R. v. Noël, 2001 NBCA 80 (CanLII)

Noel v. R., 2001 NBCA 80 205/2000/CA

IN THE COURT OF APPEAL OF NEW BRUNSWICK

Turnbull, Deschênes and Robertson, JJ.A.

B E T W E E N:

SERGE NOËL	Scott F. Fowler, Esq.
APPELLANT	for the Appellant
- and -	
HER MAJESTY THE QUEEN	Ronald J. LeBlanc, Esq.
RESPONDENT	for the Respondent

APPEAL FROM A DECISION OF Rideout, J.
August 22, 2000

DATE OF HEARING May 8, 2001

DATE OF DECISION July 10, 2001

REASONS FOR JUDGMENT BY Deschênes, J.A.

CONCURRED IN BY Turnbull, J.A.
and Robertson, J.A.

THE COURT

The appeal is dismissed and it is ordered that a conviction for extortion under s. 346(1.1)(b) of the ***Criminal Code*** be entered against the appellant in lieu of the conviction for "attempted extortion" entered by the trial judge. The appellant shall forthwith surrender himself to the Codiac detachment of the RCMP to serve the sentence imposed on him by the sentencing judge.

DESCHÊNES, J.A.

[1] The appellant appeals his conviction of "attempted extortion" pursuant to s. 346(1.1)(b) of the ***Criminal Code of Canada***.

[2] The grounds of appeal are as follows:

> (1) The Trial Judge erred in finding the Appellant guilty of an offence he was not charged with and that was not supported by the evidence; and
>
> (2) The Trial Judge erred in law by apparently amending the indictment.

[3] The events upon which the trial judge relied to convict the appellant essentially took place on February 17, 2000 when the appellant visited Ms. Nadine Kandalaft-Johnson and Ms. Ouellette-Johnson at their residence in Dieppe, N.B. The purpose of the visit was to discuss a drug debt owed to the appellant by Sacha Kandalaft, Ms. Ouellette-Johnson's son.

[4] After considering the evidence as a whole, the trial judge made the following findings:

> I am satisfied that there was no physical violence on the times alleged in the indictment. As mentioned earlier, there were two other incidents of physical violence but they are unrelated to this matter. However, I am also satisfied beyond a reasonable doubt that there were threats and menaces on February 17th 2000 in Dieppe, New Brunswick. I am satisfied that Serge Noël made these -- those threats and menaces on that day. I believe Nadine Kandalaft-Johnson and Ms. Ouellette-Johnson when they say they felt threatened and that Serge Noël did say in effect you don't know who you are dealing with and he was going to punch Sacha's lights out. He swore this on his mother's heart. This could only be for the purpose of collecting the money.

> I am satisfied that other incidents which occurred against Nicole Ouellette-Johnson at or near the Town of Dieppe during the time period in question also constitute threats or menaces. And I'm referring to the phone calls and the other visits. The problem I face in this matter is the issue raised by Defense counsel concerning the wording of the indictment. No money exchanged hands on these occasions of threat or menace. So, Serge Noël did not extort anything on those occasions. Therefore, according to Defense counsel, the Crown did not prove its case. As alluded to earlier, I do not believe the Crown has proved its case beyond a reasonable doubt with respect to Sacha Kandalaft. I do not believe many of the things that he had to say and I therefore can't convict because I cannot -- I still have reasonable doubts with respect to the charges relating to Sacha Kandalaft.
>
> However, based on the authorities and on the evidence, I believe the Crown has proved beyond a reasonable doubt that Serge Noël attempted to extort money from Ms. Nicole Ouellette- Johnson. The question mark is whether the indictment and the Criminal Code permits such a finding of [guilt]. Section 346(1) refers to induces or attempts to induce. And Section 660 of the Code says, "Where the complete commission of an offence charge is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt. I believe that that is the case.
>
> Mr. Noël, would you please stand?
>
> Based on all of the evidence I have heard, I am satisfied beyond a reasonable doubt that you are guilty of attempted extortion, contrary to Section 346(1.1)(b) as against Ms. Ouellette-Johnson.

