Quigley, for the Crown Michael Taylor, for the Defence

By the Court:

Introduction

[1] The accused, Christopher Phillips is charged that he, between December 26, 2014, and January 21, 2015 at, or near Cole Harbour, Nova Scotia, unlawfully uttered a threat to police to cause bodily harm or death to the said police, contrary to subsection 264.1(1)(a) of the *Criminal Code*. He is also charged with having in his possession a weapon or imitation of a weapon, to wit, "Osmium Tetroxide", for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to subsection 88(1) of the *Criminal Code*.

[2] There is no dispute about the identity of Mr. Phillips as the alleged offender, nor as to the date and place of the alleged offences. Also not in dispute are the contents of the utterance made by Mr. Phillips, or that he had in his possession the chemical alleged by the Crown. In respect to the offence of uttering a threat, the issue is whether, in the circumstances, the utterance constituted a threat under the *Criminal Code*. In respect to the offence of possession of a weapon, the issue is whether the possession of the chemical was "for a purpose dangerous to the public peace or for the purpose of committing an offence".

Fundamental Principles

[3] There are two basic and fundamental principles in every criminal trial: the presumption of innocence and the need for proof beyond a reasonable doubt.

[4] The presumption of innocence remains with an accused throughout the trial. It only ceases to apply if, after considering all the evidence, the court is satisfied beyond a reasonable doubt that the accused is guilty. The accused has no obligation to prove his innocence, or to explain the evidence presented by the Crown. The law presumes him to be innocent until a court of law, having considered all of the evidence, is satisfied that the Crown has proven every element of the offence charged beyond a reasonable doubt.

[5] This burden of proof on the Crown marks the second fundamental principle in our criminal law. It is not sufficient if, on the balance of probabilities, the accused may have, or is likely to have, committed the offence. Every element of

the offence must be proved beyond a reasonable doubt. If the Crown fails to prove any one or more of the elements beyond a reasonable doubt, the accused must be acquitted. Proof beyond a reasonable doubt is more than proof on a balance of probabilities and less than proof to an absolute certainty. It, however, lies "much closer to absolute certainty than to proof on a balance of probabilities": see *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Bisson*, [1998] 1 S.C.R. 306; and *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144.

[6] In considering the evidence, including the exhibits, I recognize I do not have to necessarily accept or reject all the evidence of any witness. I am permitted to accept part of it. However, I am required to direct myself to all of the evidence bearing on the relevant issues in order to attribute the correct weight, recognizing that individual pieces of evidence must not be examined in isolation but must be considered in the context of all the evidence as a whole.

[7] Witnesses see and hear things differently and discrepancies do not necessarily mean that the testimony of a witness should be disregarded. Discrepancies in trivial matters may be, and often are, unimportant. In assessing credibility, one must consider the opportunity the witnesses had to observe the events to which they testified, the extent to which the witnesses had any interest in the outcome of the trial or any motive for either injuring or favouring the accused. In doing so, I must consider in respect to each witness whether their testimony is reasonably internally consistent, as well as consistent with other proven facts.

The Offences

Uttering threats

[8] Section 264.1(1)(a) of the *Criminal Code* provides that:

> [E]very 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 any person;

[9] In *R. v. McRae*, 2013 SCC 68, Justices Cromwell and Karakatsanis, for the court, outlined the essential elements of the offence of uttering threats. Here, at issue is whether Mr. Phillips intended his words to be taken seriously or to instill fear. In respect to the *mens rea*, fault element of the offence, the court held:

