
CANADA / JUDGMENT

R. v. James

2010 BCSC 1891

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1891 R. v. James

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. James,

2010 BCSC 1891

Date: 20100505

Docket: 147686-2

Registry: Victoria

Regina

v.

William Frederick James

Before: The Honourable Madam Justice Ross

Oral Reasons for Judgment

Counsel for Crown:

D. Murray, Adhoc

Counsel for Defence:

D. Lyon

Place of Trial:

Victoria, B.C.

May 3 and 4, 2010

Place and Date of Judgment:

Victoria, B.C.

May 5, 2010

- [1] THE COURT: The accused, William Frederick James, is charged with three counts of uttering threats and two counts of intimidation of a justice system participant. All counts relate to statements made by Mr. James concerning a now retired Crown counsel, Georgia Peters.
- [2] In the years between 2004 and her retirement in 2009, Ms. Peters was employed as a Crown counsel. Her dealings with Mr. James commenced in October 2004 when she approved charges against Mr. James for three counts relating to child pornography. She retained conduct of that matter, which resulted in a conviction and sentence being imposed in June of 2005 when Mr. James was sentenced by Judge Hubbard to an 18-month conditional sentence order followed by an 18-month probation officer.
- [3] Then, in November 2005, proceedings were commenced for breach of the conditional sentence order. Ms. Peters had conduct of these proceedings, which resulted in a sentence of seven days' time served and the conditional sentence order being resumed.
- [4] In February 2006, Ms. Peters was responsible for charge approval for two counts of accessing child pornography, two counts of possessing child pornography, and one count of breach of order. She retained conduct of this file through sentencing in May 2006 when Mr. James received a sentence from Judge Maughan of 18 months, with credit for four months, for a net custodial sentence of 14 months followed by a three-year probation order.
- [5] In January 2007, Ms. Peters approved additional charges of one count of making child pornography and one count of importing child pornography. She retained conduct of this matter until a review concerning the comments allegedly made by Mr. James to Dr. Miller in April 2007 led to her being removed from Mr. James' files and security measures put in place.
- [6] Mr. Stokes then took over conduct of the file for the Crown. After information in April 2008 concerning comments made to Mr. Leslie-Spinks, further security measures were put in place.
- [7] The charges approved in 2007 came to trial before Mr. Justice Grist in January of 2009. Mr. James was convicted and given a conditional sentence, conditions of which included a no-contact provision relating to Ms. Peters.
- [8] Counts 4 and 5 arise from statements alleged to have been made by Mr. James to Dr. Robert Miller on April 2, 2007. Dr. Miller is a psychiatrist with a lengthy history of service with the forensic psychiatric services. In April 2007, Mr. James was subject to a conditional sentence order. He was in the process of undergoing an assessment for suitability for a sexual offender's program. Mr. James was referred to Dr. Miller by a psychologist for psychiatric

assessment when it came to the attention of the psychologist that Mr. James had been taking antidepressant medication.

- [9] Dr. Miller stated that in the interview Mr. James expressed that he was very distressed that he was on a conditional sentence. He stated that he felt unfairly treated. He was angry. In the course of the session, Mr. James stated that he had fantasies that his charges had changed from sexual to violent. He stated that he had fantasies of harming Georgia Edwards, the Crown attorney, and also the judge. He stated that his fantasies were that he was going to shoot them.
- [10] With respect to the reference to Georgia Edwards, there is no Crown attorney in the relevant service named Georgia Edwards. Ms. Peters is the only Georgia in the relevant service and the only Crown attorney to have conduct of Mr. James' files prior to being relieved by Mr. Stokes.
- [11] Dr. Miller stated that he told Mr. James that he had to understand that if he said anything that led Dr. Miller to the opinion that Mr. James would be violent, he would need to disclose this to Mr. James' probation officer. Mr. James then repeated the statements again after having been given this caution.
- [12] Mr. James then said that he likely did not have the courage to shoot, but he would like to see them kneecapped.
- [13] Dr. Miller stated that Mr. James' demeanour did not change when he made these statements. He emphasized how unfair he thought his treatment was. He was angry. He was not, however, overly agitated or out of control. Dr. Miller came to the conclusion that Mr. James was not psychotic and was not suffering from a serious psychiatric disorder. Dr. Miller reported the comments to the probation officer.
- [14] Counts 2 and 3 relate to statements alleged to have been made by Mr. James to Timothy Leslie-Spinks. Mr. Leslie-Spinks was a probation officer in April 2008 with responsibilities in relation to Mr. James. It was his testimony that on April 25, 2008, they had a conversation at the probation office in connection with the preparation of a pre-sentence report. He said that the main thrust of the conversation was that Mr. James had a list of conditions that he wanted varied in his order. In the course of the conversation, he expressed disrespect for the justice system and stated that he had a recurring dream of throwing acid in the face of Georgia Peters. He stated that when Mr. James made the statement, his affect was flat, not a big departure from his usual demeanour. Mr. Leslie-Spinks stated that he took the comment seriously.