[5] The trial judge concluded that the appellant had made threats to use violence against Ms. Ouellette-Johnson's son, Sacha Kandalaft, on February 17th, 2000 in Dieppe, New Brunswick. He also concluded that such threats had been made for the purpose of collecting a drug debt owed by her son to the appellant and that the appellant's intent was to obtain payment of the drug debt from Ms. Ouellette-Johnson.

[6] In my view, there was ample evidence to support the findings of fact just recited and this Court ought not to interfere. There was no evidence, however, that any money had exchanged hands on or after February 17th, 2000 as a result of the threats of violence made on that date.

[7] Considering that the indictment alleges that the appellant did induce Sacha and Ms. Ouellette-Johnson by violence and threats of violence to pay the appellant the sum of $4,000, the trial judge had to deal with the appellant's argument that the respondent Crown had not proved its case as the appellant did not extort anything on that occasion. The trial judge concluded that the appellant had "attempted to extort" money from Ms. Ouellette-Johnson and after referring to sections 346 and 660 of the ***Criminal Code***, found the appellant guilty of "attempted extortion" contrary to section 346 (1.1)(b).

Analysis and Decision

[8] Sections 346 and 660 of the ***Criminal Code*** read as follows:

> 346.(1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.
>
> (1.1) Every person who commits extortion is guilty of an indictable offence and liable
>
> (*a*) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
>
> (*b*) in any other case, to imprisonment for life.
>
> ...
>
> 660. Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt.

[9] As can be seen, the offence of extortion under section 346 can be made out if anyone induces or attempts to induce. In other words, the trial judge could have found the appellant guilty of extortion under s. 346 of the ***Code*** despite the fact that neither Ms. Ouellette-Johnson nor her son Sacha had paid any money as a result of the threat of violence made on February 17, 2000. In that context, the conclusion by the trial judge that the appellant was guilty of "attempted extortion" under s. 346 was merely a reflection of his conclusion that the appellant had attempted to induce payment of the drug debt with no result. In my view, there was no need for the trial judge to refer to s.660 of the ***Code*** to find the appellant guilty.

[10] In the Supreme Court of Canada case of ***R. v. Natarelli,*** 1967 CanLII 11 (S.C.C.), [1967] S.C.R. 539 at pages 545-46, Justice Cartwright, writing on behalf of a unanimous Court, discusses the essential elements of the offense of extortion under section 291 (now, in substance, section 346) of the ***Code*** as follows:

> When it is proved that threats have been made for the making of which there could be no justification or excuse, that the threats were made with intent to gain something and were calculated to induce the person threatened to do something, the commission of the crime defined in s. 291 is established, and it is unnecessary to inquire whether the person making the threats had a lawful right to the thing demanded or entertained an honest belief that he had such a right; that inquiry would be necessary only if the threats were such that there could be reasonable justification or excuse for making them.
>
> Speaking generally, the essential ingredients of an offence under s. 291

> are, (i) that the accused has used threats, (ii) that he has done so with the intention of obtaining something by the use of threats; (whatever meaning be given to the word "extort" the word "gain" as used in the section is simply the equivalent of "obtain") and, (iii) that either the use of the threats or the making of the demand for the thing sought to be obtained was without reasonable justification or excuse; (the question on this aspect of the matter is not whether one item in the accused's course of conduct, if considered in isolation, might be said to be justifiable or excusable but rather whether his course of conduct considered in its entirety was without justification or excuse).

[11] In ***R. v. Davis (G.N.)*** reflex, (1998), 159 Nfld. & P.E.I. R., 273, affirmed by the Supreme Court of Canada at 1999 CanLII 638 (S.C.C.), [1999] 3 S.C.R 759, the following comments at para. 52 are apposite:

> The question that is left, therefore, is whether, as a matter of law, on the evidence of P.V.B., which was properly accepted by the trial judge, there was a basis for concluding that the offence of extortion had been established. Subsection 346(1) of the **Criminal Code** provides:
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> ...
>
> It is to be noted that the offence of extortion includes within it the notion of an attempt. It essentially involves four elements: (i) a threat (no accusations, menaces or violence are involved in this case); (ii) an intent to obtain "anything" by means of the threat; (iii) an inducement or attempted inducement; and (iv) the absence of reasonable justification or excuse for the use of the threat and the making of the inducement.