> 17 The fault element is made out if it is shown that threatening words uttered or conveyed "were meant to intimidate or to be taken seriously": *Clemente*, at p. 763.
>
> 18 It is not necessary to prove that the threat was uttered with the intent that it be conveyed to its intended recipient … or that the accused intended to carry out the threat… Further, the fault element is disjunctive: it can be established by showing either that the accused intended to intimidate or intended that the threats be taken seriously:…
>
> 19 The fault element here is subjective; what matters is what the accused actually intended. However, as is generally the case, the decision about what the accused actually intended may depend on inferences drawn from all of the circumstances... Drawing these inferences is not a departure from the subjective standard of fault. In *R. v. Hundal*, [1993] 1 S.C.R. 867, Justice Cory cites the following words from Professor Stuart which explain this point:
>
> > In trying to ascertain what was going on in the accused's mind, as the subjective approach demands, the trier of fact may draw reasonable inferences from the accused's actions or words at the time of his act or in the witness box. The accused may or may not be believed. To conclude that, considering all the evidence, the Crown has proved beyond a reasonable doubt that the accused "must" have thought in the penalized way is no departure from the subjective substantive standard. Resort to an objective substantive standard would only occur if the reasoning became that the accused "must have realized it if he had thought about it". [Emphasis in *McRae*]
>
> 20 *O'Brien* is an example. The person targeted by the threat -- the accused's ex-girlfriend -- had testified that she had not been frightened by the accused's words. The trial judge strongly relied on this evidence to conclude that, despite the fact that the words on their own appeared threatening, she was left with a reasonable doubt as to whether the accused had the necessary intent to threaten... The perception of the alleged victim was not directly in issue, but was relevant evidence of the accused's intent.

[10] The Court at para. 23 summarized that the *mens rea* or fault element is established where:

> …the accused intended the words uttered or conveyed to intimidate or to be taken seriously. It is not necessary to prove an intent that the words be conveyed to the subject of the threat. A subjective standard of fault applies. However, in order to determine what was in the accused's mind, a court will often have to draw reasonable inferences from the words and the circumstances, including how the words were perceived by those hearing them.

[11] In respect to the prohibited act, or *actus reus*, the court stated:

> 10 The prohibited act of the offence is "the uttering of threats of death or serious bodily harm" (*Clemente*, at p. 763). The threats can be uttered, conveyed, or in any way caused to be received by any person. The question of whether words constitute a threat is a question of law to be decided on an objective standard. Justice Cory put it this way in *McCraw*:
>
> > 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 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? [pp. 82-83]
>
> 11 The starting point of the analysis should always be the plain and ordinary meaning of the words uttered. Where the words clearly constitute a threat and there is no reason to believe that they had a secondary or less obvious meaning, the analysis is complete. However, in some cases, the context reveals that words that would on their face appear threatening may not constitute threats within the meaning of s. 264.1(1)(a)... In other cases, contextual factors might have the effect of elevating to the level of threats words that would, on their face, appear relatively innocent (see e.g. *R. v. MacDonald* (2002), 166 O.A.C. 121, where the words uttered were "You're next").
>
> …
>
> 13 Thus, the legal question of whether the accused uttered a threat of death or bodily harm turns solely on the meaning that a reasonable person would attach to the words viewed in the circumstances in which they were uttered or conveyed. The Crown need not prove that the intended recipient of the threat was made aware of it, or if aware of it, that he or she was intimidated by it or took it seriously: *Clemente*, at p. 763; O'Brien, at para. 13; *R. v. LeBlanc*, [1989] 1 S.C.R. 1583 (confirming the trial judge's instruction that it was not necessary that "the person threatened be ever aware that the threat was made": (1988), 90 N.B.R. (2d) 63 (C.A.), at para. 13). Further, the words do not have to be directed towards a specific person; a threat against an ascertained group of people is sufficient: *R. v. Rémy* (1993), 82 C.C.C. (3d) 176 (Que. C.A.), at p. 185, leave to appeal refused, [1993] 4 S.C.R. vii (threat against "police officers" generally); *R. v. Upson*, 2001 NSCA 89, 194 N.S.R. (2d) 87, at para. 31 (threat against "members of the black race" generally).

[12] The court cited the Ontario Court of Appeal decision in *R. v. Batista*, 2008 ONCA 804, where the court considered the meaning of “reasonable person”, and

concluded that "a reasonable person considering whether the impugned words amount to a threat at law is one who is objective, fully-informed, right-minded, dispassionate, practical and realistic" (para. 24).

[13] In summary, the court in *McRae*, *supra*, said at para. 16, "the prohibited act of the offence of uttering threats will be made out if a reasonable person fully aware of the circumstances in which the words were uttered or conveyed would have perceived them to be a threat of death or bodily harm."

