R. *v.* McCraw

The acquittal of Stephen Joseph McCraw by Judge Flanigan earlier this year stirred up controversy and emotions in the community. Certain members of the public expressed their strong disapproval of the decision by demonstrating in front of the provincial court house where the case was heard. Other members of the public mocked these protestations.

Mr McCraw had been accused of threatening to cause serious bodily harm to three women. He had written letters to three professional cheerleaders. Each letter described a series of sexual acts that he wished to perform upon the woman to whom the letter was addressed and ended by asserting that, if she were unwilling to participate voluntarily, he would rape her.

Mr McCraw admitted writing the letters but defended his actions by suggesting that the letters simply described his sexual fantasies and did not threaten serious bodily harm. The Crown argued that rape necessarily includes physical, emotional and psychological harm; therefore, the accused was guilty of the offense of threatening to cause serious bodily harm. The Judge concluded that rape does not necessarily involve serious bodily harm; therefore, a threat to rape does not necessarily constitute a threat to cause serious bodily harm and the accused was acquitted.* The Judge observed that the accused was a "creep" but that the Court could not bend the law to convict him.

To further the public dabate sparked by *R.* v. *McCraw*, the 1988-89 Board of Editors of the OTTAWA LAW REVIEW invited commentaries on the case from members of the legal community. Professors Kathleen Mahoney and Ruth Sullivan, and Robert Wakefield of the Ottawa Defence Bar responded generously with the case comments published here. Each author's commentary takes a different approach to arrive at an answer to the same basic question: Did the threats made by Mr McCraw constitute threats to cause serious bodily harm?

The Board of Editors gave careful consideration to the inclusion of the text of the threatening letters in the OTTAWA LAW REVIEW. The reasons for judgment of Flanigan J. refer only to a sentence in the letters and describe the text of the letters as a "sexual fantasy". The Board was well aware that the letters are offensive and that their inclusion in the pages of the REVIEW could be regarded as a gratuitous re-publication of texts perceived by many to be pornographic.

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*(Ed. note) As this issue went to press the Ontario Court of Appeal handed down its decision on the Crown appeal of Mr. McCraw's acquittal. The Court reversed the trial judgment and convicted Mr. McCraw. *R.* v. *McCraw*, Oct. 16, 1989, Doc. 1715/89 (Ont. C.A.).

Nevertheless, it was our view that the judgment could be more carefully assessed by our readers with the entire text of a letter available to them. The three letters are substantially similar, and the text of only one of the letters clearly is sufficient to allow the readers to assess their impact and to determine whether they constitute a threat within the terms of the *Criminal Code*. Thus, the Board determined to publish one of the threatening letters.

. Let me tell you, your a beautiful woman, I am disapointed you wern't in the calendar, you are the most beautiful cheerleader on the squad. I think you should pose nude for playboy. Every time I see you I get an instant erection. I masturbate thinking about you every night. Fucking you would be like a dream come true. I would lick your whole body, starting with your toes, up your legs, then right to your vagina. Then I would kiss your nice perfect shaped breasts. I would then turn you over and lick your asshole. Then you would go down and suck my dick. Once I am nice and horny, I would stick my dick in your vagina, then I would shove my dick up your nice tight asshole. Then you would go down and suck my dick, and I would shoot my sperm all over your face. I am going to fuck you even if I have to rape you. Even if it takes me till the day I die. There should be more beautiful women around like you.

See you later and have a nice day!

DISTRICT COURT OF ONTARIO

HER MAJESTY THE QUEEN

v.

STEPHEN JOSEPH McCRAW

* * *

CHARGE: S. 243.4(2) C.C.C.
3 counts

* * *

REASONS FOR JUDGMENT

DELIVERED BY THE HONOURABLE JUDGE K.A. FLANIGAN, SENIOR JUDGE, ON TUESDAY, NOVEMBER 8TH, 1988, AT THE COURT HOUSE, 161 ELGIN STREET, OTTAWA.

APPEARANCES:
Bernhard Dandyk, Esq., for the Crown.
Donald B. Bayne, Esq., for the Accused.

REASONS FOR JUDGMENT
Flanigan, D.C.J.

TUESDAY, NOVEMBER 8TH, 1988.

U P O N R E S U M I N G : (10:05 A.M.)

REASONS FOR JUDGMENT
FLANIGAN, D.C.J. (orally):

The accused is charged with three counts of threatening, pursuant to Section 243.4(1)(a) of the **Criminal Code of Canada**. The offence alleged relates to exhibits one, two and three, typed pages sent to each of the three complainants. The exhibits are almost identical and set out a sexual fantasy with respect to each complainant, and near the end of each exhibit is contained the threat, ". . .even if I have to rape you."

