

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* McRae, 2013 SCC 68, [2013] 3 S.C.R. 931 | **Date:** 20131206  **Docket:** 34743 |

**Between:**

**Her Majesty The Queen**

Appellant

and

**Stéphane McRae**

Respondent

**Coram:** LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

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| **Joint Reasons for Judgment:**  (paras. 1 to 41) | Cromwell and Karakatsanis JJ. (LeBel, Fish, Abella, Moldaver and Wagner JJ. concurring) |

R. ***v.*** McRae, 2013 SCC 68, [2013] 3 S.C.R. 931

Her Majesty The Queen Appellant

v.

Stéphane McRae Respondent

**Indexed as:** R. ***v.*** McRae

2013 SCC 68

File No.: 34743.

2013:  May 21; 2013:  December 6.

Present: LeBel, Fish, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for quebec

*Criminal law — Offences — Uttering threats — Elements of offence — Actus reus — Mens rea — Respondent stating to fellow detainees that he would kill and/or harm Crown prosecutor, officer‑investigator and witnesses involved in his trial — Whether it is necessary to prove threats were conveyed to their subjects and/or that accused intended they be so conveyed — Whether lower courts erred in finding that elements of offence not made out — Criminal Code, R.S.C. 1985, c. C‑46, s. 264.1(1)(a).*

While the accused was detained awaiting trial, he stated to fellow detainees that he would take down the guys at the top to rearrange the face of the prosecutor and one of the witnesses because he thought that he was the one who snitched on him. The accused also stated that he had hired a private detective to find the prosecutor’s address, and asked one of the detainees to do what was necessary to find the address of the officer‑investigator. The accused further asserted that once his trial was over, he would kill the witnesses who had informed against him. The accused was acquitted of five counts of uttering threats on the basis that the *mens rea* of the offence had not been established because the words were not conveyed by the accused with the intent that they be transmitted to the subjects of the threats in an attempt to influence their actions. The Court of Appeal dismissed the Crown’s appeal.

Held: The appeal should be allowed and a new trial ordered.

The *actus reus* 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. 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. Nor must the words be directed toward a specific person; a threat against an ascertained group of people is sufficient.

The *mens rea* of the offence is made out if 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 or that the accused intended to carry out 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.

In this case, both the trial judge and the Court of Appeal erred in law in finding that the elements of the offence had not been made out. With respect to the *actus reus* of the offence, the Court of Appeal erred in concluding that the words uttered by the accused did not amount to threats because they were not conveyed to their intended recipients and they did not cause anyone to be fearful or intimidated. It is not necessary to prove that the threats were conveyed to their intended recipients or to prove that anyone was actually intimidated or made fearful as a result of the words uttered in order to make out the prohibited act of the offence. As for the *mens rea* of the offence, both the trial judge and the Court of Appeal erred in finding that in order to make out the fault element it was necessary to prove that the accused intended the words to be transmitted to their objects/recipients and specifically intended to intimidate the ultimate objects of the threats. In other words, each failed to consider the disjunctive nature of the fault element required for the offence. It would have been sufficient had the accused intended that the threats be taken seriously by those to whom the words were spoken.

The Crown has met its burden to demonstrate that the trial judge’s legal error with regard to the fault element might reasonably be thought, in the circumstances of this case to have had a material bearing on the acquittal. Indeed, had the trial judge not erred as to that element of the offence, he would have had to consider whether the accused intended his threatening words to be taken seriously and the evidence of two witnesses provided some basis to conclude that he did. Accordingly, the acquittals should be set aside. However, this is not the clearest of cases where this Court’s power to enter a conviction should be exercised. A new trial is therefore required to determine whether the charges against the accused will be proved beyond a reasonable doubt.

