
CANADA / JUDGMENT

R. v. Hawkins

2006 BCCA 498

COURT

British Columbia Court of Appeal

DECIDED

2 November 2006

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2006 BCCA 498err1 R. v. Hawkins

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hawkins,

2006 BCCA 498

Date: 20061102

Docket: CA032801

Between:

Regina

Respondent

And

David Hawkins

Appellant

Before:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Lowry

Oral Reasons for Judgment

R.S. Gill

Counsel for the Appellant

W.J.S. Bell

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia

2 November 2006

- [1] MACKENZIE, J.A.: This is an appeal from the appellant's conviction for two offences charged by indictment: criminal harassment, contrary to s. 264 of the Criminal Code; and uttering threats, contrary to s. 264.1(1)(a) of the Criminal Code. Both charges arise out of the same series of telephone calls by the appellant to five employees of the British Columbia government on September 1 and 2, 2004.
- [2] The appellant submits that the evidence does not support a conviction for either offence. If the appeal does not succeed on that ground, the appellant submits that the trial judge erred in not applying the principle in *R. v. Kienapple*, [1975] 1 S.C.R. 729.
- [3] The first telephone call in the series was to Jill Walker, Deputy Superintendent of Motor Vehicles and Director of Hearings and Appeals within the Superintendent's office. The background to this call was a lengthy involvement of the appellant with the Superintendent's office and Ms. Walker. The appellant had a number of driving licence suspensions and reinstatements going back at least to 1990. There were a number of communications between the appellant and Ms. Walker concerning his driving and his licence. In September 2001, Ms. Walker advised the appellant that as a result of a driving incident in August 2001 his driver's licence was to be suspended for 12 months and thereafter a medical hold would be imposed, requiring that he provide psychiatric assessment to satisfy her that he was fit to drive a motor vehicle before the licence would be reinstated.
- [4] In August 2004, the appellant provided a report to the Superintendent's office from a psychiatrist, Dr. R.A. Chale. Dr. Chale's opinion was that the appellant did not show evidence of a major mental illness, but he did have a personality disorder expressed in "past problematic behaviour, minimization of said behaviours, refusal/inability to accept personal responsibility, and ongoing problems with entitlement". He concluded that the appellant's "issues are not treatable in the acute sense".
- [5] The appellant, who was then living in Clearwater, B.C., telephoned Ms. Walker at about 4:20 p.m. on September 1, 2004. She informed him of her decision that he was still unfit to drive and he became very angry. In a tone that Ms. Walker described as "beyond alarming", he said to her, "You cunt, you are a skank, don't fuck with me." Ms. Walker informed him that he would receive a letter setting out the reasons for her decision and that he could appeal the decision to a medical review board. The conversation deteriorated further and Ms. Walker hung up.

