

CANADA / JUDGMENT

R. v. Jansen

2023 BCCA 387

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 387 R. v. Jansen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Jansen,

2023 BCCA 387

Date: 20231013

Docket: CA48302

Between:

Rex

Respondent

And

Jason Curtis Jansen

Appellant

Corrected Judgment: The text of the judgment was corrected
at paragraph 8 on October 23, 2023.

Before:

The Honourable Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Voith

On appeal from: An order of the Provincial Court of British Columbia, dated

March 18, 2022 (conviction) (R. v. Jansen, Port Coquitlam Docket 103736-5-C).

Oral Reasons for Judgment

Counsel for the Appellant:

A. Willox

Counsel for the Respondent:

M. Richards

Place and Date of Hearing:

Vancouver, British Columbia

October 11, 2023

Place and Date of Judgment:

Vancouver, British Columbia

October 13, 2023

Summary:

The appellant was found guilty of uttering a threat and assault causing bodily harm. The Crown concedes that the conviction for uttering a threat should be set aside because it is grounded in conduct the parties did not understand to form the basis for the charge. The conviction for assault causing bodily harm is challenged on two bases: (1) inconsistent verdicts; and (2) insufficient reasons. Held: appeal is allowed, in part. The conviction for uttering a threat is set aside and an acquittal entered. The appeal from conviction for assault causing bodily harm is dismissed. The appellant has not established an unreasonable verdict or that the trial judge's reasons frustrated appellate review.

- [1] DEWITT-VAN OOSTEN J.A.: Following a trial in the Provincial Court, Jason Curtis Jansen was found guilty of three offences under the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code]: uttering a threat to cause death or bodily harm, assault causing bodily harm, and breach of a bail undertaking. The Crown proceeded by indictment.
- [2] Mr. Jansen appeals the convictions for uttering a threat and assault causing bodily harm. He does not challenge the breach conviction.
- [3] The Crown concedes the conviction for uttering a threat must be set aside because the trial judge found Mr. Jansen guilty of that offence on the basis of conduct that the parties did not understand to be the focus of the charge.
- [4] This concession leaves one issue to be decided, namely, whether Mr. Jansen has established reversible error that necessitates a new trial for assault causing bodily harm.

Background

- [5] For purposes of the appeal, it is not necessary to set out the entirety of the factual background.
- [6] Instead, it will suffice to note that Mr. Jansen was prosecuted with a co-accused on a multiple count Information. The charges arose out of two separate incidents involving the same victim that occurred on consecutive days in April 2020.
- [7] On the first day, Mr. Jansen and the co-accused were involved in an altercation with the victim in the parking lot of a 7-11 store in Port Coquitlam. The victim and Mr. Jansen had known each other for about nine years.
- [8] As a result of this altercation, the co-accused was acquitted of assaulting the victim with a knife and threatening him. Mr. Jansen was found guilty of uttering a threat. Both he and the co-accused were arrested after the incident and later released. The police drove them home. Upon arrival, Mr. Jansen discovered that his bicycle had been stolen. He believed the victim was responsible. He was angry and said to a police officer: "you [had] better find him before I do". This statement was found to constitute a threat within the meaning of the Criminal Code.
- [9] On appeal, the Crown concedes that its prosecution for uttering a threat was focused on a different and earlier statement made by Mr. Jansen, one that arose before his arrest and while he was still in the 7-11 parking lot. When the police arrived at the parking lot, the victim was noted to be waving a stick. He was agitated and acting erratically. He told the police that Mr. Jansen and his co-accused were trying to kill him. Mr. Jansen was heard to exclaim: "[I]t's lucky the police are here, I would have caved his skull in".
- [10] This is the statement the parties understood to be the subject matter of the charge. In its appeal factum, the Crown acknowledges that the statement made after Mr. Jansen discovered his bike had been stolen was led "as proof of motive [for an assault the next day], rather than as the actus reus of the threat" (emphasis added).
- [11] Unfortunately, the trial judge misunderstood that fact. She analyzed the statement in the 7-11 parking lot and determined that it did not meet the legal standard for a threat. However, she then concluded that the second statement substantiated the charge. Without providing the parties with an opportunity to address that issue, she convicted Mr. Jansen on the basis of the second statement. As noted, neither the Crown nor the defence viewed the second statement as forming the actus reus of the charged offence. They did not prosecute or defend the case on that basis. Consequently, the Crown accepts there has been a miscarriage of justice on this count and the conviction for uttering a threat must be set aside.
- [12] On the second of the two days in question, the victim was again assaulted. While riding Mr. Jansen's (admittedly stolen) bike in an alley, the victim was chased by a car, knocked to the ground, and assaulted by four males. The bike was then put into the back of the car. The car reversed out of the alley and it drove away. Both the co-accused and Mr. Jansen were

charged with assault causing bodily harm arising out of this incident. The co-accused was acquitted because the Crown was unable to prove she was one of the assailants. However, Mr. Jansen was convicted. At the material time, he was subject to an undertaking to not have any contact, directly or indirectly, with the victim.

