SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Judge Benjamin Mutanga Itoe, Presiding Judge
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: 5 November 2004

THE PROSECUTOR **Against** **SAM HINGA NORMAN**
MOININA FOFANA
ALLIEU KONDEWA

Case No. SCSL – 2004 – 14 – T

RE-FILING OF AUTHORITIES PURSUANT TO THE "ORDER TO PROSECUTION TO RE-FILE MOTION AND SEEK LEAVE TO SUBMIT SUPPLEMENTARY MATERIALS"

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1. On 25 October, the Prosecution filed a "Motion for the Immediate Cessation of Violations of the Orders on Protective Measures for Witnesses and for Contempt" (the" Prosecution Motion") together with the Prosecution's Index of Authorities submitted as Annex B.
2. Pursuant to the Trial Chamber's "Order to Prosecution to Re-File Motion and Seek leave to Submit Supplementary Materials" dated 3 November 2004, the Prosecution hereby re-files the Index of Authorities (Annex B).

Done in Freetown, 5 November 2004.

For the Prosecution,

James C. Johnson, Senior Trial Counsel

Annex B

PROSECUTION'S INDEX OF AUTHORITIES

1) *Prosecutor v Gatete*, "Decision on Prosecution Request for Protection of Witnesses", ICTR-2000-61-I, 11 February 2004;

   URL:http://web2.westlaw.com/Welcome/WestlawInternational/default.wl?RS=WLW4.10&VR=2.0&FN=_top&MT=WestlawInternational&SV=Split

2) *Prosecutor v Aleksovki,* " Judgment on Appeal by Anto Nobilo against Finding of Contempt", 30 May 2001;

   URL: http://www.un.org/icty/aleksovski/appeal/judgement/nob-aj010530e.htm

3) *Prosecutor v Nahimana*, "Order concerning Prosecution witness GO's complaint regarding contact by the Defence team for Ferdinand Nahimana", 11 June 2001;

4) *Prosecutor v Kajelijeli,* "Decision on Kajelijeli's Motion to hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C)", 15 November 2002;

   URL:http://web2.westlaw.com/Welcome/WestlawInternational/default.wl?RS=WLW4.10&VR=2.0&FN=_top&MT=WestlawInternational&SV=Split

5) *R v McCraw*, Supreme Court of Canada , 4 June 1991, [1991] 3R.C.R. 72 para, 27;

   URL:http://web2.westlaw.com/Welcome/WestlawInternational/default.wl?RS=WLW4.10&VR=2.0&FN=_top&MT=WestlawInternational&SV=Split

6) *R v DaSilva*, British Columbia Provincial Court, 21 May 2002, 2002 Carswell BC 1154;

   URL:http://web2.westlaw.com/Welcome/WestlawInternational/default.wl?RS=WLW4.10&VR=2.0&FN=_top&MT=WestlawInternational&SV=Split

7) *R v Patrascu*, Court of Appeal (Criminal Division), 14 October 2004, [2004] EWCA CRIM 2417;

   URL:http://www.lexis.com/research/retrieve/frames?_m=c52500da2b03bceea484fb6daaaf839a&csvc=bl&cform=bool&_fmtstr=CITE&docnum=1&_startdoc=1&wchp=dGLbVzz-zSkAB&_md5=e020bce098839aa1762eda5b431ec56d

Annex B

Prosecutor v Nahimana, "Order concerning Prosecution witness GO's complaint regarding contact by the Defence team for Ferdinand Nahimana", 11 June 2001;

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER I

OR.: ENG

Before: Judge Navanethem Pillay, Presiding
Judge Erik Møse
Judge Asoka de Zoysa Gunawardana

Registry: Ms. Marianne Ben Salimo

Decision date: 11 June 2001

THE PROSECUTOR v. FERDINAND NAHIMANA
Case N°. ICTR-96-11-T

ORDER CONCERNING PROSECUTION WITNESS GO'S COMPLAINT REGARDING CONTACT BY THE DEFENCE TEAM FOR FERDINAND NAHIMANA

The Office of the Prosecutor:
Ms. Monasebian — Assistant Trial Attorney
Ms. Kagwi — Assistant Trial Attorney