- [6] Ms. Walker said that the anger conveyed by the appellant over the telephone was outside the norms of anger she had experienced before and it unnerved and frightened her. She was afraid that he would cause harm to her or to someone else. She notified the Clearwater R.C.M.P. of her concern and arranged for additional security at the building where she worked. She also had the Victoria City Police conduct a security check at her residence.
- [7] Some time after 4:00 p.m. on September 1, 2004, Jennifer Barclay, an administrative coordinator in the Office of the Solicitor General in Victoria, took an angry telephone call from the appellant that lasted approximately 15 minutes. Ms. Barclay said he was yelling and belligerent and described his voice as "shivering". In the course of the conversation, he made a statement repeated in later conversations that his psychologist had told him that there was an 85% chance he would kill government employees within a year and a 100% chance that he would get away with it. He also said he was not going to do anything illegal and just wanted his driver's licence back. Ms. Barclay was sufficiently troubled that she informed her husband that evening and a fellow employee, Tiny Vermaning, the following day.
- [8] At about 9:45 a.m. on September 2, 2004, Daniel Sanderson, an employee of Enquiry B.C. in Vancouver, received a call by a male stating to be calling from Clearwater wanting to complain about the Superintendent's office and calling their receptionist a "skank". The caller said that he was 85% likely to snap and kill all the staff at the Superintendent's office; he then disconnected. Mr. Sanderson immediately informed his supervisor and reported the call to the Clearwater R.C.M.P. and legislative security as directed.
- [9] The next call was taken by Tiny Vermaning in the Solicitor General's office at about 10:00 a.m. on September 2. The appellant identified himself, referred to Ms. Walker as a "skank" and stated that his psychiatrist had said that it was 85% likely he would start killing government employees within the next year and 100% likely he would get away with it. He repeated that he was not going to do anything illegal and he wanted his driver's licence back. Ms. Vermaning contacted the Superintendent's office and left a voice-mail message.
- [10] Ms. Vermaning receiving a second call from the appellant at about 1:30 p.m. He repeated his comments about what his psychiatrist had said. Ms. Vermaning tried unsuccessfully to transfer the call to the Superintendent's office and asked the appellant to call back later. She then contacted the Superintendent's office and was given background information. She was told that only Jill Walker was to deal with him and that a letter had been sent to him stating the Superintendent's position.
- [11] At about 2:15 p.m. the appellant called again and spoke briefly to Ms. Barclay and then to Ms. Vermaning, who advised him of the letter. He did not sound overly aggressive in this conversation, but he repeated the comments attributed to the psychiatrist, causing Ms. Vermaning to take him more seriously and contact legislative security.
- [12] Finally, the appellant called Dan Kazmiruk, an employee in the Superintendent's office, on September 2. He left a voice-mail message. Mr. Kazmiruk had dealt with the appellant for many years and recognized his voice. The message included the comments that

psychologists had said, "There's an 85% chance that I'm going to start killing government workers within five years." Mr. Kazmiruk sent an e-mail warning to all members of the office, posted a picture of the appellant in the office reception area, and notified the commissionaires responsible for building security. He also notified his parents and his wife.

[13] On the issue of criminal harassment, the trial judge quoted the material portions of s. 264 of the Criminal Code and the five elements of the offence as outlined by Mr. Justice Berger in *R. v. Sillip* (1997), 120 C.C.C. (3d) 384 (Alta. C.A.) at para. 18 as follows:

- 1) It must be established that the accused has engaged in the conduct set out in s. 264(2)(a), (b), (c), or (d) of the Criminal Code.
- 2) It must be established that the complainant was harassed.
- 3) It must be established that the accused who engaged in such conduct knew that the complainant was harassed or was reckless or wilfully blind as to whether the complainant was harassed;
- 4) It must be established that the conduct caused the complainant to fear for her safety or the safety of anyone known to her; and
- 5) It must be established that the complainant's fear was, in all of the circumstances, reasonable.

[14] On the evidence the trial judge concluded:

[33] The issue in this case is not a question of the lawful authority of the public to contact the office of the Superintendent of Motor Vehicles. In my view telephoning government employees and informing them that you were told by your psychologists that you are 85% likely to kill government employees within the next year and that you have a 100% chance of getting away with it, was, in the circumstances in which these statements were made, a threat. The fact that the accused hastened to add, on all but one occasion, that he did not believe his psychologists and that he wished to pursue lawful means, did not change the nature of those statements.

[34] I disagree with defence counsel that when the accused uttered these words he was merely repeating what his psychologists had told him. I find that it was more than that. I find that these statements were threats, pure and simple. The statements made by the accused to Daniel Sanderson were even more glaring, and completely unconditional. It is also significant that some of these threatening statements were made by the accused when he was so angry at Ms. Walker that his voice was quivering.