Possession of a weapon for a dangerous purpose.

[14] Subsection 88(1) provides that every person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence.

[15] The element in dispute in respect to this offence was the accused's purpose in having possession of the "osmium tetroxide". Although its practicality as a weapon was criticized by both Mr. Phillips and Dr. Cameron Orr, the expert called by the defence, they each acknowledged that this chemical could be used as a weapon. In fact, the defence does not dispute that the chemical, for purposes of s. 88(1) of the *Criminal Code*, is a weapon. Nor is it disputed that Mr. Phillips had possession of the chemical, notwithstanding it was in a shed located on a property registered in his wife's name.

[16] The only offence that Mr. Phillips is alleged to have committed is that of uttering a threat. If he is found not guilty of this offence, then he would similarly be not guilty of possession of a weapon for the purpose of committing an offence, in view of the absence of any suggestion he committed or intended to commit any other offence.

[17] On the evidence the alleged threat is, in the submission of the Crown, related to the use of "osmium tetroxide" in threating the police. Although there was evidence adduced as to whether it was safely stored in the unlocked shed, and Dr. Orr, on the circumstances as suggested by Crown counsel, agreed that in his opinion it would not have been safely stored, the offence is not in relation to unsafe storage but whether it was possessed for a purpose dangerous to the public peace. The only "purpose" suggested as being dangerous to the public peace was to carry

out the threat. Therefore, if it is determined that Mr. Phillips is not guilty of uttering a threat, in the circumstances alleged in respect to the second count, he would be similarly not guilty of the possession of a weapon for a purpose dangerous to the public peace.

Background

[18] On December 27, 2014, at 7:47 a.m. the accused, Christopher Phillips, forwarded an email to a friend, Chris Wood. Later that day he forwarded the same email to his wife, Gosia Phillips. The email which raises the issue of the alleged threat as well as possession of a weapon for dangerous purposes or to commit an offence, reads as follows (reproduced exactly as typed in original):

> Hey, Chris.
>
> Just wanted to wish you a merry Christmas and warn you of a gift I would like to give you . . .
>
> On a seriously funny note, I still get a kick out of that box that your brother made that had the ax, etc. behind the glass to be used only under "zombie apocalypse", or whatever.
>
> Well, since it is a festive time of year and since you are such an eccentric individual (albeit I still get the award for that one) I figured I would go with your brother's idea but while adding a little spice in a manner that only I could/would do (without breaking a single law, of course). Hell, when I finally get it done, I will probably leave your gift on the dash of my truck when crossing the border just to have some fun with those testy immigration officials I always have to deal with at the border.
>
> Anyway, as you already know, over the years I have amassed a rather impressive amount of osmium tetroxide (please see the attachment). After all, there are some chemicals, legal as them may be, that not even I would sell to a stranger on eBay. This has resulted in me having so much of this . . . novelty, shall we say, just lying around my lab, and, while naturally refusing to heed my demands to "get the fuck out" or "don't touch my shit", somehow manages to break open a vial of osmium tetroxide in a manner that only a government employee could do. While I must admit, that there is something bitter-sweet to be found in even such a tragedy, it is not one I would intentionally wish on even a police officer. Nonetheless, even I must admit that it is rather odd, perhaps even conserving, for someone with my history to possess such ILLEGAL THOUGHTS. While I would never harm a human, an animal, a plant, or even a police officer with something as terribly toxic as osmium tetroxide, you and I both know that evidence is only an optional element required for conviction of a crime. That being the case, it is

still probably best for me to come up with a way to SAFELY disperse of at least part of my stockpile of this little novelty chemical. While we both know that the most important element required for the conviction of a crime is the opinion testimony of someone wearing pressed blues, given the ethically challenged nature of most police officers I have witnessed on the stand, it is probably best that I not keep this much of my novelty chemical lying around as, knowing my luck, it could be improperly misconstrued as actual evidence. I don't need any more of that shit.