Reasons for Judgment

[13] The trial was held in July 2021. Unpublished reasons for judgment ("RFJ") were delivered in October 2021. The trial judge made a number of findings specific to the assault in the alley:

- She found that the victim, who identified Mr. Jansen as one of the perpetrators, was not an untruthful witness (at para. 72).
- She disagreed with the defence that when testifying, the victim was argumentative, defensive, or lied when it was convenient to him (at para. 73).
- She accepted that although he was "doing his best to tell the truth", the victim was "mistaken about some of the critical details" (at para. 74).
- The trial judge found that some of the victim's evidence was unreliable. She attributed this lack of reliability to his "self-admitted significant opioid use at the time". In addition, "he was in the middle of a highly dangerous, fast-moving situation, trying frantically to outride a vehicle that was gaining on him from behind". He only had a "fleeting opportunity" to see who was driving or sitting in the car and during the assault, his "vision was obscured because he was using his hands and arms to shield his face" (at para. 74).
- However, the evidence of independent eye witnesses was consistent on "key issues" (at para. 75).
- These witnesses were credible and reliable, and their evidence was "consistent with [the victim's] recollection that he was run down by a Jetta travelling at high speed down the lane, he was assaulted, the bike he was riding was placed in the back of the car and it reversed down the lane" (at para. 75).
- The evidence of the eyewitnesses was also consistent with photographic and video evidence taken of the offence as it unfolded (at para. 75).
- Much of the Crown's case against Mr. Jansen was circumstantial (at para. 85).
- The trial judge accepted that the day before the assault, Mr. Jansen had possession of the keys of the vehicle used in the alley. She also accepted that the victim had seen Mr. Jansen driving the vehicle earlier on the day of the assault (at para. 85).
- The vehicle belonged to someone who was later seen at Mr. Jansen's home (at para. 85).
- The evidence established "on-going conflict" between Mr. Jansen and the victim and Mr. Jansen had a motive to retaliate against the victim for stealing his bike (at para. 85).

- The day prior to the assault, Mr. Jansen warned police they should find the victim before he did (at para. 85).
- In addition to the circumstantial evidence, the trial judge accepted the victim's testimony that he heard Mr. Jansen's voice during the assault and that he saw him participate. They "had been friends for years" (at para. 89).

[14] Based on these findings, the trial judge was satisfied beyond a reasonable doubt that Mr. Jansen was one of the four males who assaulted the victim.

[15] Mr. Jansen did not testify at the trial.

Issues on Appeal

[16] Mr. Jansen says the trial judge committed six errors. Four of the errors focus on the conviction for uttering a threat, which the Crown concedes must be set aside. Consequently, it is not necessary to address those issues.

[17] The remaining two errors are specific to the conviction for assault causing bodily harm. Mr. Jansen alleges the trial judge erred by:

- a) delivering inconsistent verdicts between Mr. Jansen and his co-accused, rendering the finding of guilt against him unreasonable; and,
- b) providing insufficient reasons for the conviction.

Discussion

[18] I would not give effect to either ground of appeal.

Inconsistent Verdicts

[19] The legal principles that apply to a claim of inconsistent verdicts were affirmed by the Supreme Court of Canada in *R. v. R.V.*, 2021 SCC 10 [R.V.].

[20] Before an appellate court may interfere with a conviction on the ground it is inconsistent with an acquittal arising out of the same circumstances, the court must find that the guilty verdict is unreasonable: *R.V.* at para. 28. This test will be met where an appellant establishes that the conviction and acquittal are "irreconcilable such that no reasonable jury, properly instructed, could possibly have rendered them on the evidence": *R.V.* at para. 29 (emphasis added), citing *R. v. Pittiman*, 2006 SCC 9 [Pittiman] at para. 10.

[21] This is a difficult ground of appeal because a trier of fact has "very wide latitude" in the assessment of evidence: *Pittiman* at para. 7. Nor is a judge or jury "bound by the theories advanced by either the Crown or the defence": *Pittiman* at para. 7. Ultimately, the "question is whether the verdicts are supportable on any theory of the evidence" consistent with the legal principles the trier of fact was bound to apply: *Pittiman* at para. 7, emphasis added.