**Cases Cited**

**Referred to:** *R. v. Comeau*, 2010 QCCQ 20939 (CanLII); *R. v. McCraw*, [1991] 3 S.C.R. 72; *R. v. Clemente*, [1994] 2 S.C.R. 758; *R. v. O’Brien*, 2013 SCC 2, [2013] 1 S.C.R. 7, aff’g 2012 MBCA 6, 275 Man. R. (2d) 144; *R. v. MacDonald* (2002), 166 O.A.C. 121; *R. v. Felteau*, 2010 ONCA 821 (CanLII); *R. v. LeBlanc*, [1989] 1 S.C.R. 1583, rev’g (1988), 90 N.B.R. (2d) 63; *R. v. Rémy* (1993), 82 C.C.C. (3d) 176, leave to appeal refused, [1993] 4 S.C.R. vii; *R. v. Upson*, 2001 NSCA 89, 194 N.S.R. (2d) 87; *R. v. Batista*, 2008 ONCA 804, 62 C.R. (6th) 376; *R. v. Neve* (1993), 145 A.R. 311; *R. v. Hiscox*, 2002 BCCA 312, 167 B.C.A.C. 315; *R. v. Noble*, 2009 MBQB 98, 247 Man. R. (2d) 6, aff’d 2010 MBCA 60, 255 Man. R. (2d) 144; *R. v. Heaney*, 2013 BCCA 177 (CanLII); *R. v. Rudnicki*, [2004] R.J.Q. 2954; *R. v. Beyo* (2000), 47 O.R. (3d) 712; *R. v. Hundal*, [1993] 1 S.C.R. 867; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *Lewis v. The Queen*, [1979] 2 S.C.R. 821; *R. v. Katigbak*, 2011 SCC 48, [2011] 3 S.C.R. 326; *R. v. Audet*, [1996] 2 S.C.R. 171.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 264.1(1)(*a*), 686(4).

APPEAL from a judgment of the Quebec Court of Appeal (Rochette and Giroux JJ.A. and Viens J. (*ad hoc*)), 2012 QCCA 236, [2012] J.Q. no 757 (QL), 2012 CarswellQue 835, SOQUIJ AZ‑50828082, upholding the accused’s acquittals. Appeal allowed.

Sébastien Bergeron‑Guyard and Thomas Jacques, for the appellant.

Stéphanie Carrier, for the respondent.

The judgment of the Court was delivered by

Cromwell and Karakatsanis JJ. —

I. Introduction

1. This appeal provides an opportunity to consolidate and clarify the elements of the offence of uttering threats. In particular, it raises two issues:
2. In order for the offence to be made out, is it necessary to prove that the threats were conveyed to their subjects and/or that the accused intended that they be so conveyed?
3. If the trial judge erred in this respect, has the Crown discharged its burden to have the acquittals entered at trial set aside?
4. We conclude that the offence does not require proof that the accused’s threats were conveyed to their subject or that someone was actually intimidated by them. Further, the Crown need not establish that the accused intended that the threats be conveyed to their subject or to intimidate anyone. In our view, and with respect to the contrary opinion of the Court of Appeal, the trial judge made legal errors in his analysis of the offence and the Crown has met its burden of showing that these errors might reasonably be thought to have had a material bearing on his decision to acquit. We would, therefore, allow the appeal and order a new trial.

II. Facts and Proceedings

A. *Overview of the Facts*

1. In June of 2009, the respondent Stéphane McRae was detained awaiting trial on several charges relating to trafficking in narcotics. For a time, Louis-Joseph Comeau, Édouard Collin, and Patrick Cloutier were also detained at the same detention centre. The respondent introduced Mr. Comeau to Mr. Cloutier as his [translation] “contract killer”. At times, Mr. Cloutier passed on messages from Mr. Comeau to the respondent.
2. Based on the statements of Édouard Collin and Patrick Cloutier, various charges of uttering threats were laid against the respondent and Mr. Comeau. Mr. Comeau was convicted of uttering threats in a separate trial (*R. v. Comeau*, 2010 QCCQ 20939 (CanLII)). At issue on this appeal are five counts of knowingly conveying to Patrick Cloutier and Édouard Collin, at various times between June 1, 2009, and September 5, 2009, threats to cause death or bodily harm, contrary to s. 264.1(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46, to: the Crown prosecutor; an officer-investigator; and four witnesses involved in the case being brought against the respondent and Mr. Comeau for trafficking narcotics.
3. At trial, it was established, among other things, that the respondent had: (1) told Mr. Collin that he would take down the guys at the top to rearrange the face of the Crown prosecutor and one of the witnesses because he thought that he was the one who snitched on him; (2) informed Mr. Cloutier that he had hired a private detective to find the Crown prosecutor’s address; (3) asked Mr. Cloutier to do what was necessary to find the address of the officer-investigator; and (4) told Mr. Cloutier that once his trial was over he would kill the witnesses who had informed against him (2010 QCCQ 9043 (CanLII), at para. 6).