So, I am thinking about giving you some of the good stuff in a sealed, glass vial. No, I am not too keen on that polymer backbone shit. I am talking a sizeable lump if pure osmium tetroxide, fully encased in an impermeable glass vial for all the world to see. This glass vail will be thick enough to safely contain the osmium tetroxide even without refrigeration, yet this fragile, glass vial will be enclosed in a box with an opening large enough through which one could fit a fork, a spoon, or even a stick. While I will be the first to admit that these would constitute some rather blunt tools, such tools do have the benefit of being within arm's reach pretty much anywhere and anytime and, in my personal opinion, in times of emergency it is always wisest to keep your tools as simple and as accommodating as possible, even if they may appear to have some as somewhat clandestine. You know, just in case you, the HYPOTHETICAL user, ever did, HYPOTHETICALLY, knowingly choose to play with some benign chemical in the presence of an armed intruder dressed in blue that is relentlessly attempting to rip from you your very heart after taking up residence in your own fucking property. In any event, I figure a good place for it would be securely screwed to a shelf on a credenza that shall soon be located behind an executive desk located in your private dental practice. So, blunt tools or not, any one would suffice to get the job done if skillfully mastered. That is, after all, what makes the box, or, I mean, the novelty, so fucking special. Please understand, however, that it would require some really stupid, insane effort to actually urn this hypothesis into a theory by breaking the vial. The vial is not really for breaking, but merely relishing. In other words, it will be safe.

The box itself, except for the opening made for viewing, will be constructed of either absolute black granite, seamless stainless steel, or seamless borosilicate glass. I have all kinds of furnaces that can mold metals, especially those with a melting point as low as that of stainless steel, and am now and am getting better at this glass blowing thing, so it will be easier than what it sounds. I also have an old CNC Router with all kinds of diamond burs which I will use to etch into the top of box (be it granite, stainless or glass) something like the following. "INSTRUCTIONS: (1.) TO BE USED ONLY IN THE EVENT OF FORCEFUL ENTRY BY THE POLICE. (2.) HOLD BREATH (VERY IMPORTANT). (3.) POKE GLASS VIALWITH STICK, PREFERRABLY WHILE WEARING FULL HAZMAT PROTECTIVE GEAR. (4.) THROW ENTIRE BOX AT ANY OFFICER THAT HAS DECIDED TO TAKE UP RESIDENCE ON YOUR PROPERTY. (5.) WHILE STILL HOLDING YOUR BREATH, RUN LIKE

HELL. (6) IF YOU ARE LUCKY YOU WILL HAVE DIED LIKE THE REST OF THEM. (7) IF YOU ARE UNLUCKY, AND AS A RESULT OF COMPLETE BLINDNESS, YOU WILL RUN INTO A WALL WHILE TRYING TO GET THE FUCK OUT AND WILL LIKELY NEED HE AFFOREMENTIONED STICK TO GET AROUND FOR THE REST OF YOUR LIFE"

Finally, on the bottom, where no one can actually see, you will find the words "OSMIUM TETROXIDE-A BILLIONAIRE'S WEAPON OF TERROR."

Again, and seeing how this is a written document that could potentially be stored for perpetuity, I do which to stress that the box will not be designed to be actually used as a weapon. It is more about the satisfaction of knowing that you have that sort of immense power and the satisfaction of knowing that there is not a chance in hell that ANYONE would ever figure that shit out. While I am sure that such things sound COMPLETELY FUCKING NUTS to most people, I suspect that you can find the humor in this form of crazy, especially if, god forbid, you ever actually did find yourself in a position where the pressures of authority have you bent you over while taking turns fucking you up the ass. You see, it is about that very moment wherein you discover that you never really had any constitutional rights at all and you must bear witness to those mother fuckers mercilessly stripping from you every ounce of your being. You see, even though it may feel like you have lost all control, you will find that the box will bring you a certain comfort – certain satisfaction that can only be gleamed from possessing such an immense sort of power while consciously choosing not to use it – even against those that you would otherwise, and with great joy, I might add, batter until they were fucking senseless. The fact that you have not chosen to use it, and, as conclusively evidenced by the fact that it is still sitting there quite literally screwed to your shelf of your credenza (so as not to fall over) will be sufficient to prove that you are better than those mother fuckers we have come to know both personally and via recent media reports as the "blue wall".

