SUPREME COURT OF QUEENSLAND

CITATION:	*R v Enright* [2020] QCA 6
PARTIES:	**R** **v** **ENRIGHT, Michael Edward Stanley** (appellant)
FILE NO/S:	CA No 163 of 2018 DC No 19 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Maryborough – Date of Conviction: 8 June 2018 (Farr SC DCJ)
DELIVERED ON:	4 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	20 November 2019
JUDGES:	Philippides and McMurdo JJA and Boddice J
ORDERS:	**1. The appeal be allowed.** **2. The convictions be set aside.** **3. There be a new trial in respect of each of counts 2, 3, 5 and 6.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – where the appellant was found guilty of four counts of retaliation against a judicial officer – where the appellant was sentenced to 12 months imprisonment on each count to be served concurrently – where the appellant appeals against the convictions on the ground that the trial Judge erred in directing the jury about the first element of the offences – where the offences were committed in the course of telephone calls between the appellant and his mother and grandmother – where each of the counts alleged a breach of s 119B of the *Criminal Code* (Qld) – where the appellant submitted the directions given by the trial Judge did not apprise the jury of the issues to be considered in relation to the first element of each offence – where the respondent submitted the directions given to the jury were sufficient to apprise the jury of the elements of each offence – whether there was a material misdirection – whether there was a miscarriage of justice

Criminal Code (Qld), s 119B

Carter v R (1994) 176 LSJS 112; [1994] SASC 4498, cited
Jeffery v The State of Western Australia [2009] WASCA 133, cited

COUNSEL: R M O'Gorman with N Edridge for the appellant
C W Heaton QC for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PHILIPPIDES JA:** I agree with Boddice J.

[2] **McMURDO JA:** I agree with Boddice J.

[3] **BODDICE J:** On 8 June 2018, a jury found Michael Edward Stanley Enright guilty of four counts of retaliation against a judicial officer. The jury found him not guilty of a further count of retaliation against a judicial officer. He was sentenced to 12 months imprisonment on each count, to be served concurrently. His parole release date was set at 8 June 2018.

[4] The appellant appeals those convictions. The sole ground of appeal is that the learned trial Judge erred in directing the jury about the first element of the offences.

Background

[5] On 26 June 2017, in the Magistrates Court at Kingaroy, the appellant was sentenced to a period of imprisonment by an acting Magistrate.

[6] On 1 December 2017, the appellant successfully appealed that sentence, resulting in a reduction in the period of imprisonment.

[7] Prior to his successful appeal, the appellant was held in the Maryborough Correctional Centre.

[8] Whilst incarcerated in that correctional centre, the appellant had telephone conversations with his mother and grandmother. Each of those calls was recorded electronically.

[9] The offences were all committed in the course of those telephone calls. The Crown case was that each of those telephone calls contained a threat to cause injury to the acting Magistrate in retaliation for having imposed imprisonment upon the appellant.

Offences

[10] Each of the counts alleged a breach of s 119B of the *Criminal Code* (Qld) (***"the Code"***).

[11] The first offence of which the appellant found guilty (count 2) was committed on 4 July 2017. In a telephone conversation with his mother, the appellant said:

> "The people who've put me in here are going to fuckin' suffer when I get out. Like, I've still contacts in Centrelink who've still got

> access to the Medicare system, so if you got a Medicare card I've got your address, you know. You won't be – they won't be able to hide … I'll come here for something worthwhile next time. That fuckin' fat fuckin' prosecutor fuckwit – I'm going to fuckin' beat him to a fuckin' pulp, and this fuckin' cunt of a magistrate, I'm going to destroy him. I'm going to destroy them. I'm going to put them on fuckin' hospital food diet for months."

[12] The second offence of which the appellant was found guilty (count 3) was committed on 5 July 2017. In a telephone conversation with his grandmother, the appellant said:

> "As soon as I get out of here cunts are going to die. Fucking sick of these cunts. Reckon they can stand over me. The fucking prosecutor is dead, so is that magistrate … He'd want to be careful in the street. So had this other fucking magistrate. I actually fucking mean it. I'm going to kill the cunt when I get out of here [indistinct] for lying in court, for misleading the court. You know, fucking talking shit about me, and that fucking magistrate not taking stuff into account. I'm going to beat him to a fucking pulp. That's right. I'm going to show him what he needs to take into account."

[13] The third offence of which appellant was found guilty (count 5) was committed on 8 July 2017. In a telephone conversation with his grandmother, the appellant said:

> "I'm going to kill them when I get out … They're going to die. It's going to be a bloodbath. I will be – I will come back for something worthwhile this time. I don't care. There'll be three deaths. Parole officer Bushby and that fucking magistrate … I'm worried they're going to be recording it. I hope they're recording it. Best they fucking know. Yeah, they should. That's why I'm fucking going to kill them all."