B. *Court of Québec, 2010 QCCQ 9043 (Decoste J.)*

1. The respondent did not testify at trial (appeal decision, 2012 QCCA 236 (CanLII), at para. 18). The trial judge found that Messrs. Cloutier and Collin were credible witnesses (para. 12), but held that the fault element (the *mens rea*) of the offences had not been established because the words were not conveyed by the respondent with the intent that they would be transmitted to the subjects of the threats in an attempt to influence their actions (paras. 14-15). He found that the respondent rather intended to seek revenge once the trial was done, and that he had uttered the words out of anger and frustration (paras. 14 and 16).

C. *Court of Appeal, 2012 QCCA 236 (Rochette and Giroux JJ.A. and Viens J. (ad hoc))*

1. The Court of Appeal confirmed the trial judge’s decision with regard to the fault element (paras. 16-18), and added that the prohibited act (the *actus reus*)had not been established because the words were uttered in a “closed circle” ― i.e. with an expectation of confidentiality ― and thus they could not instill fear in the subjects of the threats (paras. 8-9). The court confirmed the trial judge’s finding that the respondent acted out of frustration and with an intention to seek revenge rather than an intention to intimidate (para. 16).

III. Analysis

A. *The Applicable Law*

1. The respondent is charged with the offence of uttering threats, provided for in s. 264.1(1)(*a*) of the *Criminal Code*:

**264.1** (1) Every 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;

1. This Court has previously considered this offence in *R. v. McCraw*, [1991] 3 S.C.R. 72, *R. v. Clemente*, [1994] 2 S.C.R. 758, and more recently in *R. v. O’Brien*, 2013 SCC 2, [2013] 1 S.C.R. 7. The elements of the offence include: (1) the utterance or conveyance of a threat to cause death or bodily harm; and (2) an intent to threaten. We review here the law relating to each element.

(1) The Prohibited Act (*Actus Reus*)

1. 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]

1. 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*) (see, e.g., *O’Brien*, at paras. 10-12). 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”).
2. For example, in *R. v. Felteau*, 2010 ONCA 821 (CanLII), the accused had told a mental health care worker that he was going to follow Ms. G, his former probation officer, and “assault” her (paras. 1-2). The trial judge found that the words did not constitute a threat because the threat must be of death or bodily harm and the accused’s reference to “assault” did not necessarily include bodily harm (para. 3). The Court of Appeal for Ontario found that the trial judge had erred in looking at the word “assault” in isolation from the circumstances (para. 7). The court held that the factors relevant to the determination of the meaning of the words included the facts that: the accused was fixated upon Ms. G and had very recently been convicted of harassing her; he was angry with Ms. G when he uttered the words; he blamed her for his arrest and detention; and he was mentally unstable, had been consuming cocaine and had a known history of serious violence directed at women (para. 8). The Court of Appeal concluded that the accused’s words, viewed in these circumstances, would convey a threat of bodily harm to a reasonable person (para. 9).
3. 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)).
4. The reasonable person standard must be applied in light of the particular circumstances of a case. As the Court of Appeal for Ontario explained in *R. v. Batista*, 2008 ONCA 804, 62 C.R. (6th) 376:

An ordinary reasonable person considering an alleged threat objectively would be one informed of all the circumstances relevant to his or her determination. The characteristics of a reasonable person were considered by the Supreme Court of Canada in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.), in the context of the test for bias. In that case, L’Heureux-Dubé and McLachlin JJ., at para. 36, described such a person as a:

reasonable, informed, practical and realistic person who considers the matter in some detail. . . . The person postulated is not a “very sensitive or scrupulous” person, but rather a right-minded person familiar with the circumstances of the case.

Similarly, in *R. v. Collins*, [1987] 1 S.C.R. 265 (S.C.C.), at p. 282, in the context of the test for bringing the administration of justice into disrepute, Lamer J. for the majority describes a reasonable person as “dispassionate and fully apprised of the circumstances of the case”: see also *R. v. Burlingham*, [1995] 2 S.C.R. 206 (S.C.C.), at para. 71.

