
CANADA / JUDGMENT

R. v. Bergeron

2015 BCCA 177

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 177 R. v. Bergeron

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Bergeron,

2015 BCCA 177

Date: 20150427

Docket: CA040923

Between:

Regina

Respondent

And

Adrien Real Bergeron

Appellant

Before:

The Honourable Mr. Justice Saunders

The Honourable Madam Justice Tysoe

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia

dated March 1, 2013 (R. v. Bergeron, 2013 BCSC 443,

Prince George Docket 35041)

Counsel for the Appellant:

H. M. Patey

Counsel for the Respondent:

R. R. Hira, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

March 31, 2015

Place and Date of Judgment:

Vancouver, British Columbia

April 27, 2015

Written Reasons by:

The Honourable Mr. Justice Tysoe

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Harris

Summary:

The appellant appeals his conviction for intimidation of a justice system participant contrary to s. 423.1 of the Criminal Code. He argues the judge erred by applying a purely objective approach to the mens rea requirement that he used violence against a justice system participant "in order to impede him or her in the performance of his or her duties". Held: Appeal dismissed. The judge did not use an objective test only, and he considered whether the Crown had proven beyond a reasonable doubt that the appellant had the required subjective intent. The judge was entitled to draw the inference that the appellant foresaw the consequence that the justice system participant would be substantially certain to be impeded in the performance of his duties.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

- [1] In the morning of September 15, 2011, Mr. Bergeron went on a rampage in downtown Prince George. He assaulted two people, one of whom was a prosecutor, and he damaged property worth more than \$5,000.

- [2] Mr. Bergeron pleaded guilty to one count of assault, one count of aggravated assault and one count of mischief. He pleaded not guilty to one count under s. 423.1 of the Criminal Code, which makes it an offence to, among other things, use violence against a justice system participant with "the intent to provoke a state of fear in a justice system participant in order to impede him or her in the performance of his or her duties". The term "justice system participant" is defined in s. 2 of the Code to include prosecutors.
- [3] The trial judge found Mr. Bergeron guilty of the offence under s. 423.1. He appeals his conviction of this offence on the ground that the judge erred in finding he had the necessary intent.

Background

- [4] On September 14, 2011, Mr. Bergeron was accepted as a long-term resident of the Active Support Against Poverty Housing Society, a housing facility for homeless people in downtown Prince George located several blocks from the courthouse. Shortly after 8:00 a.m. on the following morning, he complained in an aggressive manner about another resident to the woman tending to the reception desk. The program manager overheard Mr. Bergeron and asked him into her office. She told him that he would be taken out of the long-term residents program if he was too aggressive. Mr. Bergeron punched the program manager on the side of her head. He then took a chair from the building and used it to break the windows on the outside of the building. These events were the subject matter of the counts of assault and mischief.
- [5] Mr. Bergeron then walked in the direction of the courthouse. He passed a parked police vehicle and smashed two of its windows with a rock. He entered the courthouse, approached the registry which was behind a metal gate as it was not yet open, and spoke in a profane and demeaning manner to the staff because he considered them to work for the police. He tried to call an elevator leading to the upper floors of the courthouse, but the doors would not open. He continued to swear at the registry staff and, when a staff member told him to watch his language, he either kicked or grabbed the metal gate protecting the registry. He left the courthouse after the sheriffs were called.
- [6] At the time Mr. Bergeron was leaving the courthouse, Alex Schmeisser was approaching it. Mr. Schmeisser worked as Crown counsel, dealing with Provincial Court matters, and he appeared for the Crown once a week in "initial appearance" court. On four occasions over the previous one and a half years, Mr. Bergeron made appearances in the courtroom when Mr. Schmeisser was in attendance, but Mr. Schmeisser was not involved in any prosecution of Mr. Bergeron other than the setting of dates.