[12] Finally, in ***R. v. Perera*** (1991), 5 B.C.A.C. 302; [1991] B.C.J. No. 2999, online: QL (BCJ), the issue raised by the appellant in this case is squarely dealt with. In that case, the accused was indicted on a charge that he, without reasonable justification or excuse and with intent to obtain money by threats, did induce the complainant to pay money to the accused. The complainant had responded to the threats by going to the police who subsequently taped incriminating phone calls and then arrested the accused. As in this case, the argument was advanced that the essential elements of the indictment had not been proved as there was, in fact, no inducement as alleged in the indictment as the money was never paid. After having referred to section 346 of the ***Criminal Code***, the British Columbia Court of Appeal stated:

> For convenience I will deal with those issues in the order in which I have set them out. The first issue was stated in these words:
>
> 1. THAT the Appellant did not "induce" the victim to pay $4000. to him and/or that no monies were paid to him in fact.
>
> In order to consider this issue it is necessary to look at the specific terms of the section of the Criminal Code under which the appellant was charged. It is s. 346:

...

The argument that was made by the appellant in relation to this ground of appeal was that no act of the appellant "induced" any conduct of the complainant. She went immediately to the police and thereafter the conduct was as suggested by the police. In particular, the parting with the money orders was not induced by the appellant.

Secondly, it was said that an amount of money was specified in the indictment, though that is a particularization of the terms of the section, and that the money orders used were not genuine money orders and so the terms of the indictment in relation to the payment of money were not proven.

In response to these arguments counsel for the Crown said this: First, that it was money that was paid; Second, that the indictment could be amended with respect to whether it was money or not; Third, that in any event it was an attempt to induce the payment of that amount of money. In relation to the attempt point, Crown Counsel argued that there is power to convict of an attempt to commit the offence charged without any amendment to the indictment, and, as a second aspect of the argument under attempt, that there was the power to amend the indictment to specify the attempt and so to correspond to the evidence.

The section of the *Criminal Code* on extortion, s. 346 is one of the very few sections in the *Code* which makes an attempt to commit the offence an offence in itself. The attempt is itself specified in the section. Other examples are uttering in s. 368 and a way of committing assault in s. 261 (1)(b).

Counsel for the Crown referred to sections which he suggested the Court might consider relevant to his arguments. He referred particularly to s. 24(1), s. 660, s. 662(1), s. 686(1)(b)(i), and s. 683(l)(g). My brother Mr. Justice Toy referred also to s. 463(b).

In my opinion, it is not necessary to set out and analyze the relevance of those sections, though they all indicate a pattern which permits some procedural flexibility in the interests of justice so long as there is no prejudice to the accused.

In this case I rely on s. 683(1)(g). It is a comparatively new section and there is no reason to trammel it with pre-existing jurisprudence that it was intended to overcome. It specifically gives power to the Court of Appeal to amend an indictment unless the Court is of the opinion that the accused has been misled or prejudiced in his defence or in his appeal. The specific amendment that I would make to the indictment is that I would add the words "attempt to" before "induce". In my opinion, in every criminal charge the accused must understand that not only the offence specified in the count requires a defence but any attempt to commit the offence as specified in the charge, if it is proven to have been coupled with acts to carry out the commission of the offence, puts the accused in Jeopardy on the very same count in relation to a conviction for an attempt.

In my opinion, in those circumstances it cannot be said that there was any misleading of the appellant or any prejudice to him in his defence through making the amendment that I have set out to the indictment.