- [15] It was his testimony that at a subsequent meeting about a week later, Mr. Leslie-Spinks stated that Mr. James asked if he had discussed the acid dream with anyone else. Mr. Leslie-Spinks reported that he had, and he said that Mr. James reacted. He told Mr. Leslie-Spinks that he had come to him for assistance in getting his conditions altered and that he had instead reported him to police. He stated that Mr. James then mentioned the acid dream again, saying that he had more such dreams and now they included Mr. Leslie-Spinks.
- [16] Mr. Leslie-Spinks was asked to prepare an updated pre-sentence report for Mr. James. He prepared the report after he was retired under a contract to continue such work. There were later concerns with the report, and his contract was terminated. Mr. Leslie-Spinks felt that this termination was unfair.
- [17] In the pre-sentence report, and in his testimony at the preliminary inquiry, Mr. Leslie-Spinks stated that the comments about the acid dream were made after he had asked Mr. James if he had any input to suggest with respect to the contents of the pre-sentence report.
- [18] Counsel played a tape recording, subsequently marked as Exhibit 1 in these proceedings, that Mr. James had apparently made of the interview. It is clear from the recording that the sequence did not occur as described in Mr. Leslie-Spinks' testimony. However, it is also clear that Mr. James did make the statement concerning Ms. Peters. The context was a review of the various conditions that Mr. James wanted changed or removed. He noted that some conditions he was content to leave in place, indeed forever. He then states: "Do you know a woman called Georgia Peters? I used to have dreams about her. You know. I used to dream about me throwing acid in her face. It was just terrible. I just hate the woman."
- [19] Much later in the conversation when he is complaining about the fact that his photographs have been seized, including ones that do not contain child pornography, he states that "Ms. Peters says that is part of your punishment. We are taking everything you have."
- [20] Later on, when asked if he had anything to add to the pre-sentence report, he states: "I hate the justice system. I have no respect for them as of 2004. You can say that because it is the truth."
- [21] Count 1 arises from statements alleged to have been made by Mr. James to Tammy Kushner on January 23, 2009. Ms. Kushner, as of January 2009, had been a probation officer for 17 years. She met with Mr. James on January 16, 2009, at the probation office to review the terms of his conditional sentence order. When they came to the condition relating to no-contact with Ms. Peters, Ms. Kushner stated that Mr. James said, "I wish I could have put her in a wheelchair and now I can't." She stated that he was red in the face, voice raised, angry, in a rant. Ms. Kushner thought it best not to escalate the situation. She broke off the meeting and informed the Crown.
- [22] Section 264.1 provides:

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 . . .

[23] Section 2 defines bodily harm as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature." The purpose of this section was described by the Supreme Court of Canada in the judgment *R. v. McCraw*, [1991] 3 S.C.R. 72, [1991] S.C.J. No. 69, in which Justice Cory for the court stated at paras. 24-25 (cited to S.C.J.):

Parliament, in creating this offence recognized that the act of threatening permits a person uttering the threat to use intimidation in order to achieve his or her objects. The threat need not be carried out; the offence is completed when the threat is made. It is designed to facilitate the achievement of the goal sought by the issuer of the threat. A threat is a tool of intimidation which is designed to instill a sense of fear in its recipient. The aim and purpose of the offence is to protect against fear and intimidation. In enacting the section Parliament was moving to protect personal freedom of choice and action, a matter of fundamental importance to members of a democratic society.