It follows 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. [Emphasis added; paras. 23-24.]

1. Thus, while testimony from persons who heard or were the object of the threat may be considered in applying this objective test, the question in relation to the prohibited act is not whether people in fact felt threatened. As the Court of Appeal for Ontario put it in *Batista*, witness opinions are relevant to the application of the reasonable person standard; however, they are not determinative, given that they amount to personal opinions and “d[o] not necessarily satisfy the requirements of the legal test” (para. 26).
2. To conclude on this point, 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.

(2) The Fault Element (*Mens Rea*)

1. 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).
2. It is not necessary to prove that the threat was uttered with the intent that it be conveyed to its intended recipient (*Clemente*, at p. 763) or that the accused intended to carry out the threat (*McCraw*, at p. 82). 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 (see, e.g., *Clemente*, at p. 763; *O’Brien*, at para. 7; *R. v. Neve* (1993), 145 A.R. 311 (C.A.); *R. v. Hiscox*, 2002 BCCA 312, 167 B.C.A.C. 315, at paras. 18 and 20; *R. v. Noble*, 2009 MBQB 98, 247 Man. R. (2d) 6, at paras. 28 and 32-35, aff’d 2010 MBCA 60, 255 Man. R. (2d) 144, at paras. 16-17; *R. v. Heaney*, 2013 BCCA 177 (CanLII), at para. 40; *R. v. Rudnicki*, [2004] R.J.Q. 2954 (C.A.), at para. 41; *R. v. Beyo* (2000), 47 O.R. (3d) 712 (C.A.), at para. 46).
3. 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 (see, e.g., *McCraw*, at p. 82). 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 added: p. 883.]

1. *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 (2012 MBCA 6, 275 Man. R. (2d) 144, at para. 34). The perception of the alleged victim was not directly in issue, but was relevant evidence of the accused’s intent.
2. Similarly, in *Noble*, the court had to determine if the accused intended to be taken seriously when he uttered the words “I guess we know whose house is going to burn down”, immediately followed by “just kidding” and laughter (trial decision, at para. 1). The accused had uttered the words to a sheriff’s officer as he was returning to prison from court after having been sentenced for threatening to kill the Crown attorney who had successfully prosecuted him for robbery. The trial judge found that in spite of the remark’s off-the-cuff nature and the absence of any indication that the accused was angry or upset when he uttered the words, when viewed in the larger context, the accused was aware that his words, which were very specific, would be taken seriously as a threat against that same Crown attorney (paras. 33-35). After the first time the accused had threatened the Crown attorney, she had been the victim of an attempted home invasion. Although it was not alleged that the accused was involved, he told the media that the Crown attorney had gotten what she deserved. After she was made aware of the accused’s reference to a house burning, the Crown attorney took the comment seriously and was very frightened by it. As a result, she and her partner sold their house (trial decision, at paras. 2-19). In addition to the Crown attorney’s reaction to the threats, the fact that the accused knew that criminal sanctions flowed from threatening language, as a result of having just been sentenced to two years’ imprisonment for uttering threats, was also an important factor with regard to the fault element in this case (para. 34). The trial judge concluded that the words might “have been blurted out on the spur of the moment, or driven by bravado, but given all the circumstances . . . the evidence demonstrate[d] that the accused was aware that it would be taken seriously” (para. 35).
3. The Court of Appeal for Manitoba confirmed the factual findings of the trial judge, specifically the contextual analysis she undertook with regard to the fault element (*Noble*, at para. 17).
4. To sum up, the fault element of the offence is made out if 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.