Defence Counsel:
Mr. Biju-Duval — Lead Counsel
Ms. Ellis — Co-Counsel

SITTING as Trial Chamber I, composed of Judge Navanethem Pillay, Presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana;

PURSUANT to Articles 20 and 21 of the Statute and Rules 69 and 75 of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED OF an oral complaint by Prosecution Witness GO that the Defence Team for Ferdinand Nahimana tried to contact him on 27 May 2001 at a "safe house";

HAVING HEARD the parties on 28 May 2001 in Closed Session;

CONSIDERING the submission by the Defence that the Lead Counsel, Mr. Biju-Duval believed that he had seen witness GO talk to a previous witness, Mr. Kamilindi on 23 May 2001;

TAKING INTO ACCOUNT that during the cross-examination of witness GO, Mr. Biju-Duval questioned him as to whether he spoke to Mr. Kamilindi at the place where he was staying while in Arusha, and considering that the Chamber overruled questions relating to the name of the "safe house";

CONSIDERING FURTHER that Mr. Biju-Duval stated that he had sighted witness GO with another witness and convinced that the correct facts had not been placed before the Chamber, the Defence decided to make further inquiries so as to challenge the credibility of witness GO. They had proceeded to a location, identified themselves and asked the proprietress for the register, to ascertain whether someone from Rwanda or Tanzania was staying there over the past week;

NOTING the objection by the Prosecutor to the procedure adopted by the Defence to challenge the credibility of witness GO;

CONSIDERING the Prosecution submission that the Defence was in contempt of the ruling of the Chamber overruling any questions on the place of abode of witness GO whilst in Arusha and that the Defence had also violated the Witness Protection Order[1] in respect of witness GO which prohibited the divulgence of any information about witness GO by the Defence, to anyone;

TAKING INTO ACCOUNT the explanation by Mr. S. Vahidy, Chief of Witness and Victims Support Section ("WVSS") who confirmed what the Defence had stated, except to add that the proprietress had informed him that the Defence specifically inquired about a Rwandan person staying at the hotel and that she had sent a note to witness GO with the names of the Defence Counsel.

[1] Order dated 8 July 1998, Oral Decision rendered on 26 June 1997.

DELIBERATIONS

In terms of the Witness Protection Order, in the case of *The Prosecutor vs. Ferdinand Nahimana* (ICTR-96-11-T), dated 8 July 1998, the Trial Chamber ordered in paragraph 7 that:

> The accused or his defense counsel shall make a written request, on reasonable notice to the Prosecution, the Trial Chamber or a Judge thereof, of its wish to contact any protected Prosecution witnesses, and the Prosecution shall undertake to facilitate such contact.

The Trial Chamber notes that the Defence did not contact or attempt to contact the protected witness. However, the Defence made investigations at a "safe house" where a protected witness was staying. They (a) entered the premises, (b) made enquiries, and (c) aroused the suspicion of the proprietress who then alerted the witness of the visit.

Witness GO expressed his alarm to the Trial Chamber. Protected witnesses are in a vulnerable position. The Trial Chamber recognizes this and has ordered protective measures to cover situations such as these. The Trial Chamber notes the explanations given by the Defence in this case: that they had not intended to contact the witness, and it accepts that no direct contact was in fact made with the witness. Therefore, the Trial Chamber finds that no violation of the Witness Protection Order occurred.

However, the Trial Chamber views the visit of the Defence to the "safe house" in the manner in which it was undertaken as inappropriate. Such visits may expose witnesses to risk, as to their safety. The Defence is advised to exercise more prudence and to follow alternative procedures available to them. In this case, they could have approached the Prosecutor, the WVSS or the Trial Chamber itself in a closed session for assistance and direction.

Accordingly, the Defence is hereby required not to engage in any such activity, as enumerated above, which would endanger the safety of a protected witness.