The true nature of the offence was recognized by this Court in *R. v. LeBlanc*, [1989] 1 S.C.R. 1583. There the Court approved the trial judge's ruling that whether the threatener intends to carry out the threat is irrelevant to determining if a conviction can be maintained. It is the element of fear instilled in the victim by the issuer of the threat at which the criminal sanction is aimed. Section 264.1 provides that the threat must be knowingly uttered or conveyed by the accused. Thus the Crown is required to establish that the accused intended to threaten the victim with serious bodily harm. However the determination as to whether there was such a subjective intent will often have to be based to a large extent upon a consideration of the words used by the accused. In those cases where the accused does not testify or call evidence the determination must be made on the basis of the words used.

[24] It should be noted that the section was amended after the decision in *McCraw* to remove the reference to serious in relation to bodily harm.

[25] The term threat was defined by the Ontario Court of Appeal in *R. v. Ross*, 13 O.A.C. 340, as follows:

In our view "threat" in s. 331(1)(a) includes what may be thought of as a conditional threat. One of the definitions of "threat" in *The Shorter Oxford English Dictionary* is..

a denunciation to a person of ill to befall him; esp. a declaration of hostile determination or of loss, pain, punishment, or damage to be inflicted in retribution of or conditionally upon some course; a menace. (Emphasis in original.)

We note that this definition was quoted with approval by this Court in *R. v. Swartz et al.* (1977), 37 C.C.C. (2d) 409 at 411 (judgment affirmed by Supreme Court of Canada sub nom. *R. v. Cotroni*; *Papalia v. The Queen* (1979), 42 C.C.C. (2d) 1), albeit on a point different from that before us.

A conditional threat, if one wants to describe it that way, is part of the ordinary meaning of threat and we think that it would be in accordance with the purpose of s. 331(1) to interpret it as including such a threat. In *Black's Law Dictionary*, 5th ed., 1979 the definition of "threat" reads, in part:

The term, "threat" means an avowed present determination or intent to injure presently or in the future. A statement may constitute a threat even though it is subject to a possible contingency in the maker's control.

[26] In *R. v. Clemente*, [1994] 2 S.C.R. 758, [1994] S.C.J. No. 50, Justice Cory for the court provided the following discussion of the approach to be taken in the analysis of the evidence pursuant to charges under the section at paras. 8-9 (cited to S.C.J.):

Section 264.1(1)(a) is directed at words which cause fear or intimidation. Its purpose is to protect the exercise of freedom of choice by preventing intimidation. The section makes it a crime to issue threats without any further action being taken beyond the threat itself. Thus, it is the meaning conveyed by the words that is important. Yet it cannot be that words spoken in jest were meant to be caught by the section.

This Court considered the provisions of s. 264.1(1)(a) in *R. v. McCraw*, [1991] 3 S.C.R. 72. The manner in which a court should approach charges of threatening was set out at pp. 82-83 in these words:

How then should a court approach the issue? 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 words which are said to constitute a threat must be looked at in light of various factors. They must be considered objectively and within the context of all the written words or conversation in which they occurred. As well, some thought must be given to the situation of the recipient of the threat.

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?

Thus, 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.

[27] 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.

[28] To determine if a reasonable person would consider that the words were uttered as a threat, the court must regard them objectively and review 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. Obviously, words spoken in jest or in such a manner that they could not be taken seriously could not lead a reasonable person to conclude that the words conveyed a threat.

[29] In *R. v. Armstrong*, 2008 BCSC 1693, Madam Justice Dickson noted at para. 58:

It is unnecessary that the accused actually intend to carry out the threat at issue; *R. v. Hiscox*, 2002 BCCA 312. The threat must, however, contain clear words that expressly or by necessary implication refer to the infliction of death or bodily harm. Where the words alleged to be threatening are ambiguous in this regard, a reasonable doubt will arise; *R. v. Abdallah*, 2002 ABPC 126.

[30] I turn then to s. 423.1. That section provides:

423.1 (1) No person shall, without lawful authority, engage in conduct referred to in subsection (2) with the intent to provoke a state of fear in . . .

(b) a justice system participant in order to impede him or her in the performance of his or her duties . . .

