# *R. v. Beseiso*

Ontario Judgments

Ontario Superior Court of Justice

Summary Conviction Appeal Court

D.E. Harris J.

Heard: November 21, 2018.

Judgment: November 26, 2018.

Court File No.: 81/18 (AP)

**[2018] O.J. No. 6177** | 2018 ONSC 7074

Between Her Majesty the Queen, Respondent, and Alex Beseiso, Appellant

(34 paras.)

## Case Summary

**Criminal law — Appeals — Burden on appellant — Appeal by Beseiso (appellant) against his convictions for criminal harassment dismissed — On criminal harassment, trial judge found that appellant made threat and that Fess reasonably feared for her safety and that of her staff — Trial judge rejected appellant's evidence and found him guilty — Trial judge impermissibly relaxed rigor of only reasonable inference standard.**

Appeal by Beseiso (appellant) against his convictions for criminal harassment. Charges were under Section 264(2)(d) of the Criminal Code, uttering threats Section 264.4(1) and cause a disturbance Section 175(1)(a). Appellant contracted with registered court transcriptionist Fess for her to prepare transcripts of a real estate tribunal matter for him. When the transcripts were completed and it was time to pay, the appellant because upset that H.S.T. had been included on the invoice. He expressed his displeasure in a telephone conversation with Fess and then sent her a barrage of text messages. Fess called the police and they arrived shortly afterwards at her home office. By the time the appellant arrived in his pick-up truck, the police were already there. The police officers talked to the appellant but he seemed more concerned with launching profanities at Fess. The appellant was unrepresented at trial. He testified in his own defence. He agreed that he was upset about the H.S.T. He explained that when he texted that he was coming for her, what he meant was that he was coming for the transcripts. The word "bitch" he admitted using but it was not a threat. He was not threatening bodily harm, he was threatening legal action. With respect to the cousins overseas, the appellant said that it was a reference to them paying for the transcripts. They were rich cousins. He had thousands upon thousands of cousins. In cross-examination, the appellant acknowledged calling 9-1-1 on his way over to Fess' home office and saying "there was a chance he was going to break someone's face." With respect to the uttering threats, the trial judge found beyond a reasonable doubt that the Crown version of events was true and rejected the appellant's evidence. The words did not specifically

threaten bodily harm but they would have been perceived by a reasonable person, in the circumstances, as a threat of bodily harm. The trial judge referred to the "I'm coming for you, bitch" and "You're fucking with me, I'll teach you your place," concluding it was "reasonably possible" for a person to think that bodily harm was being threatened. The trial judge held that "it's probably the only rational conclusion you could apply" and concluded that the Crown had proven the case beyond a reasonable doubt. With respect to the causing disturbance by yelling and using obscene language count, after going through the case law, the trial judge held that there was a disturbance to Fess and her employees. They were terrified. The trial judge was convinced of guilt beyond a reasonable doubt on this allegation. Lastly, on the criminal harassment, the trial judge found that the appellant made a threat and that Fess reasonably feared for her safety and that of her staff. The trial judge rejected the appellant's evidence and found him guilty.
HELD: Appeal dismissed.

At the beginning of the hearing as well as in his factum, the appellant admitted guilt. He had felt that there was a strategic benefit to it. That does little to alter the fact that a summary conviction appeal judge has a duty to address potential procedural and substantive errors committed by the trial judge. The trial judge impermissibly relaxed the rigor of the only reasonable inference standard. If that had been a jury instruction, there was little doubt that it would have constituted serious and perhaps reversible error. But when the full text of the trial judge's reasons was taken into account, there was no harm caused in this trial. Moreover, in trial, specific alternative suggestions to the conclusion that a threat of bodily harm was intended were advanced by the appellant in his evidence. The trial judge rejected them. He was certainly entitled to do so. The suggestion that "I'm coming for you" actually meant, "I'm coming for the transcripts" was not persuasive. The idea that he was threatening legal action and not bodily harm was also extremely weak.

## Statutes, Regulations and Rules Cited:

Criminal Code, s. 175(1)(a), s. 264.4(1), s. 264(2)(d)

**Appeal From:**

On Appeal from the Judgment of Mr. Justice A. Cooper, dated November 28, 2017.

## Counsel

M. Coristine, for the Crown.

Appearing on his own behalf.

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**REASONS FOR JUDGMENT**

**D.E. HARRIS J.**

**INTRODUCTION**

**1** The appellant Alex Beseiso appeals his convictions for criminal harassment (Section 264(2)(d) of the *Criminal Code*), uttering threats (Section 264.4(1)) and cause a disturbance (Section 175(1)(a)).