Respectfully,

Your Friend, Chris P (Now also known as Chrispy).

PS: On an equally festive note, my immigration/work permit stuff is finally moving along. Lucky for those immigration bastards, eh? (Yes, that is a joke which I make with some emotion, but not of the type which could be construed as malice aforethought or my voluntary decision to join in any form of criminal conspiracy, be it related to these issues or otherwise). In any event, I suspect that this recent flurry of activity could have something to do with the fact that the latest prosecutor opposed to my interest decided to drop all charges against me after reviewing my experts report with his own expert. I, personally, think that was a wise decision because, even though I would never harm a flea, it probably

> is in their best interest to keep me on their good side. So I am in a pretty good place right now. I haven't felt this way in a long time, Bro. Hope dental school and those animals with two X chromosomes are treating you well.

[19] By January 19, 2015, Mrs. Phillips became concerned after learning that the osmium tetroxide that Mr. Phillips had been acquiring for some time had not all been disposed of, as he had previously promised her. Brad Way, a person employed to do renovations on the home they had purchased, had been in a shed on the property at Lakeridge Crescent and observed what he understood to be "osmium tetroxide" in a box located on a shelf of a lazy susan. On her way to work, Mrs. Phillips went to the Cole Harbour detachment of the RCMP to ask them to remove this chemical. At the detachment she eventually met with Constable Fraser who, it appears did not believe her, considering it "almost a grand scheme, too big to be real." He went as far as to call her mother to determine whether she was mentally ill or was having a mental breakdown, and in order to confirm her story. In his conversation with Mrs. Phillips he was advised that Mr. Phillips had mental health issues and had left the province. From his discussion with Mrs. Phillips he formed the view that Mr. Phillips' mental state had deteriorated and there was a fear of what he might do with this chemical. Upon learning that she had emails she had received from Mr. Phillips, he requested copies. Mrs. Phillips went home and forwarded him the subject email, and later forwarded other emails she had received from or exchanged with Mr. Phillips during this time. Constable Fraser had never heard of the chemical before but from what he was being told he believed it to be dangerous. He was concerned that Mr. Phillips might be angry and upset if he interacted with police, and that there might be a physical confrontation. Before reading the emails he was looking to apprehend Mr. Phillips for an involuntary assessment under the *Mental Health Act*. At the conclusion of the meeting he brought the information to the attention of his supervisor, who contacted the watch commander, who, in turn, contacted "General Investigative Services" (GIS). At this point the file was turned over to them.

[20] Constable Fraser was the only police witness to testify that on reading the email he felt it contained a threat to police. Although he was later involved when the RCMP sought to secure three locations which were believed to contain chemicals or were otherwise believed to be possibly involved, he had no other involvement in the investigation of this matter.

[21] The file subsequently was turned over to Detective Constable Reeves, who prepared the documentation for a search warrant as well as for a Canada-wide warrant having regard to the information that Mr. Phillips had left the province. He explained that his concerns were based on a "totality" of factors, including concern expressed by people around Mr. Phillips about a recent deterioration of his mental health; the statements in the email about possessing osmium tetroxide "and potentially using it against law enforcement officials"; and the belief that Mr. Phillips was outside the province, with his passport, and that he had access to money. He formed the view that "should Mr. Phillips be stopped he may carry out his threat."

[22] Counsel for the Crown says that in regard to all the circumstances the evidence supports the existence of a threat and the necessary mental element. She also refers to a letter forwarded by Mr. Phillips to the Canadian Broadcasting Corporation, while he was incarcerated pending trial, and an excerpt from his statement given to two police officers from Halifax who attended in Ottawa and took a statement from him.

[23] The Crown's submission appears to advance the belief of Detective Constable Reeves that, in the totality of the circumstances, there was a threat. Those circumstances apparently included the belief that Mr. Phillips might have had his passport with him and might have had the chemical in his vehicle, which could prove a danger to police if he was stopped. Later it was learned that Mr. Phillips did not have his passport and there is no evidence that he had any of this chemical in his possession while travelling from Halifax to Ottawa.