- [7] As Mr. Schmeisser was crossing the street to the courthouse, Mr. Bergeron veered in his direction. Mr. Bergeron yelled that Mr. Schmeisser had put him in jail and that he was going to get him and going to kill him. Mr. Schmeisser raised his hands in a defensive manner and told Mr. Bergeron that he was not the person who put him in jail. Mr. Bergeron ran up to Mr. Schmeisser and punched him with a powerful blow to the left side of his face, knocking him to the ground.
- [8] Mr. Bergeron ran away but was shortly apprehended by the police. Upon his apprehension, Mr. Bergeron said words to the effect that Mr. Schmeisser deserved what he got for wrongfully putting him in jail.
- [9] As a result of the punch, Mr. Schmeisser suffered fractures of his cheekbone, orbital bone and zygomatic arch. He had surgery and will permanently have plates, screws and mesh to stabilize the broken bones in his face. He missed two and a half months of work. At the time of the trial, he was experiencing fear as a result of the attack by Mr. Bergeron, and his fear made it difficult at times to do his work.
- [10] The witnesses at the trial included workers from the Active Support Against Poverty Housing Society, police officers, court registry staff, sheriffs, Mr. Schmeisser and another prosecutor. The evidence included video recordings showing some of the events in question. Mr. Bergeron did not testify or call any other evidence.

Decision of the Trial Judge

- [11] The sole issue at trial was whether the Crown had proven beyond a reasonable doubt that Mr. Bergeron had the requisite intent (or mens rea) to commit the offence under s. 423.1. In his reasons for judgment indexed as 2013 BCSC 443, the trial judge referred to numerous authorities dealing with mens rea, including *R. v. Armstrong*, 2012 BCCA 248; *R. v. Chartrand*, [1994] 2 S.C.R. 864, 116 D.L.R. (4th) 207; *R. v. Bernard*, [1988] 2 S.C.R. 833, 45 C.C.C. (3d) 1; *R. v. Buzzanga and Durocher* (1979), 101 D.L.R. (3d) 488, 49 C.C.C. (2d) 369 (Ont. C.A.); *R. v. Cluney*, 2008 SKQB 240; *R. v. Noble*, 2009 MBQB 98; and *R. v. Treleaven*, 2012 ONSC 6930.
- [12] After describing his basic findings of fact, the judge addressed the issue of whether Mr. Bergeron had the required intention of provoking a state of fear in Mr. Schmeisser. He concluded, at para. 43, that he had no doubt Mr. Bergeron knew or foresaw that his actions would be certain or substantially certain to provoke a state of fear in Mr. Schmeisser. On appeal, Mr. Bergeron does not take issue with this conclusion.
- [13] The judge then addressed the issue of whether Mr. Bergeron provoked the state of fear in Mr. Schmeisser in order to impede him in the performance of his duties:
- [47] In the present case, the proven facts strongly support an intention to produce the prohibited consequence. The accused attacked Mr. Schmeisser because he was Crown counsel and because of the role the accused believed he played in convicting or jailing him. His threats

against and attack on Mr. Schmeisser were specifically tied to the performance of his duties as a justice system participant or at least what the accused believed them to have been. Even after his attack on Mr. Schmeisser, the accused continued to express anger and hostility towards him for performing his role as a prosecutor. The essence of his conduct was to exact revenge and punish Mr. Schmeisser for being a justice system participant and for the performance of his duties in that role. As such, the concept of deterrence is inextricably woven into the accused's conduct. Behaviour such as revenge or punishment, that is, "getting even," inevitably reflects an intent to curb or otherwise affect the behaviour of those who are its recipients because of the certainty or substantial certainty that a violent response to past conduct will affect the recipient's future conduct.

- [48] As I see it, however much the accused was engaged in an angry, violent rampage, there is sufficient pattern, direction, and focus to his conduct to establish beyond a reasonable doubt that he was cognizant of the inevitable consequences which it would have upon Mr. Schmeisser, and as such, he intended, at least in the sense contemplated in *Chartrand* and *Armstrong*, *supra*, to impede him in the performance of his duties.
- [14] As a result, the judge found Mr. Bergeron guilty of the offence under s. 423.1.

Issue on Appeal

- [15] Mr. Bergeron asserts the trial judge erred by considering whether it was objectively foreseeable that his actions were substantially certain to impede Mr. Schmeisser in the performance of his duties, rather than determining whether it was proven beyond a reasonable doubt that Mr. Bergeron subjectively foresaw the consequence. He says the judge should have followed the approach taken in the decision in *Treleaven*, and the judge erred by dismissing that decision on the same basis as he dismissed *Cluney* and *Noble*.