(2) The conduct referred to in subsection (1) consists of

(a) using violence against a justice system participant or a journalist or anyone known to either of them or destroying or causing damage to the property of any of those persons;

(b) threatening to engage in conduct described in paragraph (a) in Canada or elsewhere . . .

[31] By virtue of the definition in s. 2, Ms. Peters is a justice system participant.

[32] Section 423.1 is a specific intent offence. With regards to the mens rea of such an offence, the test was described in *R. v. Chartrand*, [1994] 2 S.C.R. 864, [1994] S.C.J. No. 67 as follows, at paras. 54-55, and 61 (cited to S.C.J.):

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.

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. It adopted the English Court of Appeal's dictum in *R. v. Allsop* (1976), 64 Cr. App. R. 29:

Generally the primary objective of fraudsmen is to advantage themselves. The detriment that results to their victims is secondary to that purpose and incidental. It is "intended" only in the sense that it is a contemplated outcome of the fraud that is perpetrated.

...

To summarize, although proof of intent under s. 281 can be met by the intentional and purposeful deprivation of the parent's control over the child, the main body of jurisprudence and the academic commentaries support the view that the mens rea in offences such as s. 281 of the Code can also be proven by the mere fact of the deprivation of possession of the child from the child's parents (guardians, etc.) through a taking, as long as the trier of fact draws an inference that the consequences of that taking are foreseen by the accused as a certain or substantially certain result of the taking, independently of the purpose or motive for which such taking occurred.

[33] I turn then to the application of those legal principles to the facts in this case.

[34] First, I find that Mr. James made the statements described in the testimony of Dr. Miller and Ms. Kushner and that he made the statements with respect to Ms. Peters as recorded in Exhibit 1.

[35] With respect to Counts 1, 3, and 5, uttering threats, the next question is whether in each case the statement amounted to a threat of death or bodily harm. In that regard, as noted above in *Clemente*, the inquiry the court must undertake is to regard the words objectively and review 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 in order to determine if a reasonable person would consider that the words were uttered as a threat.

- [36] Crown counsel emphasizes that in each case the words were spoken to a person associated with the justice system. The remarks were repeated after Mr. James was cautioned by Dr. Miller that the statements of intended violence would be reported. The repetition of the statements demonstrates, in Crown's submission, that they were not spontaneous utterances of the moment nor were they humorous.
- [37] Counsel for Mr. James notes that the statements did not reflect an intention to commit acts of violence. In the case of the statements to Dr. Miller, they were of fantasies made in the context of an interview with a professional whose task it was to examine Mr. James' mental state and thought processes. He notes that the statements to Mr. Leslie-Spinks were the past dreams and that the statement to Ms. Kushner was of a wish that could now not be fulfilled.
- [38] While the statements made to Dr. Miller were framed in part as fantasies, they were not exclusively expressed in such terms. In particular, after making and repeating the statements about his fantasies, Mr. James said that he likely did not have the courage to shoot but he would like to see them kneecapped. Mr. James spoke these words after being cautioned. In all of the circumstances, I find that the reasonable observer would conclude that these words were a threat. In relation to Count 5, I find that the words uttered were a threat.
- [39] With respect to the statements made to Mr. Leslie-Spinks, while there is a reference to past state in dreams, "I used to dream," this is coupled with the statement "I just hate her," which is clearly referring to his present state of mind and with reference later in the conversation to continuing grievance associated with Ms. Peters with respect to the return of his possessions.
- [40] Again, I conclude that in all the circumstances, the reasonable observer would conclude that these words constituted a threat. In relation to Count 3, I find the words uttered were a threat.
- [41] However, the statement made to Ms. Kushner is not only in reference to wishes in the past but coupled with the statement that it is not possible to act on the past wish. In my view, recognizing that threats may be veiled or contingent, this statement, however vile, does not constitute a threat as the term has been defined in the authorities. It was not a statement of intent to injure presently or in the future. Accordingly, the Crown has not proved the necessary *actus reus* with respect to Count 1.
- [42] I turn to the *mens rea* with respect to Counts 3 and 5. Defence counsel, citing *R. v. Payne-Binder*, [1991] Y.J. No. 232, a decision of the Yukon Territory Court of Appeal, and *R. v. I.B.R.*, [1998] B.C.J. No. 2986, submits that Mr. James did not intend his words to be taken seriously. Rather, in each case, he was venting his ongoing grievances.
- [43] In that regard, with respect to *R. v. I.B.R.*, on my reading of the authorities, it is not the case that the Crown must prove that the accused intended to perform the acts, as Justice Gove seems to suggest in that decision.