[24] There was no evidence by either friends or other police officers that they viewed the subject email as containing a threat against the police. In fact, to the extent there was any evidence, it is to the contrary. Admittedly one of his neighbours, although it is unclear whether this is one of the friends to whom Detective Reeves was referring, testified that in a conversation with Mr. Phillips, he had indicated he either had or could acquire chemicals and described his clothing, which appeared to be clothing suitable for construction or other physical work, as his "terrorist outfit." However the witness was quick to point out that Mr. Phillips made this comment flippantly. He also said that the reference to having or being able to access chemicals was not made in a threatening manner, but simply by way of information.

[25] The GIS investigation was led by Sergeant Lisa Stuart and Sergeant David Boon. Initially Sgt. Boon received the call to attend at the Cole Harbour detachment at which time he, with two other constables, was briefed on what had occurred and what was known at that time. He then travelled to 54 Lakeridge, arriving about twenty minutes to midnight, parked his vehicle and entered the property.

[26] Sergeant Boon said that although the shed door was closed, it could have been open a few inches, adding that it was not secured. He opened the door and entered, using a flashlight to look around. He found a lazy susan in the right rear corner of the shed. He noticed a gym bag on the bottom shelf of the lazy susan and moved it so that he could open the bag and observe its contents. He found an 18-inch container with blue markings on it. He had previously been informed of the possible existence of a pipe bomb and this was one of the things he was looking for. He also noticed on the shelf a box with the words "do not touch" written on it. He did not touch the box. He returned to the police station and contacted his supervisor. In view of this unknown device he decided to secure the scene, as well as the other two locations that had been identified as potentially having chemicals or being involved, namely 95 Dyke Road and 43 Parkridge Crescent.

[27] While being cross-examined on the notes he made after the briefing on his arrival at Cole Harbor, and whether he viewed the email as a threat, Sergeant Boon had the following exchange with defence counsel:

> Q. …there are no direct threats made or plans described. The emails are scattered in thought and seem ranting….
>
> A. Yes
>
> Q. Where did that information come from.
>
> A. We, when we met with, when I met with the RCMP in Cole Harbour they had copies of emails that were provided to them by Ms. Phillips.
>
> Q. Right.
>
> A. So we reviewed those emails in that meeting with the six of us.
>
> …
>
> Q. Okay but the description of the emails seeming scattered in thought and ranting, seem ranting those are words that you describe
>
> A. Those are my words yeah.
>
> Q. Okay and you go on to say as far as, here's what you're saying, he goes as far as to describe a situation where it may be used to harm the police but it is

> general in nature and seems like he is describing a scenario not a plan, those are your words as well.
>
> A. Yes, from my initial review of the emails.

[28] Sergeant Lisa Stuart led the second squad that took over from Sgt. Boon. Upon being questioned as to how she viewed the subject email she had the following exchange with defence counsel:

> Q. Okay. And you would acknowledge that throughout these emails there are numerous references to safety precautions being taken and Mr. Phillips wished that no one be harmed and he not do anything to harm anyone and that people and animals don't get harmed. You acknowledge…you read those things?…
>
> A. Yes he did state that.
>
> Q. …didn't you?
>
> A. Yes.
>
> Q. Okay, and when you first read that email, would you agree with me that…really the thought was….well there is nothing really specific here. We don't know what this is all about, but there wasn't an immediate thought that Oh my God, he's threatening the police?
>
> A. Yeah, I mean, as police it is our job to gather the facts and look at them in totality.
>
> Q. Right.
>
> A. So that was one part of the puzzle, I guess you could say.
>
> …
>
> Q. …until you gathered more information?
>
> A. That's right, and … I'm coming into the investigation after the fact…
>
> Q. Uh hmm.
>
> A. So, that first day they're gathering those facts. So I'm presenting with those facts right away. So, I would say my level of concern and alert was higher than maybe perhaps the first officers that dealt with it.

[29] Crown Counsel suggests that the relevant circumstances include the handwritten letter by Mr. Phillips to the Canadian Broadcasting Corporation, noted earlier. In the letter, he stated:

> ...I am providing you a copy of the enclosed e-mail which forms the only basis for the charges against me. Plainly the charges against me are baseless. The email

> contains no actual "threat" (as that term is defined in the law) nor was it ever intended to be construed as such.