- [35] In the case at bar I find that the actions of the accused establish beyond a reasonable doubt that the accused knew that his conduct caused the complainants to be harassed. If that was not the case his actions certainly establish beyond a reasonable doubt that he was aware of such a risk and was reckless or wilfully blind as to whether or not the persons listed in the indictment were harassed.
- [36] I find that the conduct of the accused caused the complainants to fear for their safety and the safety of others. This is evidenced by the steps taken by them after they received the threats. Ms. Walker had an additional commissionaire attached to her office building, she reported the matter to the police and she told her daughter to be careful about opening the front door at home. She reported the matter to I.C.B.C and the Clearwater R.C.M.P. Jennifer Barclay, Tiny Vermaning and Daniel Sanderson reported the matter to the Legislative security. Dan Kazmiruk alerted his wife and his parents.
- [37] On the evidence before me I am also satisfied that the Crown has proved beyond a reasonable doubt that the threats made by the accused caused the complainants to be harassed. I also find that the Crown has proved beyond a reasonable doubt that the complainants' fear was in all the circumstances reasonable.
- [15] The appellant relies on *R. v. Kosikar* (1999), 138 C.C.C. (3d) 217 (Ont. C.A.) para. 20, for the proposition that repeated conduct is required to support a conviction for criminal harassment as charged here. He contends that the criminal harassment pleaded in the indictment can only fall within s. 264(2)(b) of the Criminal Code which requires repetition.
- [16] The material portion of the indictment states:

Count 1

David Wayne HAWKINS, between the 1st day of September, 2004 and the 2nd day of September, 2004, inclusive, at or near Clearwater, in the Province of British Columbia, did without lawful authority and knowing that other person were harassed or was reckless as to whether the other persons were harassed, engage in conduct that caused those other persons, namely Jennifer Barclay, Tiny Vermaning, Daniel Sanderson, Jill Walker and Dan Kazmiruk, to reasonably fear for their safety or the safety of others known to them, contrary to Section 264 of the Criminal Code.

[17] Section 264.(1) and (2) read:

Criminal harassment

264. (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

Prohibited conduct

- (2) The conduct mentioned in subsection (1) consists of
- (a) repeatedly following from place to place the other person or anyone known to them;
 - (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
 - (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
 - (d) engaging in threatening conduct directed at the other person or any member of their family.
- [18] The appellant contends that there was only one telephone call to each of Ms. Walker, Mr. Sanderson and Mr. Kazmiruk. The necessary element of repetition is missing and the offence cannot be made out with respect to them.
- [19] The trial judge concluded that the appellant had engaged in threatening comments directed at the individuals within s. 264(2)(d). He relied on Kosikar as authority that a single incident is sufficient for a conviction under that subsection.
- [20] In my view, there was no error in the trial judge's analysis or conclusion on that point. In any event, the narrow focus of the appellant's submission misses the fact that all of the telephone calls had the one objective - the reinstatement of the appellant's driving licence through threats and intimidation. Directly or indirectly, they were all aimed at the Superintendent's office and Ms. Walker in particular because she was in charge of his case. In my view, all of the telephone calls were intended to harass the others directly for the purpose of indirectly harassing and intimidating Ms. Walker.
- [21] The appellant also submits that the trial judge erred in treating the appellant's repeated reference to the psychiatrist's comments as anything more than a "completely inappropriate and tasteless joke".
- [22] As quoted above, the trial judge found those comments to be threats and in my view the evidence amply supported that conclusion. There is no merit this submission.
- [23] The appellant then argues that the evidence fell short of establishing that all of the recipients felt harassed by the particular telephone calls each received. The argument is emphasized particularly with respect to Ms. Vermaning, Ms. Barclay and Mr. Sanderson, who may not have been personally threatened by the calls. Nonetheless, the nature of the calls and the steps they took in response to the calls support a finding that they had "reasonable fear for the safety of others known to them" within the charge of the indictment. In my view, "others known to them" can extend to government workers generally when the threat is not specific. That view is supported by *R. v. Denault*, 2002 BCCA 178, [2002] B.C.J. No. 517) BCCA. It would not sensible to require a recipient to identify a particular individual as the subject of a threat stated in indiscriminate terms and I do not think that the statutory wording requires that construction.