Done in Arusha, this 11th day of June 2001,

Navanethem Pillay
Presiding Judge

Erik Møse
Judge

Asoka de Zoysa Gunawardana
Judge

Annex B

R v McCraw, Supreme Court of Canada , 4 June 1991, [1991] 3R.C.R. 72 para, 27;

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7 C.R. (4th) 314, 66 C.C.C. (3d) 517, 128 N.R. 299, 49 O.A.C. 47, [1991] 3 S.C.R. 72

R. v. **McCraw**

STEPHEN JOSEPH **McCRAW** v. R.

Supreme Court of Canada

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Cory, Stevenson and Iacobucci JJ.

Heard: June 4, 1991
Judgment: September 26, 1991
Docket: Doc. 21684

Counsel: Donald B. Bayne, for appellant.
Carol Brewer and Rosella Cornaviera, for the Crown.

Subject: Criminal

Criminal Law --- Offences against person and reputation -- Intimidation and related offences -- Threatening communications or uttering threats -- Nature and elements of offence.

Threats and intimidation -- Threatening communications -- Letters sent to football cheerleaders threatening sexual intercourse "even if I have to rape you" -- Words considered objectively and within context -- Threats meaning that women would be subjected to forcible sexual penetration without consent through violence -- Letters constituting threat to cause serious bodily harm contrary to s. 264.1(1)(a) of Criminal Code.

The accused was charged with three counts of threatening to cause serious bodily harm contrary to s. 264.1(1)(a) of the Criminal Code. He had written anonymous letters to three football cheerleaders, concluding each with a threat that he would have sexual intercourse with them "even if I have to rape you." At trial, the three recipients of the letters testified. All gave evidence that the threatening letters frightened them to the extent that they no longer felt safe when they were alone. The trial judge held that the threat of rape did not constitute a threat to cause serious bodily harm. The accused was acquitted. The Court of Appeal reversed the trial judgment, and entered convictions. The accused appealed.

Held:

The appeal was dismissed.

The trial judge found, and the accused conceded, that the words used constituted a threat. Thus, the only question to be resolved was whether the words constituted a threat to cause serious bodily harm for the purposes of s. 264.1(1)(a) of the Criminal Code.

"Serious bodily harm" should be interpreted as being any hurt or injury that interferes in a grave or substantial way with the physical integrity or well-being of the complainant. "Serious bodily harm" does not require proof of the same degree of harm required for aggravated assault described in s. 268 of the Code -- that is to say, the wounding, disfiguring or endangering of the life of the complainant. Yet it requires greater harm than the mere "bodily harm" that is defined in s. 267(2) as

hurt or injury that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature. The words are clearly broad enough to include psychological harm. Giving the word "serious" its appropriate dictionary meaning, "serious bodily harm" for the purposes of s. 264(1)(a) is any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant.

The decision as to whether the written or spoken words in question constituted a threat to cause serious bodily harm was an issue of law and not of fact. 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 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. 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?

To argue that a woman who has been forced to have sexual intercourse has not necessarily suffered grave and serious violence is to ignore the perspective of women. For women, rape under any circumstance must constitute a profound interference with their physical integrity. As well, by force or threat of force, it denies women the right to exercise freedom of choice as to their partner for sexual relations and the timing of those relations. These are choices of great importance that may have a substantial effect upon the life and health of every woman. Parliament's intention in replacing the rape laws with the sexual assault offences was to convey the message that rape is not just a sexual act, but basically an act of violence. There can be no conclusion other than that rape can cause serious bodily harm. It follows that the threat to rape may well, depending on the context and circumstances, constitute a threat to commit serious bodily harm contrary to the provisions of s.264.1 (1)(a) of the Code.