There is no doubt that this is a threat and was perceived by each of the complainants so to be. The question is whether or not it constitutes the offence set out in Section 243.4(1)(a) of the **Criminal Code of Canada**.

The Crown's position, of course, is that in each count the accused is threatening serious bodily harm. The Crown alleges that "rape" necessarily involves physical, emotional and psychological harm amounting to serious bodily harm. Although there is no longer an offence of rape since the amendments to the **Criminal Code of Canada** — it is now sexual assault in different degrees — nevertheless, to the non-legal mind, rape still exists. The Crown goes further, and says, "serious bodily harm" includes emotional and psychological harm.

For the accused, Mr. Bayne submits that the offence of assault is not made out in any of these counts and, secondly, that the offence of assault is not necessarily included in Section 243.4(1)(a) charges, nor is it included by the specific terms of this Indictment.

The accused admits writing these passages contained in exhibits one, two and three. The accused concedes that the contents are immature and disgusting, but reveal no more than a sexual fantasy, not a threat to cause serious bodily harm.

The Crown submits that by analogy, in referring to the case of **R. v. Underwood**, the threat to rape is sufficient to fall within the purview of the section.

The second case on point referred to by the Crown, **R. v. Gingras**, involves a threat by the accused that he would, "get the Crown Attorney" and "let me get my hands on him". The Court found that although the words clearly amounted to a threat they could not, beyond a reasonable doubt, be found to amount to the threat of death or serious bodily harm. To distinguish that case, the Crown respectfully submits that the threat of rape is not as ambiguous or vague as to its attendant threatening injuries, as the case of **Gingras**.

For the accused, Mr. Bayne says that the Crown is in error in claiming that "rape" necessarily involves physical, emotional or psychological harm amounting to serious bodily harm. The defence points out that rape is non-consensual sexual intercourse which may or may not involve any physical harm or emotional harm or psychological harm, depending upon the actual facts of each rape incident and each complainant. In any event, however, "rape" certainly does not necessarily amount to serious bodily harm, as the term has its meaning in criminal law. The defence asserts that the Crown has no authority for this proposition, and all authorities, **Criminal Code** sections and case law definitions of the legal concept of "bodily harm" are to the contrary and distinct from rape or sexual assault. The threat here is to have non-consensual sexual intercourse, it is not a threat to cause serious bodily harm.

The Crown argues that the word must have the meaning Mr. McCraw intended for it, not its meaning in law, and that its meaning may be gleaned from the tenor of his letters. The threat encompassed

by Section 243.4(1)(a) must deal with the specific word or words uttered.

The Court ought never to begin to speculate upon what the accused might have meant.

The Crown argument seems to concede that the defence is correct, that rape is a very different legal concept from serious bodily harm, but that the Court should depart from clear authority to guess, instead of what the accused might have meant by the word. The tenor of the letters, while immature and disgusting, reveal more of an adoring fantasy than a threat to cause serious bodily harm.

In the **Gingras** case, His Honour Judge Stortini dealt specifically with Section 243.4(1)(a), the section here being considered. The Court notes the distinction between the former section, threat to cause death or injury, and the present threat to cause death or serious bodily harm. The Court, in that case, dealt with the specific words of threat uttered by the accused. The Court did not speculate what meaning the accused might have intended beyond the plain meaning of the words used, and the Court properly found that serious bodily harm adds a further element to the original requirement of a threat of injury, and further, a separate element to non-consensual intercourse. The Court found that the words uttered did not necessarily involve serious bodily harm. In other words, the threat "to get the Crown Attorney" and "let me get my hands on him" may or may not involve serious bodily harm.

In this case, the threat to "rape", to have non-consensual sexual intercourse may or may not involve serious bodily harm. It does not involve it necessarily. The Court found that the words in **Gingras** might equally mean: I'm going to strike you, but not necessarily cause bodily harm, a separate concept. The words in our case may equally mean: I'm going to have intercourse with you with or without your consent, but not necessarily by causing any serious bodily harm. The Court concluded that the threat contemplated by Section 243.4(1)(a) has to contain within it clear words that would expressly or by necessary implication refer to serious bodily harm. Just as the words in **Gingras** are ambiguous and do not expressly or by necessary implication refer to causing serious bodily harm, so too the word "rape" in the case at bar is ambiguous and does not expressly or by necessary implication refer to the causing of serious bodily harm.