Discussion

- [16] The leading authority on the topic of mens rea under s. 423.1 is the decision of this Court in *Armstrong*. In that case, the accused had been previously convicted of assaulting a probation officer, and he made veiled threats that the same thing was in store for his present probation officer. He appealed his conviction under s. 423.1 on the bases that the trial judge misinterpreted the phrase "in order to impede" in s. 423.1 and applied a purely objective test in determining mens rea.
- [17] In dismissing the appeal, Madam Justice Saunders, for the Court, reviewed the decisions of the Supreme Court of Canada in *Bernard* and *Chartrand*. At para. 44, she quoted a passage from *Bernard* (at 863) in which Mr. Justice McIntyre described the difference between specific and general intent offences, referring to "purpose" when discussing specific intent. Madam Justice Saunders did not consider this to be a clear equation between "intent" and "purpose", and, at paras. 45-46, quoted the following passage to the opposite effect from *Chartrand* (which involved the offence of abduction of a child) at 890-891:

General principles of mens rea apply to the words "with intent to", and, accordingly, in order to conclude that the mens rea of the offence under s. 281 has been made out, it is sufficient that the taker knows or foresees that his or her actions would be certain or substantially certain to result in the parents (guardians, etc.) being deprived of the ability to exercise control over the child.

In *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), although in the context of wilful promotion of hatred, Martin J.A. stated at pp. 384-85:

I agree ... that, as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. The actor's foresight of the certainty or moral certainty of the consequence resulting from his conduct compels a conclusion that if he, none the less, acted so as to produce it, then he decided to bring it about (albeit regretfully), in order to achieve his ultimate purpose. His intention encompasses the means as well as to his ultimate objective. [Emphasis of L'Heureux-Dubé J.]

This definition of intent was subsequently approved by this Court in *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 774-75. Moreover, in *R. v. Olan*, [1978] 2 S.C.R. 1175, at p. 1182, this Court examined the possibility that intent under s. 338 (now s. 380) of the Code may encompass a contemplated outcome distinct from the purpose of the conduct.

* * *

The argument of innocent motive or purpose, while relevant, is not dispositive of the question of intent, since intent, purpose and motive are not one and the same.

[Emphasis of Saunders J.A.]

[18] Although the words "in order to" in s. 423.1 are different from the words "with intent to", Saunders J.A. did not consider that they had a more specific meaning, and concluded that the approach described in *Chartrand* is the approach to be applied to mens rea under s. 423.1.

[19] Madam Justice Saunders disagreed with the appellant's contention that the trial judge had applied an objective test in determining that mens rea had been proven beyond a reasonable doubt:

[51] Mr. Armstrong's connection to the subjects of his comments was their work with him at the half-way house. It follows that the descriptions "angry that Ms. O'Flanagan had acted in a way ...", "retribution for her actions", and "determination to inflict punishment in retribution when as promised, Mr. Armstrong would 'see' [them]", connect the threats to past and future performance of work-related duties. To these descriptions is added the judge's conclusion that the predictable and inevitable effect of the threats would be to impede the justice system participant in the general performance of her duties. Taken alone, that statement might be read as applying a general rule of thumb rather than an individual assessment of Mr. Armstrong's state of mind. However, when combined with earlier findings of the judge

that relied heavily on Mr. Armstrong's prior assault of a justice system participant for context, one sees that the judge simply made an inference as to Mr. Armstrong intending the natural and probable consequences of his actions, being that he intended to impede justice system participants in the performance of their duties. This inference is consistent with *R. v. Seymour*, [1996] 2 S.C.R. 252, 106 C.C.C. (3d) 520. I conclude, therefore, that the judge did not demonstrate reversible error in her para. 74.