Looking at the letters as a whole strengthened and emphasized that there was a threat to inflict serious bodily harm on the three victims. This was not juvenile, puerile sexual fantasizing; it was a threat of grave violence intended to enforce compliance. The words used were not ambiguous; rather, they were explicit and clear. Taken in the context of the letter, they threatened serious bodily harm emphasized by the use of the underlined word "rape." The letters could have no other meaning than that these three women would be subjected to forcible sexual penetration without consent through the use of violence. The purpose of the threat was to create a fear of such a degree of bodily harm from the application of force that the victims would not resist the sexual acts of the accused. There could be no conclusion drawn by the victims other than that they would be subjected to violence should they resist. In this case, it was appropriate to consider the evidence of the complainants as to the effect of the letters upon them as an aid in determining what the words would mean to a reasonable person. These young women were forced to live with the threat of being sexually assaulted and to carry out their activities with the knowledge that they were being stalked by the accused. No reasonable person looking at the letters could come to any other conclusion than that they constituted a threat to cause serious bodily harm. The threat resulted in the restriction of lifestyle, movement and choice of action that the section was designed to alleviate. This is the very type of threat that s. 264.1(1)(a) was designed to combat. The evidence of the complainants, coupled with a review of the words of the letter, would inevitably lead to the conclusion that the accused had knowingly uttered a threat to cause the complainants serious bodily harm. The facts of this case required a conviction on the three charges.

Cases considered:

R. v. Billam, [1986] 1 W.L.R. 349, [1986] 1 All E.R. 985, 8 Cr. App. R. (S.) 48, 82 Cr. App. R. 347 (C.A.) -- referred to

R. v. LeBlanc, [1989] 1 S.C.R. 1583, 70 C.R. (3d) 94, 96 N.R. 240, 50 C.C.C. (3d) 192, 99 N.B.R. (2d) 449, 250 A.P.R. 449 -- referred to

R. v. Nabis, [1975] 2 S.C.R. 485, [1974] 6 W.W.R. 307, 18 C.C.C. (2d) 144, 2 N.R. 249, 48

D.L.R. 543referred to

Statutes considered:

Criminal Code, R.S.C. 1970, c. C-34 --

s. 243.4(1)(a) [now R.S.C. 1985, c. C-46, s. 264.1(1)(a)]

Criminal Code, R.S.C. 1985, c. C-46 --

s. 264.1(1)(a) [as en. R.S.C. 1985 (1st Supp.), c. 27, s. 38]

s. 267

s. 267(2)

s. 268

s. 273

s. 752

Words and phrases considered:

serious bodily harm -- for the purposes of s. 264.1(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46, is any hurt or injury, physical or psychological, interfering in a substantial way with physical or psychological integrity, health or well-being of a complainant.
Appeal from judgment of Ontario Court of Appeal, reported at (1989), 72 C.R. (3d) 373, 51 C.C.C. (3d) 239, 35 O.A.C. 144, allowing appeal from acquittal on charges of threatening serious bodily harm.

The judgment of the court was delivered by *Cory J.*:

1 The appellant wrote anonymous letters to three young women. In those letters he graphically detailed various sexual acts which he wished to perform with them, and concluded by stating that he was going to have sexual intercourse with them even if he had to rape them. At issue is whether the letters amounted to a threat to cause serious bodily harm contrary to the provisions of s. 243.4(1)(*a*), now s. 264.1(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46.

Factual Background

2 The appellant McCraw was known to follow the Ottawa Rough Rider Cheerleaders and had been seen at their practices. In the fall of 1987 he phoned some of the cheerleaders using an assumed name, and asked them to pose for photographs. During the same period he sent anonymous letters to three of the cheerleaders. In the letters he described sexual acts he intended to perform upon them. He concluded each letter with a threat that he would have sexual intercourse with them "even if I have to rape you," and even if it took until the day he died.

3 Each letter was personally addressed to one of the three cheerleaders. The letters are so similar that it is sufficient for the purposes of these reasons to set out the contents of one of them:

> Sandy
>
> Let me tell you, your [sic] a beautiful woman, I am disapointed [sic] you wernt [sic] 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. I would love to taste your juicy vagina. Then I would suck on your perfect, well 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 into your nice tight asshole. Then you would 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 woman [sic] around like you.
>
> See you later and have a nice day!

(Emphasis in original.)

4 One of the victims received a second letter in the same envelope. In that letter she was told to meet McCraw at a specified time behind the National Arts Centre in Ottawa. The appellant warned the victim that "If you don't show up I will go to Rockland [her home] and *get you*, don't forget I know where you live" (emphasis in original). A list of the cheerleaders' names and telephone numbers, including those of the victims, was found in the appellant's possession upon his arrest.