The Ontario Court of Appeal, in **Guerrero**, which was issued on the 31st of May, 1988, stresses the importance of heeding the terms of each **Code** section to determine what type of threat Parliament had specifically prescribed. In **Guerrero**, the Court noted that Section 244(3)(b) requires a specific threat of application of force, not a threat to publicize nude photographs. So too, in this case at bar, Section 243.4(1)(a) prescribes threats, specifically, to cause serious bodily harm, and not a threat to have non-consensual intercourse. The Court of Appeal's concluding words apply exactly to this case:

> The appellant's conduct in this case, reprehensible as it was, does not fall within any of the enumerated kinds of

> conduct. It follows, therefore, that there should have been no conviction on the charge with which the Crown chose to proceed against the appellant.

In other words, in the **Guerrero** case, the Court of Appeal has stated that the words used must fall specifically within the particular terms of the section of the **Code** which the Crown chooses to proceed under.

With respect to the included offence of assault which the Crown has argued in its brief, the defence submits that the clear words of this penal provision require that, to constitute an assault at law, a threat to apply force by act or gesture, not merely written words, that cause another person reasonably to believe that there is a present ability to effect the application of force. In other words, the words "present ability" mean present both in time and space: the accused, to assault by means of a threat, must be physically present at the time of the threat and must be in a position to carry out his threat to apply force at the very point in time that the threat is made.

In the result, the essence of the threat in each count is to cause serious bodily harm. The message in each of exhibits one, two and three is to have sexual intercourse "even if I have to rape you"; the threat here, in each case, is rape, if necessary, to achieve it. It seems to me that the threats of bodily harm, if they exist under the old concept of rape or under the new concept of sexual assault goes to the question of consent. It is independent of rape or sexual assault, so far as the sexual aspect of the act goes. The threat of bodily harm only goes to the question of consent. Rape or sexual assault does not of itself necessarily involve any kind of physical harm to the victim. Rape or sexual assault involves non-consensual intercourse, as defined in the **Criminal Code of Canada**.

In this case, we are dealing with "serious bodily harm" which is equated in the section to "death". What we have here is a threat to have sexual intercourse with each of the complainants, with or without their consent. This is quite separate and distinct, in the Court's view, to threatening serious bodily harm. Again, the threat to commit a sexual assault does not necessarily cause serious bodily harm.

In my view, regrettably, this person is no more, in the Court's view, than a creep, but that does not of itself require the Court to bend the law to convict him where no such conviction, in this Court's view, is sustainable by law. The accused will therefore be acquitted.

* * * * *

I propose, however, Mr. Bayne, to have him enter into a peace bond, which I must have your comments on before I am able to do it.

MR BAYNE: The position I take in respect of that is set out in the written argument, and it is my respectful position, Your Honour, that there is sufficient material before the Court and in the evidence, oral or admitted, of the complainants, to justify a Section 745 order going in respect of each of the three.

THE COURT: Mr. Dandyk?

MR. DANDYK: Your Honour, the only further comment I make is the case law in Section 745 seems to indicate that at least the accused must be heard from. I assume my friend's comments are the accused being heard from.

MR. BAYNE: Yes. In Section 745 cases, usually counsel speaks, in any event.

MR. DANDYK: I realize that. I'm trying to clarify that.

THE COURT: I'm not sure of the wording of the section.

MR. BAYNE: Under Section 745, the accused is to enter into a bond —

MR. DANDYK: There is an indication that he, ". . .enter into a recognizance, with or without sureties" — that being up to the court — "to keep the peace and be of good behaviour for any period that does not exceed twelve months, and comply with such other reasonable conditions prescribed in the recognizance as the court considers desirable for securing the good conduct of the defendant." That is the wording under Section 745(3)(a).

MR. BAYNE: So if it's to enter into a recognizance, I take it the condition the Crown is concerned with is to refrain from communication, directly or indirectly, with any of the three named complainants.

MR. DANDYK: The Crown would in fact go further. The information the Crown has, at least, is this accused was previously convicted of a break and enter with intent in respect of another cheerleader. The Crown would ask the complainants in this case to be named and also any other Ottawa Rough Riders cheerleaders to be named, generally, that he not contact them, directly or indirectly. The Crown would also suggest that, with the information we have, given the past background, that in fact this accused should seek psychiatric help in respect of his fixation in respect of Ottawa Rough Riders cheerleaders, because there is a concern. . .

THE COURT: I don't think I can go that far. I will order a peace bond.

MR DANDYK: Fine. I would indicate, at least, that that is reasonable, given the evidence, but it's up to the Court.

THE COURT: He will be ordered to enter into a peace bond for a period of 12 months under Section 745(3)(a) with respect to each of the complainants and any other cheerleader of the Ottawa Rough Riders.

--R E C E S S (10:20 A.M.)

I HEREBY CERTIFY that I have, to the best of my skill and ability, accurately recorded by Stenomask, and correctly transcribed the foregoing proceedings.

Clotilde Leclerc
District Court Reporter