- [22] When conducting an inconsistent verdicts analysis in a case involving multiple accused charged with the same offence, appellate judges must keep in mind that a trier of fact "may accept the complainant's testimony as credible in respect of one accused, but reject the complaint against another": Pittiman at para. 9. Additionally, the "overall strength of the evidence relating to each accused may not be the same, leaving the [trier of fact] with a reasonable doubt on the guilt of one, but not of the other": Pittiman at para. 9. Consequently, there is "often a wider scope for differing verdicts in the case of multiple accused": Pittiman at para. 10.
- [23] Mr. Jansen says his conviction and the acquittal of his co-accused cannot be reconciled. They both depended on the evidence of the victim. The assessment of that evidence gave rise to reasonable doubt in respect of the co-accused. However, Mr. Jansen was found guilty. From his perspective, this outcome makes no sense and leads invariably to the conclusion that the verdict against him is unreasonable.
- [24] I disagree. In my view, the conviction and acquittal are reconcilable.
- [25] Mr. Jansen's co-accused is female. One of the eyewitnesses to the assault was "certain that she saw four men, not persons of unknown gender, get out of the car and assault [the victim]": RFJ at para. 77, emphasis added.
- [26] This evidence was accepted by the trial judge. The eyewitness "saw and heard a woman in the nearby yard yelling words to [the victim] that [were] very similar to what [the victim] testified he heard [the co-accused] yelling at him": RFJ at para. 77, emphasis added. In cross-examination, the eyewitness said that "during" the altercation involving the four males and the victim, the female was "in the back yard". She began yelling at the victim "[a]s soon as he got up" after the assault.
- [27] The victim confirmed that the co-accused used to live in the house associated with the yard, and the eyewitness confirmed that she had previously seen the female she described for the court at that residence: RFJ at para. 77. At trial, the co-accused admitted that she was the female depicted in videos and images taken of the scene and was wearing grey clothing. In her testimony, the eyewitness agreed that the female she saw "in the back yard" was wearing clothes that were "grey-green" in colour.
- [28] The trial judge considered the victim's testimony that the co-accused was one of the people who assaulted him in the context of the evidence of this eyewitness, and concluded the victim was mistaken: RFJ at para. 78. She was satisfied that the co-accused was in "close proximity to the assault" and yelling at the victim while it unfolded: at para. 83. However, she had a reasonable doubt that the co-accused physically engaged with the victim: at para. 83.
- [29] The evidence specific to Mr. Jansen was not the same and it was open to the trial judge to reach a different conclusion.

- [30] In his testimony, the victim also identified Mr. Jansen as one of the assailants. He had known Mr. Jansen for many years, heard his voice, and testified that he saw him participate in the assault. When challenged in cross-examination about whether he simply assumed Mr. Jansen was involved, the victim was adamant that he "actually saw" him. He was "certain that [Mr. Jansen] was there. Certain". The trial judge found on the whole of the evidence that "there were four men in the car who ran down and assaulted [the victim]": RFJ at para. 82. Mr. Jansen is male.
- [31] There was also circumstantial evidence linking Mr. Jansen to the car. He was seen to have had possession of the keys for part of the previous day, and the victim said he had seen Mr. Jansen driving the car earlier on the day of the assault. There was ongoing conflict between them and the trial judge was satisfied that Mr. Jansen had a motive to retaliate against the victim for stealing his bike. She described this as "one of the important factual components" of the case against Mr. Jansen: RFJ at para. 85. The day before the assault, Mr. Jansen had "warned the police to find [the victim] before he [did]": at para. 85. After the assault, Mr. Jansen's bike was put into the car and taken away.
- [32] Importantly, the evidence of the earlier mentioned eyewitness, who was found to have the "best vantage point" to observe the assault (RFJ at para. 63), identified a female approximating the description of the co-accused as standing separate from the assault and in a back yard while the assault was unfolding. It was the evidence of this witness that caused the trial judge to have a reasonable doubt about the co-accused's involvement: at para. 78. She was in "close proximity to the assault and had a good view of the area immediately before and afterwards": at para. 76. The eyewitness's evidence did not contradict or otherwise undermine the victim's testimony about Mr. Jansen in the same way.
- [33] The law is clear that the trial judge was entitled to accept all, none, or part of the victim's evidence. This is a long-standing and well-established principle: *R. v. François*, [1994] 2 S.C.R. 827 at 837, 1994 CanLII 52; *R. v. Brar*, 2009 BCCA 585 at para. 55. The fact that she rejected part of the victim's testimony did not mean his testimony was non-credible or unreliable for all purposes.
- [34] On the record in this case, it cannot be said that no reasonable jury, properly instructed, could possibly have acquitted the co-accused of assault causing bodily harm, but convicted Mr. Jansen. As noted at para. 9 of *Pittman*, the "overall strength of the evidence relating to each accused may not be the same" and leave the trier of fact with a reasonable doubt on the guilt of one accused, but not the other. In my view, that is what happened here.
- [35] I am also not persuaded the guilty verdict against Mr. Jansen is otherwise unreasonable because the findings of fact or the inferences drawn by the trial judge were plainly contradicted by evidence relied upon for that purpose, or demonstrably incompatible with evidence that was neither contradicted nor rejected: *R. v. R.P.*, 2012 SCC 22 at para. 9. As aptly noted at para. 5 of *R. v. Demedeiros*, 2018 ABCA 241, *aff'd* 2019 SCC 11: "Trial judges have considerable leeway in their appreciation of the evidence and in their ultimate