**2** Mr. Beseiso contracted with registered court transcriptionist Kim Fess for her to prepare transcripts of a real estate tribunal matter for him. When the transcripts were completed and it was time to pay, the appellant because upset that H.S.T. had been included on the invoice. He expressed his displeasure in a telephone conversation with Ms. Fess and then sent her a barrage of text messages which stated, amongst other things, "you ... should order police presence...I'm coming for you, bitch...Fucking bitch...You fucking with me, I'll teach you your place." The appellant called Halton police and said he was going to Fess' home office address and that there was going to be trouble if they did not attend. Fess also called the police and they arrived shortly afterwards at her home office.

**3** By the time the appellant arrived in his pick-up truck, the police were already there. The police officers talked to the appellant but he seemed more concerned with launching profanities at Ms. Fess. He was irate. When the police asked the appellant to leave, he loudly proclaimed that he would, to paraphrase, "get his cousins from overseas and get back at her." The police asked him again to leave but he refused to do so. He was arrested for cause a disturbance and utter threats. Fess and her employees were frightened and devised measures to protect themselves if the appellant returned.

**4** The appellant was unrepresented at trial. He testified in his own defence. He agreed that he was upset about the H.S.T. He explained that when he texted that he was coming for her, what he meant was that he was coming for the transcripts. The word "bitch" he admitted using but it was not a threat. He was not threatening bodily harm, he was threatening legal action. With respect to the cousins overseas, the appellant said that it was a reference to them paying for the transcripts. They were rich cousins. He had thousands upon thousands of cousins.

**5** In cross-examination, the appellant acknowledged calling 9-1-1 on his way over to Fess' home office and saying "there was a chance he was going to break someone's face."

## THE TRIAL JUDGE'S REASONS

**6** With respect to the uttering threats, the trial judge found beyond a reasonable doubt that the Crown version of events was true and rejected the appellant's evidence. The words did not specifically threaten bodily harm but they would have been perceived by a reasonable person, in the circumstances, as a threat of bodily harm. The trial judge referred to the "I'm coming for you, bitch" and "You're fucking with me, I'll teach you your place", concluding it was "reasonably possible" for a person to think that bodily harm was being threatened. The trial judge held that "it's probably the only rational conclusion you could apply" and concluded that the Crown had proven the case beyond a reasonable doubt.

**7** With respect to the causing disturbance by yelling and using obscene language count, after going through the case law, the trial judge held that there was a disturbance to Ms. Fess and her

employees. They were terrified. The trial judge was convinced of guilt beyond a reasonable doubt on this allegation.

**8** Lastly, on the criminal harassment, the trial judge found that the appellant made a threat and that Ms. Fess reasonably feared for her safety and that of her staff. The trial judge rejected the appellant's evidence and found him guilty.

## THE GROUNDS OF APPEAL

**9** The appellant representing himself on appeal as he did at trial, argued two grounds of appeal in the oral hearing:

1. The trial judge erred in not finding an abuse of process caused by the trial Crown's intentional delay of the trial while he was in custody; and
2. The trial judge erred in not considering his Section 11(b) of the *Charter* application.

**10** I will also deal with a ground that emerged during review of the record. Other grounds argued in the appellant's factum in my view have no substance and will not be discussed here.

## THE ABUSE OF PROCESS CLAIM

**11** The basis for the abuse of process argument was the assertion that the trial Crown, Jill Cameron, deliberately stalled the proceeding in order to keep the appellant in custody for a longer period of time. The trial judge rejected this. He recounted that the appellant was facing a total of three different matters, including this one. There was some difficulty in setting the dates. In addition, Ms. Cameron, the record shows, had a very busy schedule.

**12** The appellant argued that although he originally asked that the court not sit during Ramadan because of his religious observance, he rescinded this request when it because clear that it would cause inordinate delay of the trial. The record fails to bear this out. At one point he asked that two trial dates, one in May and one in August, be put together. This did not occur. But in no way did this constitute, as the appellant has argued, a willingness on his part to proceed with the trial during Ramadan.

**13** The appellant argued at trial and again on appeal that the police officers were available at all times, despite what Ms. Cameron had said. Subsequent to the trial, the appellant obtained a chart with their leave dates and no dates were blacked out. The appellant also complained about the trial judge not allowing him to ask questions of officers examining in retrospect the dates they had available.

**14** It is important to inject some semblance of reality into these submissions. The factual foundation of the abuse of process claim had to be proved by the appellant on a balance of probabilities. The relief sought, a stay of proceedings, required a "clearest of cases" showing: *R. v. Regan*, *[2002] S.C.J. No. 14*.