5 At trial the three recipients of the letters testified. All gave evidence that the threatening letters frightened them to the extent that they no longer felt safe when they were alone. One stated that as a result of receiving the letter she took greater precautions when she went out and had someone with her at all times. She also ensured that no one at her place of work would give out any information about her. Another stated that the letters scared her and that she took steps to always have someone with her wherever she went. The third stated that she became more anxious about going out alone and more cautious about where she went. None of these witnesses were cross-examined. The appellant did not testify and no evidence was called on his behalf.

The Charges and the Relevant Section

6 The appellant was tried on the following three charges:

> THAT HE THE SAID STEPHEN JOSEPH MCCRAW, between the 1st day of November, 1987 and the 26th day of November, 1987, at the City of Ottawa in the said Judicial District, did knowingly cause to be received a threat to Sandy Kobluk, by letter, to cause serious bodily harm to Sandy Kobluk, contrary to Section 243.4(2) of the Criminal Code of Canada.
>
> AND FURTHER, THAT HE THE SAID STEPHEN JOSEPH MCCRAW, between the 1st day of November, 1987 and the 26th day of November, 1987, at the City of Ottawa in the said Judicial District, did knowingly cause to be received a threat to Johanne Robillard, by letter, to cause serious bodily harm to Johanne Robillard, contrary to Section 243.4(2) of the Criminal Code of Canada.
>
> AND FURTHER, THAT HE THE SAID STEPHEN JOSEPH MCCRAW, between the 1st day of October, 1987 and the 30th day of October, 1987, at the City of Ottawa in the said Judicial District, did knowingly cause to be received a threat to Deborah Burgoyn, by letter, to cause serious bodily harm to Deborah Burgoyn, contrary to Section 243.4(2) of the Criminal Code of Canada.

7 Section 264.1(1), then 243.4(1), the definition section of the offences charged, reads as follows:

> 264.4(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 serious bodily harm to any person;
>
> (*b*) to burn, destroy or damage real or personal property; or

10549

(c) to kill, poison or injure an animal or bird that is the property of any person.

The Courts Below

Trial Judge

8 The trial judge found as a fact that the statement contained in each letter, "even if I have to rape you," constituted a threat of rape and was perceived by the complainants as a threat to rape them. However, in his view, the central issue was whether the threat to rape constituted a threat to cause serious bodily harm to the complainants. He stated that the court should focus on the plain meaning of the actual words used, and should not speculate upon what the accused might have meant. In this regard the trial judge stated:

> The tenor of the letters, while immature and disgusting, reveal more of an adoring fantasy than a threat to cause serious bodily harm.

9 ((1989), 21 Ottawa L. Rev. 201, at p. 203.)

10 He rejected the Crown's argument that rape necessarily involves physical, emotional or psychological harm amounting to serious bodily harm. He put his position in this way (at p. 203):

> 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. ... Just as the words in *Gingras* [(1986), 16 W.C.B. 399 (Ont. Dist. Ct.)] 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.

11 He emphasized his conclusion in the following manner at p.204:

> Rape or sexual assault does not of itself necessarily involve any kind of physical harm to the victim.
>
> . . . . .
>
> 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.

The Ontario Court of Appeal

12 Brooke J.A., Tarnopolsky J.A. concurring, disagreed [(1989), 72 C.R. (3d) 373, 51 C.C.C. (3d) 239, 35 O.A.C. 144] with the trial judge's conclusion that the threat of rape did not involve serious bodily harm. In his view, the threatened acts contravened the section. He wrote at p. 243 [C.C.C., pp. 377- 378 C.R.]:

> The word 'serious' is not ambiguous and should be given its ordinary meaning. ... Putting aside any question of whether bodily harm includes emotional or psychological harm, does the threat in this case amount to a threat to cause serious bodily harm? In my opinion, it does. The object of this threat is to create fear of such a degree of bodily harm from the application of physical force that the complainant will submit or not resist the sexual assault. The nature of bodily harm which would cause her to submit to such violations of her dignity and her body is not simply a hurt or injury that would interfere with her comfort but rather something serious. In short, resistance means force, perhaps violence, and serious injury.

