

ONTARIO COURT OF JUSTICE

B E T W E E N :

COPY

HER MAJESTY THE QUEEN

— AND —

ANTONIO BATISTA

Before Justice J.J. KEANEY
Heard on 28th and 29th MAY 2007
Judgment Delivered on 27th JULY 2007
REASONS FOR JUDGMENT

MS. J. GOULIN..... for the Crown
MR. C. RUBY..... for the accused Antonio Batista

KEANEY, J:

[1] Antonio Batista is charged with uttering a threat to cause death, contrary to section 264.1(1)(a) of the Criminal Code and with Intimidation contrary to section 423(1)(a) of the Criminal Code.

Overview

[2] The accused wrote and posted in public in his neighbourhood what it is described as a poem about his Municipal Councillor Pat Saito.

[3] The Crown says the poem contains a death threat, and constitutes intimidation.

[4] The accused maintains that his intention was not to threaten, frighten, or intimidate, but to explain to his neighbours that Ms. Saito was not doing her job.

[5] It is argued on behalf of the accused that the poem is satire, intended to be in jest, so that the requisite mental element of intending that the words intimidate or be taken seriously is not made out.

[6] For completeness of understanding, the poem headed “Parked Cars and Pot-holes in the City of Mississauga” is attached to these Reasons as Appendix “A”.

[7] I have considered all the evidence, and the submissions of both counsel. Any failure in these Reasons to refer to a specific witness, argument, or exhibit, is not a reflection that I have not considered it.

Expert Evidence

[8] The Defence seeks to tender the expert opinion evidence of Dennis Duffy, Professor Emeritus of English at the University of Toronto, in order to assist the Court in understanding the historical context and use of the device of satire as a means of expression. In voir dire testimony to determine the admissibility of this evidence, Professor Duffy described satire as imaginative literature, in the form of poem or prose, in which words are not meant to be given their literal meaning, in which a subject’s vices or failings are held up to ridicule.

[9] He makes references in his evidence to noted authors of satire such as Aristophanes, whom he describes as the greatest dramatist, Alexander Pope, Margaret Atwood, and Mordecai Richler. He testifies that ridiculing political figures is something that satirists are always doing. Satire is prominent in usage today, for example in political cartoons.

[10] He testifies that satire can be a form of jest.

Analysis

[11] The admission of expert opinion evidence depends upon application of the *Mohan* criteria.¹

[12] The criteria include (a) relevance, (b) necessity in assisting the trier of fact, (c) the absence of any exclusionary rule (d) a properly qualified expert.

[13] The elements of relevance, absence of an exclusionary rule, and properly qualified expert are all conceded to be present.

[14] The issue for determination is necessity in assisting the trier of fact.

[15] The subject matter of the expert opinion evidence proffered in this case is not a matter of science such that the Court may require scientific information likely to be outside the experience and knowledge of the judge. Rather, the subject matter is an art form, words of expression, by its very nature a subjective exercise.

[16] An excerpt from The Oxford English Dictionary, Volume IX (with a date stamp 1967) filed as an exhibit, defines satire, in part, as: “A poem, or in modern use sometimes a prose composition, in which prevailing vices or follies are held up to ridicule.”

[17] The Canadian Oxford Dictionary² defines satire, in part as: “(1) The use of ridicule, irony, sarcasm, etc. to expose folly or vice or to lampoon an individual. (2) A work or composition in prose or verse using satire. ”

[18] Professor Duffy does not testify that all ridicule of a political figure is satire. He has not seen any other works authored by the accused. He acknowledges that he cannot testify as to the accused’s state of mind at the time of the writing. He agrees

¹ *R. v. Mohan*, 1994 89 C.C.C. (3d) 402 (S.C.C.)

² Oxford University Press Canada 2001

that the poem contains an inferential threat, but he does not think that it was meant to be taken seriously.

[19] The test for whether the utterances constitute a threat as defined in the Criminal Code is whether the words, viewed objectively, would convey a threat of serious bodily harm to a reasonable person.

[20] In opposing the admission of the expert opinion evidence, the Crown argues that if the matter requires an expert to understand that the writing is satire, then the reasonable person test is rendered useless.

[21] Applying the *Mohan* standard, I must determine whether the opinion is necessary in the sense that it provides information likely to be outside the experience and knowledge of a judge.