**15** Standing back and looking at the record as a whole, the fact remains that the appellant was completely unsuccessful in building even the most meagre foundation to support his argument that the trial Crown was stalling the proceedings and acting out of malice. Without any substance, the argument was mudslinging and nothing more. The leave chart, without some elaboration, cannot be taken as evidence of anything. Furthermore, given the quixotic nature of the appellant's attack, the trial judge acted within his discretion in curtailing cross-examination into matters that appeared irrelevant.

**16** The trial judge was right to dismiss the abuse of process argument. This ground of appeal fails.

## THE SECTION 11(B) ARGUMENT

**17** The appellant prepared a Section 11(b) unreasonable delay argument and supporting materials at trial but in the end decided not to argue it. He now proposes to resurrect it here on appeal. In my opinion, he clearly and unequivocally abandoned Section 11(b) below. The trial judge was not asked to and did not rule on it. The argument died in the trial court and cannot now be revived.

**18** The unreasonable delay aspect came up during the sentencing proceeding. The Crown invited the appellant to comment on his Section 11(b) position. The appellant said,

> ... the way this trial went and how things proceeded, I think that it's futile to argue it. I don't see any point in arguing it at this point.

When the trial judge asked whether the appellant was not worried about Section 11(b), the appellant said he was not.

**19** The appellant attempts to put a better face on what appears to be inescapably clear. He says that the trial judge was very angry with him during this part of the proceeding and that is why he backed off arguing the 11(b). I see no evidence of this. It appears from the transcript much more likely the appellant was resigned to his fate and was exasperated with the proceedings. Nothing derogated from his free choice in deciding not to go ahead with the argument. I am skeptical that a trial judge's frustration would stymie this appellant.

**20** This ground of appeal has no merit.

## THE "ONLY REASONABLE INFERENCE" ISSUE

**21** As mentioned, the appellant argued this appeal without the benefit of a lawyer. In my view, a judge hearing a summary conviction appeal has an overriding duty to ensure that the trial below was fair. All accused persons have the right to a review of their convictions whether represented by counsel or not: *R. v. Sheppard*, *2002 SCC 26*, *[2002] 1 S.C.R. 869*; *R. v. Farinacci*. *[1993] O.J. No. 2627*, *109 D.L.R. (4th) 97*, *86 C.C.C. (3d) 32* (C.A.), at paras. 25-26

**22** There is a judicial duty to assist unrepresented accused at trial: *R. v. Tran*, *[2001] O.J. No.*

3056, 156 C.C.C. (3d) 1 (C.A.). The Supreme Court in *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689 discussed the right of appellate courts to raise new issues. In the course of this discussion, it confirmed the obligation of judges to assist self-represented litigants in the appellate process:

> 44 There are some situations where the potential for injustice will be more self-evident ... *the parties to this appeal agree that appellate courts can intervene to assist self-represented litigants to ensure that the proceedings are fair* (see *W. (G.)*, at para. 18), although this assistance has neutrality-based limits and a judge "must exercise great care not to descend from the bench and become a spectre at the accused's counsel table, placing himself 'in the impossible position of being both advocate and impartial arbiter'"(*R. v. Phillips*, 2003 ABCA 4, 320 A.R. 172 (Alta. C.A.), at para. 24, *per* Fruman J.A., aff'd 2003 SCC 57, [2003] 2 S.C.R. 623 (S.C.C.), citing *R. v. Taubler* (1987), 20 O.A.C. 64 (Ont. C.A.), at para. 30).
>
> (Emphasis Added)

**23** In this appeal, at the beginning of the hearing as well as in his factum, the appellant admitted guilt. He may have felt that there was a strategic benefit to it. That does little to alter the fact that a summary conviction appeal judge has a duty to address potential procedural and substantive errors committed by the trial judge.

**24** In reviewing the reasons for judgment in preparation for the oral hearing, there was one aspect which was worrisome. It was alluded to above. In the assessment of the threatening count, in considering the implications of the texts to Ms. Fess and whether they amounted to threats of bodily harm, the trial judge said,

> And if somebody says to somebody else, "I'm coming for you, bitch" and "You're fucking with me, I'll teach you your place," that's *reasonably possible* for a person, a normal person, to think that bodily harm was going to be inflicted upon them. It's *probably the only rational conclusion* you could apply. So, there's no doubt in my mind the Crown had proven that case beyond a reasonable doubt.
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> (Emphasis Added)

**25** The trial judge's insertion of the words "reasonably possible" and "probably the only rational conclusion" diluted the requirement that in cases where an element of the offence depends solely on circumstantial evidence such as here, a conclusion that the element has been proven must be the *only reasonable inference available*: *R. v. Villaroram*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 30.