- [24] I would, therefore, dismiss the appellant's appeal from conviction on the first count.
- [25] On the second count, the appellant submits that the count should have been stayed under the rule against multiple convictions for the same conduct as stated in *Kienapple*.
- [26] The trial judge did not make any separate findings of fact in finding the appellant guilty of uttering threats to cause death or bodily harm under s. 264.1(1)(a) of the Criminal Code. In *R. v. Andrew* (1990), 57 CCC (3d) 301 (B.C.C.A.), Lambert J.A., for this Court, at p. 305 and 6, identified four situations in which *Kienapple* applies, following the judgment of Dickson C.J.C. in *R. v. Prince*, [1986] 2 S.C.R. 480:

The *Kienapple* principle rests on the decision of the Supreme Court of Canada in *R. v. Kienapple* (1974), 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, [1975] 1 S.C.R. 729, as that decision was explained in a unanimous judgment of a seven- member division of that court, delivered by Chief Justice Dickson, in *R. v. Prince* (1986), 30 C.C.C. (3d) 35, 33 D.L.R. (4th) 724, [1986] 2 S.C.R. 480.

In *R. v. Prince*, Chief Justice Dickson outlined the double test in these words at p. 46:

There must be a relationship of sufficient proximity first as between the facts, and secondly as between the offences, which form the basis of two or more charges for which it is sought to invoke the rule against multiple convictions.

In considering the relationship of proximity between the offences, Chief Justice Dickson said, at p. 49:

No element which Parliament has seen fit to incorporate into an offence and which has been proven beyond a reasonable doubt ought to be omitted from the offender's accounting to society, unless that element is substantially the same as, or adequately corresponds to, an element in the other offence for which he or she has been convicted.

I conclude, therefore, that the requirement of sufficient proximity between the offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle.

Chief Justice Dickson added this, at p. 49:

There is, however, a corollary to this conclusion. Where the offences are of unequal gravity, *Kienapple* may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence.

In addressing the question of when an element of an offence is not additional or distinct, Chief Justice Dickson set out three examples.

The result of Chief Justice Dickson's corollary and the three examples he gave of cases where an element of an offence is not additional or distinct, is that there are four clear keys to when the Kienapple principle should be applied, other than the long-standing case of included offences, which is usually not regarded as an application of the Kienapple principle at all. I will set out the four key situations, following Chief Justice Dickson's words as closely as possible:

- (1) Where the offences are of unequal gravity, Kienapple may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence (Prince, p. 49).
- (2) Where an element of one offence is a particularization of essentially the same element in the other offence (Prince, p. 50).
- (3) Where there is more than one method, embodied in more than one offence, to prove a single criminal act (Prince, p. 50, but I have used "criminal act" instead of "delict").
- (4) Where Parliament has deemed a particular element to be satisfied on proof of another element (Prince, p. 51).

Chief Justice Dickson specifically said that his examples were not intended to be exhaustive. But I would be cautious about adding to them.

It is very important to understand that Chief Justice Dickson, in Prince, explicitly endorsed the view that the facts and the charges must be considered together and in their relationship to each other. So, in undertaking the double test, it is a guide to judgment to let the decision about the proximity of the facts be informed by an undertaking of the offences, and the decision about the proximity of the offences be informed by an understanding of the facts. In short, the double test cannot be separated out entirely into two separate consecutive tests.

[27] In my view, the circumstances here fall within the first example set out above. As between criminal harassment and uttering threats, the latter is the lesser offence with a maximum penalty of five years imprisonment, compared to 10 years for harassment. The threats to kill government employees were an essential element of the conviction for harassment and there are no distinct additional elements of the offence of uttering threats that would take it outside the offence of harassment. Accordingly, it is a proper case for the application of Kienapple.

[28] In the result, I would set aside the conviction on the second count and direct that a stay be entered on that charge. In all other respects, I would dismiss the appeal.

[29] RYAN, J.A.: I agree.

[30] LOWRY, J.A.: I agree.

[31] RYAN, J.A.: The appeal is allowed. The conviction on Count 2 is set aside and stayed on the basis of the principles in Kienapple.

"The Honourable Mr. Justice Mackenzie"

Correction: 15 December 2006

In the reasons for judgment dated November 11, 2006, in the second sentence of paragraph 6, the word case should be cause.

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