[30] And later, in the same letter:

> This case is not at all about threats. This case is about something near and dear to both of us – Freedom of Speech. Furthermore it is about a type of speech that is supposed to be afforded the highest protection – political speech.

[31] Crown counsel also references from the statement given by Mr. Phillips to the police, in Ottawa, on the evening of his arrest, the following:

> …
>
> A. I do…I do get…I do have some appreciation. I think they're…you know, maybe it is a control thing. Maybe…you know, there is something satisfying when, you know, they're just violating your every right and everything to know…you know what, you know, if I wanted to, I could hurt you. But I'm voluntarily choosing not to, just like (aiming?) with a gun, and there's no way I would. You know, at least it makes me feel like a better person, otherwise you're just…just getting…like my letter says, I mean, it's putting it in a different context.

[32] This trial is not about whether the police were justified in mobilizing assets, both human and otherwise, to respond to the information they were given about chemicals being stored at up to three locations in Cole Harbour. The defence does not contest nor does the Court question the reasonableness of the concerns, particularly having regard to the unknown nature of the chemicals involved and the whereabouts of Mr. Phillips and what his intentions may have been. That is not the issue. The issues are: (1) whether, in the circumstances as they have become known, Mr. Phillips uttered threats to the police; and (2) whether he had possession of osmium tetroxide for a dangerous purpose or to commit an offence.

[33] The Crown appears to suggest that for purposes of determining whether a reasonable person would believe there was a threat, having regard to the test in *R. v. McRae*, *supra*, that the relevant time is when the police decided to charge Mr. Phillips. With this submission I am unable to agree. The relevant time is when all of the correct information is known. In this case, this includes the fact that Mr. Phillips did not have his passport with him, was not travelling to the United States, and that there is no evidence that he had any of the chemical on his possession or in his vehicle during his travel to Ottawa.

[34] I am unable to decipher from the Crown's references to the letter to the Canadian Broadcast Corporation and the statement made to the police officers during the interview in Ottawa why either or both of these support or corroborate either the *actus reus* or *mens rea* of either offence.

[35] In *McRae* at para. 16 the court stated that "the prohibited act of the offence of uttering threats will be made out if a reasonable person fully aware of the circumstances in which the words were uttered or conveyed would have perceived them to be a threat of death or bodily harm." On the evidence, it appears that three of the four police officers who testified about their opinion of the email did not regard it, by itself, as a threat. In the case of Sgt. Stuart, it was one part of the puzzle. In the case of Sgt. Boon it seemed like a scenario but not a plan. Keeping in mind that these two Sergeants were leading the investigation, and considering that the email itself was not immediately taken as a threat, it is difficult to see how a reasonable person would conclude differently.

[36] There is no evidence that Mr. Phillips intended either Mr. Wood or Mrs. Phillips to convey his email to the police. Although, as previously noted in *McRae,* intention to convey the threat to the victim is not required, the lack of such an intention may be a factor in deciding whether there was the intent to utter a threat.

[37] Additionally, there was nothing in the information subsequently learned that would assist in concluding that the email of December 27 was a threat. The initial concerns by the police about Mr. Phillips' intentions and what he was doing, when subsequently clarified, do not support any conclusion that he was engaged in pursuing or advancing or confirming that he had uttered a threat against the police, or anyone.

The Indictment

[38] In *R. v. Saunders*, [1990] 1 S.C.R. 1020, McLachlin J. (as she then was) said, at 1023, that it is a "fundamental principle of criminal law that the offence, as particularized in the charge, must be proved." The defence claims that the Crown has not proven all the particulars of the offence as charged in the indictment. In count one Mr. Phillips is charged with "uttering a threat to police to cause bodily harm or death to the said police". The defence says that there is no evidence of a

threat being made to the police. Instead, if there was a threat, it was contained in the email addressed to Mr. Wood and to Mrs. Phillips. The threat was never made "to the police themselves." Crown counsel says the indictment makes it clear that the particular allegation is that it was a threat to police, not that it was communicated to the police. Defence counsel references *R v. Corser*, 2004 ABQB 861, 2004 CarswellAlta 1579, where Justice Viet stated, at para. 43 observed:

> 43 Assuming that it was not initially necessary for the Crown to particularize the means by which Mr. Corser conveyed the threat to Kelly and Craig Corser, once the Crown had done so, it was obliged to prove the particulars beyond a reasonable doubt. As the Supreme Court of Canada re-iterated recently in Daoust:
>
> > They rely on the decision in *R. v. Saunders*, [1990] 1 S.C.R. 1020, in which McLachlin J. (as she then was) wrote, at p. 1023:
> >
> > > It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. In *Morozuk v. The Queen*, [1986] 1 S.C.R. 31, at p. 37, this Court decided that once the Crown has particularized the narcotic in a charge, the accused cannot be convicted if a narcotic other than the one specified is proved. The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and fair trial": *R. v. Côté*, [1978] 1 S.C.R. 8, at p. 13.
> >
> > [para22] It is a well-established legal principle that an accused need only answer the charges as they appear in the indictment and that the Crown has the burden of proving them unless it requests an amendment, [page229] which in this case was not done in time. Pursuant to s. 601(3) Cr. C., a court may amend a count in an indictment at any stage of the proceedings provided it is a particular of the offence that is amended: *Morozuk v. The Queen*, [1986] 1 S.C.R. 31 (per Lamer J., as he then was); *Elliott v. The Queen*, [1978] 2 S.C.R. 393, at p. 427 (per Ritchie J.). However, an amendment to the indictment we are concerned with would not constitute a change in the particulars of the offence. Rather, it would amount to laying a different charge from the one originally brought. At any rate, this Court is certainly not prepared to amend the indictment at this stage of the proceedings.

[39] As previously observed in *McRae* and as noted by Justice Viet, at para. 48, it is not a necessary element of the offence that the intended victim be aware of the

threat. Therefore, it was not necessary for the indictment to indicate that the utterance was made to the police in order to make out the elements of the charge. Giving the words their normal meaning, I am satisfied that the phrase "utter a threat to police to cause bodily harm or death to the said police" is that the utterance was made to the police, or, at the very least, is ambiguous. What evidence there is on this point is to the contrary. As such, if the required elements had been established, the charge would have failed on the basis that one of the particulars alleged in the indictment had not been proved, even though it was not necessary to include this particular in order to obtain a conviction.

Possession of a weapon for a dangerous purpose

[40] In respect to the second offence, possessing a weapon, namely "osmium tetroxide" for a purpose dangerous to the public or for the purpose of committing an offence, the Crown has not proven the purpose-based elements of the offence. The only evidence of a possession dangerous to the public peace would relate to possession for the purpose of the alleged threat. This element has not been proven beyond a reasonable doubt. There is no evidence that Mr. Phillips' purpose in acquiring the chemical was for a purpose dangerous to the public peace. It appears that Mr. Phillips started acquiring this chemical long before the alleged threat.

[41] The evidence is unclear as to why Mr. Phillips initially acquired this chemical, although on the basis of his emails as well as from his statement to the police, he regarded it as an unusual and novel chemical and later intended to use it, together with other chemicals, in determining whether police breathalyzers could give erroneous readings to persons stopped for impaired driving after having been in contact with any of these chemicals. There is nothing in the evidence to suggest these purposes changed or, more importantly, that his original lawful purpose became an unlawful purpose, namely to possess it for a purpose dangerous to the public peace. As earlier observed, there is no evidence suggesting Mr. Phillips ever intended or for that matter expected either Mr. Wood or Mrs. Phillips to convey the email in question to any police. Clearly, Mrs. Phillips' purpose in providing Const. Fraser with the email was to have the osmium tetroxide removed from her property. It is further evident that when she did so, Mr. Phillips was unaware. He apparently only learned she had when she later informed him in another subsequent email.

Conclusion

[42] Consequently, having in mind the onus on the Crown that it must prove all of the elements of these offences beyond a reasonable doubt, it is evident that the Crown has failed to do so. The accused is entitled to a verdict of not guilty on both charges.

MacAdam, J