assessment of whether the Crown's case is made out, overall, beyond a reasonable doubt". That assessment is entitled to deference.

Insufficiency of Reasons

- [36] Mr. Jansen's second ground of appeal challenges the sufficiency of the trial judge's reasons.
- [37] In *R. v. G.F.*, 2021 SCC 20 [G.F.], the Supreme Court of Canada affirmed that when this issue is raised on appeal, the appeal court must determine whether the reasons are "sufficient in the context of the case for which they were given": at para. 68. The court must ask whether the reasons, read in context, as a whole, and in light of the live issues at trial, "explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review": G.F. at para. 69.
- [38] Reasons must be factually sufficient (explain the "what" and the "why"), and they must be legally sufficient (allow for a meaningful exercise of the right to appeal): G.F. at paras. 71, 74. The first of these requirements presents "a very low bar": at para. 71. The second is "highly context specific and must be assessed in light of the live issues at trial": at para. 74. If the "legal basis of the decision can be discerned from the record, in the context of the live issues at trial, then the reasons will be legally sufficient": at para. 75. Convictions are not overturned simply on the basis that a trial judge has expressed themselves poorly: at para. 91.
- [39] Mr. Jansen says the reasons do not meet the test for sufficiency and frustrated his ability to seek appellate review. In that regard, he raises two primary issues.
- [40] First, he says the trial judge failed to address a reasonable alternative theory advanced by Mr. Jansen, namely, that he was also standing away from the assault and yelling at the victim from the back yard, rather than physically participating in the altercation. This alternative theory was raised with the trial judge in closing submissions.
- [41] The eyewitness who placed the co-accused in the yard said there were some males with her and they too were yelling (although she "didn't get exactly what" they were saying). Defence counsel said one of those males could have been Mr. Jansen. The defence suggested it was possible that even if the victim was correct that he saw and heard Mr. Jansen during the assault, "it was because he was in the yard right beside him with his girlfriend [the co-accused]".
- [42] Mr. Jansen says that in light of the evidence about other people in the back yard, the trial judge was obliged to consider the possibility that Mr. Jansen was in the yard during the assault rather than physically engaged with the victim, and if she rejected it, explain why.

