

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* O’Brien, 2013 SCC 2, [2013] 1 S.C.R. 7 | **Date:** 20130117  **Docket:** 34694 |

**Between:**

**Her Majesty The Queen**

Appellant

and

**Kelly Joseph O’Brien**

Respondent

**Coram:** McLachlin C.J. and Fish, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 15)  **Dissenting Reasons:**  (paras. 16 to 26) | Fish J. (Cromwell, Moldaver and Wagner JJ. concurring)  Rothstein J. (McLachlin C.J. and Abella J. concurring) |

R. *v.* O’Brien, 2013 SCC 2, [2013] 1 S.C.R. 7

Her Majesty The Queen Appellant

v.

Kelly Joseph O’Brien Respondent

**Indexed as: R. *v.* O’Brien**

2013 SCC 2

File No.: 34694.

2012:  December 6; 2013:  January 17.

Present: McLachlin C.J. and Fish, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

on appeal from the court of appeal for manitoba

*Criminal law — Offences — Uttering threats — Elements of offence — Mens rea — Respondent repeatedly telling ex‑girlfriend that he would kill her — Ex‑girlfriend testifying that words uttered by accused did not intimidate her or cause her fear as accused frequently talked in that manner — Whether trial judge erred in law in determining that accused did not have requisite mens rea — Criminal Code, R.S.C. 1985, c. C‑46, s. 264.1(1)(a).*

While the accused was incarcerated, he had a telephone conversation with his ex‑girlfriend during which he repeatedly told her that he would kill her upon his release if she proceeded with her planned abortion of their child. The accused was charged with uttering threats. At trial, the ex‑girlfriend testified that the words uttered by the accused had not intimidated her or caused her fear as the accused frequently talked in that manner. The accused was acquitted, the trial judge having a reasonable doubt whether the accused intended his words to intimidate or be taken seriously. The Court of Appeal dismissed the Crown’s appeal.

*Held* (McLachlin C.J. and Abella and Rothstein JJ. dissenting): The appeal should be dismissed.

*Per* Fish, Cromwell, Moldaver and Wagner JJ.: It is an essential element of the offence under s. 264.1(1)(*a*) of the *Criminal Code* that the accused intended his or her words to intimidate or to be taken seriously. The trial judge properly considered the words uttered in the context of the evidence of the recipient of the threats and concluded that the evidence left her with a reasonable doubt as to whether the accused had the requisite intent. There is no basis on which to conclude that the trial judge committed any error of law in concluding as she did.

*Per* McLachlin C.J. and Abella and Rothstein JJ. (dissenting): The trial judge erred in making the perception of the recipient of the threat the determinative factor in the assessment of the accused’s intent. The nature of the relationship between the accused and the recipient of a threat forms part of the circumstances surrounding the offence. However, whether the recipient of a threat takes that threat seriously is not an element of the *mens rea* of the accused.

**Cases Cited**

By Fish J.

**Discussed:** *R. v. Clemente*, [1994] 2 S.C.R. 758; *R. v. McCraw*, [1991] 3 S.C.R. 72.

By Rothstein J. (dissenting)

*R. v. Clemente*, [1994] 2 S.C.R. 758; *R. v. McCraw*, [1991] 3 S.C.R. 72; *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 264.1(1), 693(1)(*a*).

APPEAL from a judgment of the Manitoba Court of Appeal (Steel, Beard and MacInnes JJ.A.), 2012 MBCA 6, 275 Man. R. (2d) 144, 538 W.A.C. 144, 280 C.C.C. (3d) 481, [2012] 5 W.W.R. 265, [2012] M.J. No. 28 (QL), 2012 CarswellMan 25, affirming the acquittal of the accused. Appeal dismissed, McLachlin C.J. and Abella and Rothstein JJ. dissenting.

*Rekha Malaviya* and *Amiram Kotler*, for the appellant.

*Michael P. Cook* and *Marie‑France Major*, for the respondent.

The judgment of Fish, Cromwell, Moldaver and Wagner JJ. was delivered by

I

1. Fish J. — This appeal from a judgment of the Manitoba Court of Appeal comes to us as of right, pursuant to s. 693(1)(*a*) of the *Criminal Code*.
2. In virtue of that provision, the Attorney General may appeal to this Court “on any question of law on which a judge of the court of appeal dissents”. Here, the question is whether the trial judge, in acquitting the respondent Kelly Joseph O’Brien, erred in law as to the *mens rea* of the offence with which he was charged. I agree with the majority in the Court of Appeal that she did not (2012 MBCA 6, 275 Man. R. (2d) 144).
3. I would therefore dismiss the appeal.

II

1. The respondent was charged with uttering a threat to cause death or bodily harm to another person, contrary to s. 264.1(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46. He was charged as well, in a separate count, with threatening to damage that person’s property, contrary to s. 264.1(1)(*b*).
2. In her brief reasons for judgment, delivered orally, the trial judge held ― correctly, in my view ― that the *actus reus* of the offence created by s. 264.1(1)(*a*) is “the actual speaking or uttering of the threats of death or serious bodily harm”. And, again correctly, the trial judge held that the *mens rea* “is that the words are meant [to convey] a threat. In other words they are meant to intimidate”.
3. This understanding of the essential elements of a charge under s. 264.1(1)(*a*) conforms fully with the governing decisions of this Court.
4. Speaking for the Court in *R. v. Clemente*, [1994] 2 S.C.R. 758, at p. 763, Cory J. stated:

Under the present section the *actus reus* of the offence is the uttering of threats of death or serious bodily harm. The *mens rea* is that the words be spoken or written as a threat to cause death or serious bodily harm; that is, they were meant to intimidate or to be taken seriously. [Emphasis deleted.]