- [44] The decision of the BC Court of Appeal in *R. v. Hiscox*, 2002 BCCA 312, is to the contrary; as well, the decisions of the Supreme Court of Canada in *McCraw* and *LeBlanc*.
- [45] With respect to the statements made to Dr. Miller, I find that Mr. James did have the necessary mens rea. That is, he made the statements intending them to be taken seriously. I note, in that regard, that the statements were repeated. Mr. James continued with his statements after having been cautioned by Dr. Miller. He was angry but not, in Dr. Miller's opinion, psychotic, suffering from serious psychiatric disorder. His demeanour did not change. He was not, in Dr. Miller's opinion, overly agitated. Dr. Miller, a professional with years of experience, was of the opinion that the statements were serious and needed to be reported.
- [46] I am satisfied that with respect to the statements spoken to Dr. Miller, they were meant to be taken seriously as a threat.
- [47] With respect to the statements made to Mr. Leslie-Spinks, the context in which these statements were made is important. Mr. James was reviewing his ongoing conditions. He was explaining that he wanted to have some conditions vacated but that there were others he was content to be made permanent. In that context, he emphasized that he had no objection to the no-contact provisions staying in place as he had no desire to ever see or deal with certain individuals again. He then made the comments about the dreams concerning Ms. Peters. These statements are vile. However, the context in which they were made leaves me with a reasonable doubt as to whether they were made with the intention to be taken seriously as a threat or with some other intention, for example, to emphasize in a bizarre fashion that he had no desire to ever see or deal again with certain individuals or simply as a sort of stream of consciousness reporting the thoughts associated in his mind with Ms. Peters.
- [48] In the result, I am satisfied that the Crown has met its burden with respect to the mens rea in relation to Count 5, but I am left with a reasonable doubt with respect to the mens rea in relation to Count 3.
- [49] I turn, then, to Counts 2 and 4 dealing with s. 423.1 and the question of whether the Crown has established the necessary intent. That is, has the Crown established that Mr. James knew or foresaw that by conveying his threats to Ms. Peters, it was certain or substantially certain that her performance of her duties as Crown counsel would be impaired by the state of fear his threats provoked?
- [50] Since in each case the statement was not made directly to Ms. Peters, the first issue is whether he made the statements with the expectation that they would be passed along to her. I conclude that in the case of the statements made to Dr. Miller, that Mr. James had that expectation given that the statements were repeated after he was cautioned. In addition, in all of the circumstances, I am satisfied that in making the statements, Mr. James intended to provoke a state of fear in Ms. Peters and that he was substantially certain that the result of that state of fear would be to impede the performance of her duties.

- [51] I am satisfied that the Crown has discharged its burden of proof with respect to all elements in relation to Count 4.
- [52] With respect to the statements made to Mr. Leslie-Spinks, the circumstances in which the statements were made and the fact that Mr. James was angry that Mr. Leslie-Spinks had communicated the statements gives rise to a reasonable doubt that in making the statements to Mr. Leslie-Spinks Mr. James intended them to be communicated to Ms. Peters. Indeed, his anger at the fact that the statements had been communicated supports an inference that his intention and expectation was that they would not be repeated.
- [53] The circumstances in which the conversation took place further leaves me with a reasonable doubt that the statement was made with the intention of provoking fear in Ms. Peters. I am left with reasonable doubt with respect to the mens rea element with respect to Count 2.
- [54] In the result, Mr. James, will you please stand.
- [55] Sir, I find you not guilty with respect to Count 1, not guilty with respect to Count 2, not guilty with respect to Count 3, guilty with respect to Count 4, and guilty with respect to Count 5.
- [56] Pursuant to the principles in R. v. Kienapple, [1975] 1 S.C.R. 729, and consistent with Crown's submissions, I accordingly enter a stay of proceedings with respect to Count 5.

"Ross J."

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