[22] I find that it is not. The allusion to historical references and the currency of political satire, are, by their very nature and definition, matters within the purview of public knowledge. No weighing of the accused's poem with any of the references made by Dr. Duffy to renowned satirists, makes for an apt comparison.

[23] I conclude that the proffered expert evidence does not meet the *Mohan* criterion of necessity.

[24] With great respect to Dr. Duffy, I rule that his opinion evidence in this matter is not admissible.

Case for the Crown

[25] The accused has had a long-running feud with his municipal councillor Pat Saito. Since 2003 he has voiced complaints about various community issues including the sidewalks, catch basins, water fountains in community parks, development, and latterly, the matter of a tax bill in 2005 addressing tax obligations going back

2001, an issue involving the original developer of the accused's neighbourhood, which was eventually resolved.

[26] Neil Lawrence is a civilian employee of the Toronto Police Services. On February 2, 2006 he saw the accused's poem posted on a mailbox in his neighbourhood. He was shocked at its wording. He removed it from the mailbox, concerned about children in the neighbourhood. He contacted Ms. Saito's office to warn her.

[27] Peel Regional Police ultimately found four other copies, on community mailboxes and newspaper boxes.

[28] Ms. Saito testifies that she was very concerned, and that she found the posting extremely threatening and very frightening.

[29] She testifies to a long history of dealings with the accused. He first wrote to her in 2003. She spoke with him on the telephone regarding his concerns. Her office followed up six months later, and concluded that the accused appeared satisfied.

[30] On November 4, 2005, the accused wrote to Ms. Saito regarding complaints of the tax bill. He subsequently telephoned her office. A reply letter she thought had been sent did not go out by reason of a computer error.

[31] Ms. Saito had earlier been quoted in the press making comments regarding potholes as, indirectly, traffic calming devices.

[32] On January 2, 2006, an unsigned letter was circulated to members of Mississauga council, purported to be authored by "The Bed Wolf" headed "What is Good or Bad With Mrs. Pat Saito". It bears similarities to the posted poem "Parked Cars and Potholes" such that when she saw that latter piece she recognized the similarity.

[33] Peel Regional Police investigated, and on February 3, 2006, the accused provided a videotaped statement.

[34] He admits to police writing the November 4, 2005, letter, which he signed. In regards to the "Bed Wolf" letter, he asks the police if he looks like a bad wolf.

[35] Throughout the interview he denies authoring the poem, but at the same time asserts his conclusion that he did not think that the author was serious.

Defence Evidence

[36] Mr. Batista is a 75 year-old native of Portugal. He is a retired labourer. He has three years of education ending at age ten. English is not his first language. He testifies that he wrote the poem about Pat Saito. Once in a while he writes poetry, but cites only one previous example.

[37] He testifies that his intention was to let neighbours know that their elected councillor was not doing her job. He testifies that he is too shy to advise the neighbours directly.

[38] He testifies also that he just did it to make Ms. Saito feel that she should be doing her job instead of being home sick and on vacation.

[39] He makes reference to two telephone calls to her office when she was not available to speak with him, he being advised variously that she was on vacation, or home ill.

[40] He admits lying to the police about authorship of the poem, saying that he was a little shy to admit that.

[41] He testifies he did not think Ms. Saito would be scared, because she has police accompaniment wherever she goes.

Analysis

[42] The accused has limited English language facility. He does not understand

the meaning of the word satire. He first heard the word in his lawyer's office.

[43] Section 264.1(1) makes it an offence for anyone who in any manner, knowingly utters, conveys, or causes any person to receive a threat to cause death or bodily harm to any person.

[44] In determining whether or not the statements constitute a threat, the words are to be viewed objectively in the context or circumstances in which they were spoken, the issue being whether they would convey a threat of serious bodily harm to a reasonable person: see *R. and Clemente*.³

[45] It is not a necessary element of the offence that the author intends to carry out the threat.

[46] Words written 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.

[47] I subject the accused's evidence to the *R. v. W.D.* test of credibility mandated by the Supreme Court of Canada.

[48] He repeatedly asserts that he was too shy to bring directly to his neighbours his concern that Ms. Saito was not doing her job. But the bulk of his evidence suggests that there is little shy about him.