See, to the same effect, *R. v. McCraw*, [1991] 3 S.C.R. 72, at p. 82.

1. Moreover, before rendering judgment, the trial judge took care to recess the proceedings for the express purpose of reviewing the decision of this Court in *Clemente*. In her reasons for judgment, as I have already mentioned, she then proceeded to set out her understanding of the law in full conformity with that decision.

III

1. At no point in her reasons did the trial judge state, as the Crown contends, that she was acquitting the accused solely because the recipient of the threats did not take them seriously.
2. Rather, after setting out the law correctly, the trial judge quite properly felt bound “to consider the words [uttered by Mr. O’Brien] in the context of the evidence of [the person to whom they were directed]”. That evidence was relevant and therefore admissible for the purpose of assessing the context in which the words were spoken.
3. As Cory J. explained in *Clemente*, at p. 762:

. . . the question of whether the accused had the intent to intimidate, or that his words were meant to be taken seriously will, in the absence of any explanation by the accused, usually be determined by the words used, the context in which they were spoken, and the person to whom they were directed.

1. Manifestly, the trial judge asked herself the right question. Her answer was that the evidence left her with a reasonable doubt whether Mr. O’Brien had acted with the requisite *mens rea* of the offence with which he was charged. And she entered an acquittal for that reason.

IV

1. I agree with the Crown that it is not an essential element of the offence under s. 264.1(1)(*a*) that the recipient of the threats uttered by the accused feel intimidated by them or be shown to have taken them seriously. All that needs to be proven is that they were *intended by the accused to have that effect*.
2. Here, the trial judge was left with a reasonable doubt in that regard. Another judge might well have decided otherwise, but for the reasons given, I am not persuaded that the trial judge committed the error of law imputed to her by the Crown in concluding as she did.
3. I would therefore dismiss the appeal.

The reasons of McLachlin C.J. and Abella and Rothstein JJ. were delivered by

1. Rothstein J. (dissenting) — Kelly O’Brien was charged with two counts of uttering threats contrary to s. 264.1(1) of the *Criminal Code*,R.S.C. 1985, c. C-46, and two counts of breach of probation.
2. The charges arose as a result of statements made by Mr. O’Brien during a telephone call to his ex-girlfriend, Ms. W, while he was incarcerated. Ms. W was pregnant with his child and was planning to have an abortion because she suspected him of having had an affair with another woman. Mr. O’Brien told Ms. W that he would kill her if she went through with the abortion.
3. The *actus reus* of uttering threats has been conceded by Mr. O’Brien and is not in issue in this appeal. The only issue before this Court is whether the trial judge properly assessed the *mens rea* of the offence of uttering threats.
4. At trial, Mr. O’Brien’s counsel submitted that if “at the end of the day [the recipient of the threats] simply just didn’t feel threatened . . . just didn’t feel scared it’s my respectful submission that the offence at law has not been made out” (A.R., at p. 57). On the other hand, the Crown submitted that “in law . . . it matters not that the words were not taken seriously” (A.R., at p. 57).
5. The learned trial judge, referring to *R. v.* *Clemente*, [1994] 2 S.C.R. 758, said in the course of argument that while “the comments have to be uttered with the intent to intimidate or instill . . . fear. . . . The case also indicates that such threats have to be taken seriously” (A.R., at p. 59). The trial judge then retired to review *Clemente*.
6. After a short adjournment, she returned to the courtroom to deliver her oral reasons. In dealing with the mental element, the trial judge stated that she had a reasonable doubt about “the *mens rea* of the offence because of the evidence of Ms. [W], the fact she did not take [the threats] seriously” (A.R., at p. 4).
7. Respectfully, the trial judge’s holding misinterprets the *mens rea* of the offence of uttering threats as set out in *Clemente* and *R. v. McCraw*, [1991] 3 S.C.R. 72. The *Clemente* test asks the question: “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?” (p. 762, quotin*g McCraw*, at p. 83).
8. The trial judge did not ask herself what a reasonable person would objectively perceive. Rather, she asked herself what Ms. W perceived.  According to *Clemente*, the trial judge was required to determine whether the reasonable person would consider that the words were uttered as threats by “regard[ing] them objectively, and review[ing] them in light of the circumstances in which they were uttered, the manner in which they were spoken, and the person to whom they were addressed” (p. 763). Accordingly, the relationship between Mr. O’Brien and Ms. W is not irrelevant. It forms part of the context and circumstances surrounding the offence. However, whether the recipient of a threat takes the threat seriously is not, in and of itself, an element of the *mens rea* of the accused.
9. Here, the trial judge erred in making Ms. W’s perception the determinative factor in assessing the accused’s intent to instill fear in her and to intimidate her so that she would not have the abortion.
10. I am not unmindful of the “cautio[n] [to] appellate judges not to dissect, parse, or microscopically examine the reasons of a trial judge” (*R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at para. 11, referring to *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at pp. 203-5). However, in my respectful opinion, the error of law made by the trial judge is self-evident.
11. I would accordingly allow the appeal, enter a conviction and remit the matter to the Provincial Court of Manitoba for sentencing.

*Appeal dismissed,* McLachlin C.J. *and* Abella *and* Rothstein JJ. *dissenting.*

Solicitor for the appellant:  Attorney General of Manitoba, Winnipeg.

Solicitors for the respondent:  Smith Corona Van Dongen & Cook, Winnipeg;  Supreme Advocacy, Ottawa.