- [20] In the present case, Mr. Bergeron says that the trial judge applied a "general rule of thumb" as alluded to in the above passage from Armstrong. He points to the last three sentences of para. 47 of the reasons for judgment, and says what the judge held was tantamount to saying "everyone who commits an act of revenge on an individual foresees that the act will affect that individual's future conduct because the consequence is so substantially certain to flow from the act". This, says Mr. Bergeron, is an application of an objective standard to the determination of mens rea, and is not the proper approach in determining whether he subjectively foresaw the consequence of his act.
- [21] In my view, the comments by the judge at the end of para. 47 do not establish that he failed to assess whether it had been proven beyond a reasonable doubt that Mr. Bergeron subjectively foresaw the consequence that the fear provoked in Mr. Schmeisser would be substantially certain to impede him in the performance of his duties.
- [22] It is well established that a trier of fact is entitled to draw the common sense inference that a sane and sober person intends the natural and probable consequences of their actions. In the Seymour decision referred to by Saunders J.A. in the above passage from Armstrong, Mr. Justice Cory discussed the inference as follows:
- [19] When charging with respect to an offence which requires proof of a specific intent it will always be necessary to explain that, in determining the accused's state of mind at the time the offence was committed, jurors may draw the inference that sane and sober persons intend the natural and probable consequences of their actions. Common sense dictates that people are usually able to foresee the consequences of their actions. Therefore, if a person acts in a manner which is likely to produce a certain result it generally will be reasonable to infer that the person foresaw the probable consequences of the act. In other words, if a person acted so as to produce certain predictable consequences, it may be inferred that the person intended those consequences.
- [23] In order to determine what the natural and probable consequences of Mr. Bergeron's act would be, it was necessary for the trial judge to view the circumstances objectively. All the judge was saying in para. 47 was that it was a natural and probable consequence of an act of revenge that the victim's behaviour would likely be affected by it in the future. The judge did not stop his analysis there. He went on, in para. 48, to draw the inference that Mr. Bergeron did intend to impede Mr. Schmeisser in the performance of his duties. In doing so, he considered the circumstances of the attack, including Mr. Bergeron's anger. The judge found that Mr. Bergeron had the required subjective intent, and he did not err in doing so.

- [24] Mr. Bergeron relies on the Treleaven decision, and says the trial judge incorrectly chose not to follow it on the same basis as he chose not to follow Cluney and Noble. In Treleaven, it was alleged that Mr. Treleaven and another accused assaulted a witness in order to discourage the witness from testifying in an upcoming trial. The assault took place in a washroom during a party, and Mr. Treleaven testified he was feeling ill, went in the washroom, and pushed the complainant out of the way so that he could throw up.
- [25] After dismissing the bulk of Mr. Treleaven's evidence, Mr. Justice Shaw referred to the decisions in Cluney and Noble, in which the trial judges appeared to equate purpose or motive with intent. He then referred to the holding in Armstrong that the words "in order to impede" in s. 423.1 were equivalent to the phrase "with intent to [impede]". Mr. Justice Shaw then expressed the view that Cluney, Noble and Armstrong were consistent, and that they all stood for the proposition that the Crown must prove beyond a reasonable doubt that, among other things, the accused "provoked a state of fear in order to, that is, with the intent to impede [the justice system participant] in the performance of his duties". He concluded the Crown had not proven beyond a reasonable doubt that the accused provoked a state of fear in the witness in order to, or with the intent to, impede the witness in the performance of his duties as a justice system participant because a rational inference could be drawn from the evidence that the accused attacked the witness because he was angry the witness had informed on their mutual friend.
- [26] What the trial judge in the present case said about these cases was as follows:
- [34] In my view, the case of R. v. Armstrong, supra, adopts a different approach from that taken by the courts in Treleaven, Cluney, and Noble. In Armstrong, supra, the court relies on Chartrand, supra, to distinguish between the purpose or motive underlying an act, on the one hand, and the intent, on the other. In each of Cluney, Treleaven, and Noble, the courts appear to require proof beyond a reasonable doubt of the underlying purpose of the impugned conduct rather than the accompanying intent.
- [27] I agree with the trial judge that, similar to the judges in Cluney and Noble, Shaw J. in Treleaven did focus on the underlying purpose of the attack rather than on determining the intent of the accused. Although Shaw J. used the words "with the intent to" and referred to foreseeable consequences when dealing with the required intent to provoke fear, his conclusion that there existed a rational inference other than that the accused intended to impede the witness in the performance of his duties was expressed in terms of the purpose or motive (i.e., "because he was angry"), not in terms of the accused foreseeing the consequences of his actions.
- [28] Mr. Bergeron maintains that, similar to Treleaven, there was another rational inference other than that he foresaw his actions were certain or substantially certain to impede Mr. Schmeisser in the performance of his duties. The judge found his underlying purpose was to take out his anger on a justice system participant, and Mr. Bergeron says the other rational inference is that his rage at the time clouded his foresight. However, he did not testify at trial

to that effect, and it is my view the judge is entitled to deference with respect to the inference he drew, after considering Mr. Bergeron's anger, that he nevertheless foresaw the consequence that Mr. Schmeisser would be substantially certain to be impeded in the performance of his duties.

Conclusion

[29] I would dismiss the appeal.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Harris"

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