B. *First Issue:* *Is the Confidential Nature of a Threat Relevant to the Analysis?*

1. In our view, both the trial judge and the Court of Appeal erred in law in finding that the elements of the offence had not been made out because the threats were conveyed in a so-called “closed circle”. Even if it is true that the respondent could have expected his words to remain confidential, a conclusion we would not necessarily be ready to confirm, this does not preclude a finding that both the prohibited act and the fault element of the offence had been made out. This is so because, as explained above, it is not necessary to prove that the threats were conveyed to their intended recipients (prohibited act) or that the accused intended the threats to be so conveyed (fault element). Further, it is not necessary to prove that anyone was actually intimidated by the threats (prohibited act) or that the accused specifically intended to intimidate anyone (fault element). The concept of the “closed circle” is therefore legally wrong. Threats are tools of intimidation and violence. As such, in any circumstance where threats are spoken with the intent that they be taken seriously, even to third parties, the elements of the offence will be made out. As we explain below, the trial judge erred in both respects with regard to the fault element, and the Court of Appeal erred in both respects with regard to the prohibited act and the fault element.

(1) The Prohibited Act

1. The trial judge did not specifically address the prohibited act of the offence. For its part, the Court of Appeal found that the “words used by the respondent, considered objectively, may raise serious concerns that acts likely to cause death or bodily harm will occur at the respondent’s behest” and that this was “in fact what the respondent’s fellow inmates understood him to mean” (para. 8). However, the court found that “when these words and comments are put in context”, they did not constitute a threat (para. 8). The court described that context as follows:

The comments transmitted or conveyed by the respondent to three fellow inmates cannot be likened to a “tool of intimidation which is designed to instill a sense of fear in its recipient”; rather, it is on par with a threatening letter that is never sent in the mail. These conversations took place in a closed circle. The mere expression of a thought is not enough to attribute a criminal act. As the trial judge rightly pointed out, there is no “recipient” here. The comments made are [translation] “an expression of a criminal’s frustration and outrage at feeling caught by the judicial system”. The element of fear instilled in a victim is therefore absent. [para. 9]

1. In sum, the Court of Appeal concluded that the words did not amount to threats because they were not conveyed to their intended recipients and they did not cause anyone to be fearful or intimidated. As we see it, in light of the legal principles reviewed above, the court erred in this conclusion: in our view, it is not necessary to prove that the threats were conveyed to their intended recipients or to prove that anyone was actually intimidated or made fearful as a result of the words uttered in order to make out the prohibited act of the offence.

(2) The Fault Element

1. The trial judge’s reasons only addressed the fault element of the offence. He held that the fault element had not been made out because [translation] “the evidence d[id] not establish that the words used by the accused when addressing Collin and Cloutier were intended to reach the ears of the possible or potential witnesses” [[1]](#footnote-1) (para. 14). He found that it would have been different if the respondent intended to convey a message to the potential informers in order to dissuade them from testifying (para. 14). Similarly, he found that the respondent could not have imagined that if Mr. Cloutier and Mr. Collin conveyed the words to the Crown prosecutor or the officer-investigator that their attitude might change (para. 15). Thus, in the trial judge’s opinion, the respondent did not have the necessary intent to utter threats towards any of the complainants.
2. The Court of Appeal for Quebec confirmed the trial judge’s findings that the words “were [not] intended to reach the ears of the possible or potential witnesses” and that Mr. Cloutier and Mr. Collin were not “supposed to, either implicitly or explicitly, convey this message to the persons concerned” (para. 16). In short, the fault element was not made out because there was no intent to intimidate (para. 16). The court concluded, with regard to the fault element:

The respondent did not present any evidence and he did not testify. It is difficult to know what he was thinking. Did he believe that his comments would be reported and could scare the persons contemplated in his plans? The judge rejected this theory, deeming it to be neither likely nor logical. It may be that the judge speculated on this matter, but the fact remains that the burden of proving wrongful intent ― that is, the respondent’s intent to attempt to intimidate ― rested with the Crown, who failed to discharge it. [Emphasis added; para. 18.]

1. In our view, both the trial judge and the Court of Appeal erred in finding that in order to make out the fault element it was necessary to prove that the accused intended the words to be transmitted to their objects/recipients and specifically intended to intimidate the ultimate objects of the threats. It would have been sufficient had the respondent intended that the threats be taken seriously by those to whom the words were spoken.