[49] It is clear from his evidence that there remains a significant and persistent animus on his part towards Ms. Saito. He persisted, throughout his testimony, in reiterating his historical grievances against the councillor.

[50] Tellingly, in one point in cross-examination, he speculates "satire" maybe means someone is just trying to scare someone.

³ *R. v. Clemente* [1994] 2 S.C.R. 758 (S.C.C.)

[51] It is argued on behalf of the accused that the satirical expression of political comment is freedom of speech protected by section 2 of the Charter.

[52] That the subject of the threat was a public figure, an elected councillor, does not, in my view, necessarily or presumptively engage any section 2 protection.

[53] The words must still be considered in the context as set out in *R. v. Clemente*, and through the eyes of a reasonable person.

[54] The offending passages of the poem are set out in the last three paragraphs:

“We are going to dig a pot hole
about six feet long and 3 feet wide
and five feet deep to hide
her body and God will take care
of Her Soul, but We can not
forgive her for doing nothing

She can keep running
At a good pace but
We will make sure
that She is in HEAVEN
and out of the Race.

So please GOD take care
Of this SOUL for ever and
EVER.”

- [55] The offending passages invoke the first person plural. This would suggest to a reader that others in addition to the author have made a plan.
- [56] The dimensions of the pothole proposed to be dug bear similarity to what a reasonable person might consider to be the dimensions of a grave. It is proposed that her body be hidden and her soul commended to God. There is expressed a determination that she be sent to Heaven.
- [57] The poem was posted in four locations in the neighbourhood, available to be read by anyone.
- [58] The poem concludes with a photograph identifying Pat Saito, and the words “do you know her”.
- [59] The ultimate words can be seen as an invitation to readers to join the group suggested by the use of the first person plural in the three-paragraph threat.
- [60] The assertions by the accused that his intention was simply to force Ms. Saito to do a better job does not stand up to any scrutiny, and is not credible.
- [61] The accused does not know the meaning of satire. Satire is the use of ridicule, irony, or sarcasm. Satire can be jest. In order for the accused to be entitled to the defence that the words were written in jest, such that the mental element required is not present, would, of necessity, require that the words be written intending to be satirical, and therefore in jest.
- [62] For jest to constitute a defence to the mental element requirement of the

Threatening offence, it must be intentional. Unintended satire cannot amount to intended jest.

[63] I do not accept the Accused's arguments that the poem was written intending to be jest. I am not left in any doubt by his testimony.

[64] The Crown must prove that the Accused made a threat; that the threat was to cause death or bodily harm; and that the threat was made knowingly.

[65] In determining whether the Accused has made a threat, what is important is the meaning that a reasonable person, in all of the circumstances, would give to the words used. They are to be considered taking into account the criteria of circumstances in which they were used, the manner of communication, the person to whom they were addressed, and the nature of any prior or existing relationship between the parties.

[66] I find that the words were used in the culmination of a long-standing enmity of the accused toward this councillor flowing from some ultimate frustration on his part. The words were communicated publicly, addressed to a specific and identifiable person against whom the accused bore animus. Their pre-existing relationship was one that gave Ms. Saito cause for a concern.

[67] I conclude that the words written constitute a threat.

[68] The same criteria apply to the determination whether the threat was to cause death. On the analysis on the words used, as noted above, I conclude that there was communicated a threat to cause death or bodily harm that was objectively discernable from the point of view of a reasonable person.

[69] To determine whether the threat was made knowingly, it must be determined whether the words were intended to be taken seriously and meant to intimidate or to

cause fear. This analysis requires taking into account the words used and their context, together with the mental state of the accused at the time the words were used.

[70] I conclude, on the basis of this analysis that the threat was made knowingly.

[71] I am satisfied that the Crown has proven to its requisite standard of proof beyond a reasonable doubt all the essential elements of the Threatening offence.

[72] The actions of the accused crossed the line from permissible political comment to prohibited criminal conduct.

[73] The Accused will be found guilty of the offence of uttering a threat to cause death, pursuant to s. 264.1(1)(a).

[74] Regarding the charge of Intimidation. This was not strenuously argued by the Crown beyond the assertion that Intimidation is implicit in the Threat.

[75] Having found that there was a threat uttered, in any event, on the Intimidation charge, the *Kineapple* principle would apply. That charge will be stayed.

Release Date: 9 August 2007



Justice J.J. Keane