[14] The remaining offence of which the appellant was found guilty (count 6) was committed on 11 July 2017. In a telephone conversation with his grandmother, the appellant said:

> "I'm going to fucking kill the cunts. I'm out to get them seriously. Two can play that game. He was brought in just to fucking put me away … I don't care who he was. He's dead. … If you've got a Medicare card I've got your address. So they can't fucking hide … I haven't actually raised my hand to anyone but I will when I get out … best they be warned and they get the fuck out of town because they are not safe."

Relevant legislation

[15] Relevantly, s 119B of the Code provides:

> "A person who, without reasonable cause, causes, or threatens to cause, any injury or detriment to a judicial officer … for the purpose of retaliation or intimidation because of –

(a) anything lawfully done or omitted to be done or that may be lawfully done or omitted to be done by the judicial officer as a judicial officer …

is guilty of a crime."[1]

Trial

[16] At trial, there was no contest that the appellant had uttered the words alleged in the telephone conversations the subject of each count. The issue focused on by defence counsel was that of reasonable cause.

[17] The Crown case was that the jury would be satisfied that each of the threats had been uttered without reasonable cause; it was not something a reasonable person would do; the words indicated how the judicial officer's address could be obtained and contained a clear causal link between the sentence of imprisonment and the threats to that judicial officer.

[18] The defence case was that there was reasonable cause for each of the threats. The statements were made in circumstances where the appellant was upset and scared, in custody and venting to loved ones.

[19] The appellant gave evidence at trial that the contents of these telephone calls were "a lot of hot words and hot air and stuff that were just said in the heat of the moment".[2] He did not see the words as a threat. He had no control over how others interpreted those words but he had no intention of carrying anything out.

Summing up

[20] The trial Judge directed the jury that there were four elements to each offence and that the prosecution must prove each element beyond reasonable doubt. Those elements were:

1. Threaten to cause injury;
2. To a judicial officer;
3. Without reasonable cause;
4. In retaliation because of something lawfully done by a judicial officer as a judicial officer, namely imposing a sentence of imprisonment on the appellant.

[21] The trial Judge directed the jury in respect of these elements as follows:

> "Now, injury in this context means a bodily injury. Threatened is a common word used in everyday language, it means to utter a threat against someone. It is a question for your determination whether you accept, beyond reasonable doubt, that the comments made by the defendant that formed the basis of each of these charges constitutes a threat. In so far as the term judicial officer is concerned, there is no dispute in this matter that the Acting Magistrate was a judicial officer.

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1 *Criminal Code* (Qld) s 119B.
2 AB2-41/17.

> The third element is, of course, without reasonable cause. Now, in so far as that element is concerned, this is an objective test based upon the state of mind of the defendant at the time the comments were made. So you have to determine, beyond reasonable doubt, whether a reasonable person, holding the defendant's beliefs, would have been justified in making the threat or threats in question. If you are satisfied, beyond reasonable doubt, that such a reasonable person would not have been justified in making the threat, then that element would have been proved. If you are not so satisfied, then it has not.
>
> And, of course, if any one or more elements are not proved beyond reasonable doubt then the defendant is entitled to be acquitted of that charge. All elements must be proved beyond reasonable doubt before conviction can take place.
>
> Now, in so far as the element without reasonable cause is concerned, the precise wording of the threat is relevant to, and perhaps determinative of, the issue of reasonable cause. You are entitled to take in to account the wording of the threat itself. You may well take the view that there cannot be a reasonable cause when the threat of injury would involve the commission of a criminal offence but, ultimately, that is a matter for yourselves.
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> The final element is in retaliation for the imposition of a sentence of imprisonment. Now, I direct you, as a matter of law, that the imposition of a sentence of imprisonment was a lawful act by a judicial officer, as a judicial officer. Retaliation implies a causal connection between the lawful act of the judicial officer and the threat that is made. And, in the context of these charges, retaliation might mean something like an act of revenge, or out of vengeance or reprisal, something of that nature. The element of retaliation requires you, the jury, to conduct a subjective assessment. That is, you would need to look into the mind of the defendant by reference to those surrounding circumstances and facts which you do accept, so that would include all relevant circumstances as you find them to be, including the nature of the threats themselves, the circumstances in which he found himself at the time, and you do that to determine if that element has been proved to the requisite standard."[3]

Appellant's submissions

[22] The appellant submits that, notwithstanding that defence counsel at trial did not specifically address the jury on the first element, namely "threatens to cause injury", it was incumbent upon the trial Judge to direct the jury in relation to the meaning of "threatens". Although the trial Judge directed the jury that threaten was a common word, meaning to utter a threat against somebody, and that it was a question for the jury whether it accepted beyond reasonable doubt that the comments made by the defendant in respect of each count constituted a threat, these directions did not apprise the jury of the issues to be considered in that determination.