C. *Second Issue:* *Should the Acquittal Be Set Aside?*

1. To succeed on appeal against an acquittal, the Crown must show that the legal error or errors of the trial judge “might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal” (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14).
2. As we explained above, the trial judge erred with regard to the fault element in finding that it was necessary to prove that the respondent intended his threats to be conveyed to the intended victims in order to intimidate them. He acquitted the respondent on the basis of a lack of intent to convey the threats and failed to consider the disjunctive nature of the fault element required for this offence: *either* the intent to intimidate, *or* the intent to be taken seriously.
3. In spite of this error of law, the trial judge made a number of findings potentially relevant to the respondent’s intent. We must therefore consider whether these findings were affected by the legal error and if not, whether they provide a legal basis for the trial judge’s decision to acquit. As we see it, the judge’s findings are inextricably linked to his legal error as to the necessary intent and do not provide a correct legal basis for the acquittals.
4. The trial judge found, with regard to the fault element, that the respondent’s intent was [translation] “to seek revenge once the trial was over because they [the witnesses] had informed on him” (para. 14). He found that the respondent’s words were “the expression of a criminal’s frustration and outrage at beingcaught by the judicial system” and that the respondent was simply “show[ing] his anger: in fact, in one case he said that he would act once his sentence was served, and in another he asked for help in finding the address of a police officer” (para. 16).
5. The role of these findings in the respondent’s acquittal is undermined by the trial judge’s legal error in relation to the required intent, specifically that he thought the intent had not been proved because the respondent did not intend that his words would be conveyed to the objects of the threats. This error caused the trial judge to fail to consider whether the respondent intended the threats to be taken seriously.
6. The trial judge found that Mr. Cloutier and Mr. Collin were credible witnesses and that they were both of the opinion that the threats were serious and they feared that murders would be committed (para. 12). Had the trial judge not erred as to the fault element of this offence, he would have had to consider whether the accused intended his threatening words to be taken seriously and the evidence of Mr. Cloutier and Mr. Collin provided some basis to conclude that he did (see *O’Brien* (S.C.C.), at paras. 10-12).
7. Furthermore, the trial judge’s finding that the words were spoken out of anger or frustration does not avoid the difficulty that he failed to consider whether the respondent intended the words to be taken seriously. The respondent’s [translation] “frustration and outrage at being caught by the judicial system” speak to his *motive* for saying what he did, and not necessarily his *intent* as to how his words should be received. As this Court noted in *Lewis v. The Queen*, [1979] 2 S.C.R. 821, at p. 831, “the mental element, the [fault element] with which the court is concerned, relates to ‘intent’, *i.e.* the exercise of a free will to use particular means to produce a particular result, rather than with ‘motive’, *i.e.* that which precedes and induces the exercise of the will”.
8. As a result, we conclude that the Crown has met its burden to demonstrate that the trial judge’s legal error “might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal” (*Graveline*, at para 14). We would therefore set aside the acquittals.
9. While the Crown asks this Court to exercise its discretion under s. 686(4) of the *Criminal Code* and enter a conviction, we are of the view that a new trial is required in this case.
10. In order to set aside an acquittal and enter a conviction, we must be satisfied that “the trial judge’s findings of fact, viewed in light of the applicable law, supported a conviction beyond a reasonable doubt” (*R. v. Katigbak*, 2011 SCC 48, [2011] 3 S.C.R. 326, at para. 50). This is a power that should be used only in the clearest of cases (*R. v. Audet*, [1996] 2 S.C.R. 171, at para 48).
11. As noted above, the trial judge made no findings with regard to the respondent’s intent to be taken seriously. The trial judge’s finding that the respondent said the words out of anger or frustration or a desire for revenge goes to his motive for saying the words, and not necessarily his intention.  It is reasonably possible that he was motivated by anger or frustration or by the desire for revenge, and yet did not intend to be taken seriously. Questions of motive and intent are two separate inquiries and, given the trial judge’s legal errors, we cannot be certain what he would have found had he turned his mind to the correct legal question. This is not the clearest of cases. Accordingly, a new trial is required to determine whether the charges against the respondent will be proved beyond a reasonable doubt.

IV. Disposition

1. We would allow the appeal and order a new trial.

*Appeal allowed.*

Solicitor for the appellant:  Poursuites criminelles et pénales du Québec, Québec.

Solicitor for the respondent:  Stéphanie Carrier, St‑Omer, Quebec.

1. The translations are from the Court of Appeal’s decision, at para. 3. [↑](#footnote-ref-1)