- [43] Second, Mr. Jansen says the trial judge failed to address the victim's testimony that he had been bear sprayed prior to the incident. In his direct examination, he said the bear spray was no longer affecting him when riding down the alley. However, in cross-examination, he admitted the contrary. As the bear spray could have affected the victim's vision or other senses, Mr. Jansen argues the trial judge should have addressed this contradiction and its impact on the identification evidence.
- [44] Responding to these points, it is clear the trial judge was alive to the eyewitness's testimony that there were "people" yelling from the back yard, including (but not limited to) a female: RFJ at para. 65. She properly instructed herself that in assessing circumstantial evidence (which formed part of the case against Mr. Jansen), she was duty bound to consider reasonable possibilities that are inconsistent with guilt: *R. v. Villaroman*, 2016 SCC 33 at para. 38. She said she did that: RFJ at para. 88. There is no principled basis from which to hold that in conducting the latter analysis, the trial judge ignored the alternative inference raised by defence counsel, specific to the people in the back yard.
- [45] I agree with Mr. Jansen that in a case such as this, where identification is a central issue and there are obvious evidentiary frailties relevant to that issue, it is important that a trial judge identify the alternative inferences that were considered, and explain the bases upon which those inferences were rejected. As emphasized in *R. v. Dinardo*, 2008 SCC 24 [Dinardo], reasons take on heightened importance where a trial judge must resolve confused or contradictory evidence on a central issue: at para. 27, citing *R. v. Sheppard*, 2002 SCC 26 at para. 55.
- [46] However, I am satisfied that the basis for the trial judge's rejection of the alternative inference is apparent from the record. There was no evidence that placed Mr. Jansen in the back yard while the assault was unfolding and contradicted the victim's testimony about Mr. Jansen as an assailant. Moreover, there were several pieces of evidence from which the trial judge could reasonably ground a logical connection between Mr. Jansen and the assault, including (but not limited to), a strong motive to retaliate for the theft of his bicycle and a statement to the police on the prior day that evinced a desire to do so. In light of the circumstantial evidence, considered cumulatively, it was open to the trial judge to accept the victim's identification of Mr. Jansen as one of his assailants and to reject the alternative inference advanced by the defence as speculative.
- [47] The trial judge understood that "eyewitness testimony can be inherently unreliable": RFJ at para. 75. She instructed herself that in analyzing the case against Mr. Jansen, she had to consider the fact that she had rejected the victim's identification of the co-accused: at para. 86. She took a cautious approach to the evidence, declining to make findings based on the victim's testimony unless satisfied of those findings beyond a reasonable doubt: at para. 87. To survive appellate scrutiny, a trial judge's reasons do not have to explicitly demonstrate that they were "alive to and considered all of the evidence, or answer each and every argument of counsel": *Dinardo* at para. 30.

- [48] The trial judge does not mention the bear spray. However, as noted, a trial judge is not required to recite every piece of evidence that was considered in the analysis, or the weight assigned to it: Dinardo at para. 30. In any event, the trial judge accepted that Mr. Jansen's "vision was obscured" during the assault, albeit for a different reason: RFJ at para. 74. Functionally, she considered the same identification frailty that is pursued on appeal. Mr. Jansen is correct that in cross-examination, the victim acknowledged that when riding down the alley, he was "still kind of suffering the effects of being pepper sprayed". However, I note that the victim was not asked to describe those "effects". In particular, it was not suggested to him that the "effects" included impaired vision or something else that interfered with his ability to note what was happening to him and who was involved.
- [49] On a fair reading of the reasons, I am satisfied they were sufficient in the context of this case, did not frustrate Mr. Jansen's ability to seek appellate review, and do not manifest reversible error: G.F. at para. 68.

Disposition

- [50] In light of my conclusions, I would set aside the conviction for uttering a threat based on the Crown's concession that there has been a miscarriage of justice in relation to that count.
- [51] The Crown argues that the appropriate remedy for this count is a new trial. However, the trial judge made a specific finding that the conduct that properly formed the subject matter of the charge did not meet the criteria for a threat under the Criminal Code: RFJ at para. 46.
- [52] On appeal, the Crown has not challenged this aspect of the trial judge's reasoning. It has not suggested the trial judge erred in finding that the essential elements of the offence were not proved (see *R. v. O'Brien*, 2013 SCC 2). Accordingly, I am of the view the appropriate remedy is to direct that an acquittal be entered on this count, pursuant to s. 686(2)(a) of the Criminal Code.
- [53] The case before us is distinguishable from *R. v. Ochrym*, 2021 ONCA 48 [Ochrym], cited by the Crown in support of a new trial. In that case, the appellant was convicted of knowingly advertising an offer to provide sexual services for consideration. The conviction was overturned and the appeal Court ordered a new trial ordered because the trial judge entered the conviction on the basis of party liability (explicitly disavowed by the Crown), without providing the appellant with notice and an opportunity to respond: at para. 38.
- [54] In this case, Mr. Jansen was not convicted on the basis of a different theory of liability. He was convicted of uttering a threat for conduct that was not the subject matter of the charge or intertwined with it. Moreover, the conduct he was prosecuted for, was found to not meet the requirements for a threat. I consider Ochrym and this case to be qualitatively different and, in the circumstances before us, an acquittal is the appropriate remedy.

- [55] I would dismiss the appeal from the conviction for assault causing bodily harm. Mr. Jansen has not established that the verdict was unreasonable or that the trial judge's reasons frustrated appellate review.
- [56] GRIFFIN J.A.: I agree.
- [57] VOITH J.A.: I agree.
- [58] GRIFFIN J.A.: The appeal from the conviction for uttering a threat is allowed, that conviction is set aside, and we direct that an acquittal be entered on this count. The appeal from the conviction for assault causing bodily harm is dismissed.

"The Honourable Madam Justice DeWitt-Van Oosten"

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