**26** The "only reasonable inference" formulation is to help "the jury to guard against the risk of 'filling in the blanks' by too quickly overlooking reasonable alternative inferences": per Justice Cromwell in *Villaroram*, at para. 30. Adding a qualifier like "possible" or "probably" which embodies a low or middle-level degree of certainty, diminishes the rigor of the process of elimination which is the purpose of the "only reasonable inference" instruction.

**27** While related to the burden of proof, the only reasonable inference instruction as explained by Justice Cromwell in *Villaroram* has a different purpose:

> 28 The reasonable doubt instruction describes a state of mind -- the degree of persuasion that entitles and requires a juror to find an accused guilty: Berger, at p. 60. Reasonable doubt is not an inference or a finding of fact that needs support in the evidence presented at trial: see, e.g. *Schuldt v. The Queen,* [1985] 2 S.C.R. 592, at pp. 600-610. ...The reasonable doubt instructions are all directed to describing for the jurors how sure they must be of guilt in order to convict.
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> 29 An instruction about circumstantial evidence, in contrast, alerts the jury to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence: Berger, at p. 60. ... the danger ... identified so long ago -- the risk that the jury will "fill in the blanks" or "jump to conclusions" -- has more recently been confirmed by social science research: see Berger, at pp. 52-53. This Court on occasion has noted this cautionary purpose of a circumstantial evidence instruction: see, e.g., *Boucher v. The Queen,* [1955] S.C.R. 16 per Rand J., at p. 22; *John,* per Laskin J., dissenting but not on this point, at p. 813.

**28** In this case, the trial judge impermissibly relaxed the rigor of the only reasonable inference standard. If this had been a jury instruction, there is little doubt that it would have constituted serious and perhaps reversible error. But I do not believe when the full text of the trial judge's reasons is taken into account, there was any harm caused in this trial.

**29** In this trial, specific alternative suggestions to the conclusion that a threat of bodily harm was intended were advanced by the appellant in his evidence. The trial judge rejected them. He was certainly entitled to do so. The suggestion that "I'm coming for you" actually meant, "I'm coming for the transcripts" was not persuasive. The idea that he was threatening legal action and not bodily harm was also extremely weak.

**30** The trial judge's rejection of these alternative suggestions demonstrates that he did not simply jump to the conclusion that the words spoken conveyed threats of bodily harm. He had tangible alternative suggestions before him which he considered and rejected. The potential error of ignoring alternative inferences which the only reasonable inference formulation is intended to address was, in effect, rebutted in the trial judge's reasons.

**31** Either the misstatement of the only reasonable inference cautionary instruction was not a legal error when viewed in the full context of the trial judge's reasons or, if it was error, it was a minor, insignificant error that could not have affected the result. If a minor error of this kind, it is salvaged by the first branch of the curative proviso jurisprudence: *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 53; *R. v. W. (L.K.)* (1999), 138 C.C.C. (3d) 449 (Ont. C.A.), at paras. 94-95; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 35.

**32** The result would have been different if the judge's misstatements had implicated the burden of proof. Such errors, because they impact the fundamental rule of the game, are not amenable to the curative proviso: *R v. Lifchus*, [1997] 3 S.C.R. 320, [1997] S.C.J. No. 77, at paras. 45-46; *R. v. Brydon,* (1995) 129 D.L.R. (4th) 1, 188 N.R. 321, 65 B.C.A.C. 81, 106 W.A.C. 81, [1995] 4 S.C.R. 253 (S.C.C.), at p. 257.

**33** In my view, the misstatement by the trial judge did not affect the burden of proof. First, as quoted above, Justice Cromwell in *Villaroram* held that the "only reasonable inference" instruction has a different, albeit related purpose to the reasonable doubt instruction. While an error with respect to the only reasonable inference instruction can evidence a burden of proof error, it does not necessarily have this consequence. Second, immediately after the less than perfect phraseology of "reasonably possible" and "probably the only rational conclusion you could apply", the trial judge said,

> So there's no doubt in my mind the Crown has proven that case beyond reasonable doubt.

Furthermore, the trial judge properly stated and applied the three step *W.(D.)* analysis earlier in his reasons. Having accurately stated and applied the burden of proof, I do not believe that the trial judge's misstatements reflected negatively on his understanding or application of the burden or standard of proof.

**34** For these reasons, the appeal is dismissed.

D.E. HARRIS J.

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