[23] It was incumbent upon the trial Judge to direct the jury that to threaten, the relevant communication must convey, objectively, to the hypothetical reasonable person in

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3 AB1-29/40 – AB1-30/33.

the position of the recipient that the publisher intended the words used to be taken seriously. The jury must be further directed that if it remained a reasonable possibility that the appellant was doing no more than merely unburdening his feelings or uttered the words in jest or in temper and in a context where they were not intended to be taken seriously, this element would not have been made out.

[24] The appellant further submits that the trial judge ought to have directed the jury that in determining this issue, the jury would have to consider the circumstances in which each call was made, including the tone of the calls, in order to determine whether the words were intended to be taken seriously or were mere words in temper.

[25] The respondent submits that the directions given to the jury were sufficient to apprise the jury of the elements of which the jury must be satisfied beyond reasonable doubt. In the context of this particular case, there was no obligation on the trial Judge to further direct that a threat is some sort of indication of intention to cause harm. Further, no miscarriage of justice arose as a consequence of the failure of the trial Judge to so direct.

Discussion

[26] A central issue at trial was the circumstances in which the appellant uttered the words in the conversations with his mother and grandmother. The appellant's evidence raised whether the appellant's utterances were, in fact, threats to cause injury or mere venting in his incarcerated circumstances.

[27] This central issue was not dealt with, however, on the basis that those circumstances were matters for the jury to consider in determining whether, as a matter of fact, the jury was satisfied beyond reasonable doubt that the words uttered by the appellant "threatens to cause injury". Defence counsel focused on those circumstances in the context of the jury's consideration of the element of "without reasonable cause". This focus was an error. There is no reasonable basis to conclude that it was part of a forensic decision.

[28] Not surprisingly, the trial Judge, consistent with the conduct of the trial, specifically directed the jury to consider the circumstances of the telephone conversations in respect of the elements of without reasonable cause and retaliation. As a consequence, the jury was not specifically directed to consider those circumstances when determining satisfaction beyond reasonable doubt as to the first element, namely, threatens to cause injury, in respect of each count. That was an error.

[29] Although correctly directed that it was a factual determination for them whether they accepted that each of the statements made by the appellant constituted a threat, the trial Judge ought to have specifically directed the jury of the need to consider the tone and circumstances in which the words were said by the appellant in order to determine whether the jury was satisfied beyond reasonable doubt that the particular words uttered by the appellant established the element "threaten to cause injury".

[30] It was insufficient to merely direct the jury that "threaten" means "to utter a threat against someone". The words, by their very content, may be said to constitute a threat. The issue for the jury was not whether the words constituted a threat but whether the words, as uttered by the appellant in the context of the particular

circumstances in which the appellant found himself, amounted to a threat to cause injury intended to be taken seriously, or were words said in temper.

[31] In this respect, the observations of Olsson J in *Carter v R* were apposite:

> "… in the setting of this case, it was incumbent on the trial judge to make it clear to the jury that … if it remained a reasonable possibility that, in speaking as he did, the appellant was doing no more than merely unburden his feelings … the offence was not made out".[4]

[32] In the present case, the jury ought specifically to have been directed that words, which interpreted literally would amount to a threat to cause injury, are frequently made in jest or temper and in a context where they are not to be taken seriously. The issue for the jury to determine was whether those words, in the context in which they were used, satisfied the element "threatens to cause injury".[5]

[33] That obligation arose notwithstanding the manner in which the trial was conducted by defence counsel. It was a factual issue for determination by the jury, on each count.

[34] As satisfaction of the first element of each offence was specifically in contention, and the jury were inadequately directed in relation to that aspect, there has been a material misdirection. That material misdirection related to a specific factual matter for determination by the jury.

[35] In the circumstances of this trial, the material misdirection constitutes a miscarriage of justice, notwithstanding that there was no request by defence counsel for such a direction, or further redirection. The failure to properly direct the jury in respect of that element deprived the appellant of a fair chance of acquittal.

Order

[36] I would order:

1. The appeal be allowed.
2. The convictions be set aside.
3. There be a new trial in respect of each of counts 2, 3, 5 and 6.

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4 (1994) 176 LSJS 112, 118.

5 *Jeffery v The State of Western Australia* [2009] WASCA 133 at [19].