[13] Returning to the case under appeal, the appellant in

his supplemental submission relied upon ***R. v. Clemens Blair Ketchen*** (1986), 16 W.C.B. 344. The accused had been charged with extortion and was alleged to have induced one Mr. Bovey by threats of death to pay a sum of $250.00 out of a total amount due of $1,250.00 but the evidence disclosed only an attempt to do so. Mr. Bovey and the accused were involved in a motor vehicle accident while Mr. Bovey was impaired. They agreed on what the trial judge considered inflated damages and that the incident would not be reported to the police. The accused received $250.00 at the scene and some time after having made the first payment, the accused took him to the back of his vehicle, opened the trunk and showed Mr. Bovey the stock of a gun and threatened to kill him if the balance owed was not paid as agreed. Another threat was made before the second payment became due but Mr. Bovey called the police and a second payment was never made.

[14] The indictment alleged that the accused, "with intent to extort the sum of $1,250.00 in monies more or less, did induce Peter Bovey by threats of death to pay the said Clemens Blair Ketchen the sum of $250.00." The trial judge found that the evidence simply did not establish, as alleged in the indictment, that the accused had induced payment of the $250.00 by threats. On the contrary, the evidence clearly established that Mr. Bovey had paid the first installment of $250.00 to the accused well before the accused issued the threat. The trial judge then commented:

> It was submitted by the Crown Attorney that it was open to me, on the basis of the evidence, to find, applying Section 587 of the Criminal Code, that the commission of the offence charged has not been proved, but that the evidence established an attempt to commit the offence. It is, therefore, submitted that Mr. Ketchen should be convicted of the offence of attempting to extort the money from Mr. Bovey. In my view, because of the unique wording of Section 305(1), this position is not available to the Crown. It is to be observed that Section 305(1) contains language which provides for the commission of the offence of extortion in alternative ways. I am referring to the words "induces or attempts to induce any person." It was open to the Crown to charge Mr. Ketchen with attempting to induce Mr. Bovey to make certain payments by way of certain threats. However, the Crown elected not to do that. In my view, therefore, because of this unique wording to Section 305(1), even if the evidence were to support an attempt, it would not be open for the Court to convict.

[15] In my view, ***Ketchen*** is distinguishable from this case mainly because there was simply no evidence in ***Ketchen*** to support a finding of an attempt to induce Mr. Bovey by the use of a threat to pay over the first installment of $250.00. In addition, the indictment specifically alleged that the appellant had induced Mr. Bovey by threats of death to pay the appellant the sum of $250.00 out of the total amount due and the case had obviously been defended on the basis of what the trial judge referred to as an "essential averment in the indictment".

[16] In the case argued before us, there was ample evidence to support the trial judge's conclusion that the appellant attempted to induce Ms. Ouellette-Johnson to

pay her son's drug debt by threatening to cause him bodily harm and the

indictment was drafted in a manner which could not prejudice the accused in the preparation of his defense for the reasons mentioned in ***Perera***. Under such circumstances, the commission of the crime under s. 346 is established and resorting to s. 660 of the ***Criminal Code*** is not an option as the offence of extortion is complete.

[17] In my view, the trial judge could and should have amended the indictment to add the words "attempt to" before "induce" in order to have it conform to the evidence upon which he relied to convict the appellant under s.346 (1.1)(b). This Court has the power to amend the indictment under s.683(1)(g) of the ***Criminal Code*** where it considers it in the interest of justice unless it is of the opinion that the accused has been misled or prejudiced in his defence or appeal. In my view, it is in the interest of justice to do so in this case and such an amendment does not prejudice or mislead the accused for the reasons advanced in ***Perera.*** The indictment is amended to add the words "attempt to" before the word "induce".

[18] For these reasons, I would dismiss the appeal and order that a conviction for extortion under s. 346(1.1)(b) of the ***Criminal Code*** be entered against the appellant in lieu of the conviction for "attempted extortion" entered by the trial judge.

[19] The appellant shall forthwith surrender himself to the Codiac detachment of the RCMP to serve the sentence imposed on him by the sentencing judge.

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ALEXANDRE DESCHÊNES, J.A.

WE CONCUR:

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WALLACE S. TURNBULL, J.A.

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JOSEPH T. ROBERTSON, J.A.