10550

13 Brooke J.A. concluded that the trial judge had erred in his interpretation of the words "serious bodily harm" as they appear in s.264.1(1)(*a*) when he held that the threat to commit rape was no more than a threat to have sexual intercourse without the complainant's consent.

14 However, the dissent found that the letters were simply obscene and did not contain a threat of rape. Accordingly, the letters did not "constitute threats to commit a specific criminal act" (p. 244 [C.C.C., p. 378 C.R.]). As a result, it was unnecessary to consider whether a threat to rape is a threat to cause serious bodily harm. The dissent agreed with the trial judge that "[t]he tenor of the letters, while immature and disgusting, reveal more of an adoring fantasy than a threat to cause serious bodily harm." Since, the dissenting judge concluded, the trial judge had found as a fact that the appellant did not intend the letters to be taken seriously, no offence could have been committed under s. 264.1(1). Alternatively, the dissent held (at p. 248 [C.C.C., p.382 C.R.]):

> Even if I am wrong in concluding that the trial judge found as a matter of fact that the letters were not intended to be taken seriously, I certainly accept that the language of the letters, while clearly criminal in that it is obscene, is ambiguous as a threat to cause serious bodily harm.

The Sole Question to be Resolved

15 The trial judge found, and the appellant conceded, that the words "I am going to fuck you even if I have to rape you" constitute a threat. Thus, the only question to be resolved is whether the words constitute a threat to cause serious bodily harm for the purposes of s.264.1(1)(*a*) of the *Code*.

The Meaning of "Serious Bodily Harm" in s. 264.1(1)(a)

16 Prior to 1985 the *Criminal Code* prohibited threats made by "letter, telegram, telephone, cable, radio, or otherwise" to cause "death or injury" to any person. The offence was aimed at the prohibition of written threats which were viewed as creating greater fear in the recipient than oral threats. In *R. v. Nabis*, [1975] 2 S.C.R. 485, [1974] 6 W.W.R. 307, 18 C.C.C. (2d) 144, 2 N.R. 249, 48 D.L.R. (3d) 543, this Court interpreted the words "or otherwise", holding that they were not broad enough to include oral threats of death or injury. It followed that oral threats made face to face, no matter how serious, were not prohibited.

17 In 1985, Parliament took steps to amend the section and to fill the void created by the decision in *R. v. Nabis*, supra. It replaced the existing section with s. 243.4(1)(*a*), now 264.1(1)(*a*). The present section was expanded to include threats made "in any manner" to cause death or "serious bodily harm". The amendment had the effect of including oral threats made to the recipient but as well increased the required threshold of harm from "death or injury" to "death or serious bodily harm". At the same time the offence of uttering threats was moved to that portion of the *Criminal Code* dealing with offences against the person.

18 With that background in mind it is now appropriate to consider what meaning should be given to the words "serious bodily harm".

19 The appellant urged that serious bodily harm is *ejusdem generis* with death. I cannot accept that contention. The principle of *ejusdem generis* has no application to this case. It is well settled that words contained in a statute are to be given their ordinary meaning. Other principles of statutory interpretation only come into play where the words sought to be defined are ambiguous. The words "serious bodily harm" are not in any way ambiguous.

20 It is true that the phrase is not defined in the Code. However, "bodily harm" is defined in s. 267 (2). That definition is as follows:

> For the purposes of this section [assault with a weapon or causing bodily harm] and sections 269 [unlawfully causing bodily harm] and 272 [sexual assault with a weapon, threats to a third party or causing bodily harm], 'bodily harm' means any hurt or injury to the complainant

10551

> that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.

21 That definition of "bodily harm" can, I think, be properly applied to those words as they appear in s. 264.1(1)(*a*).

22 There remains the question then of how the word "serious" ought to be defined. The *Shorter Oxford English Dictionary*, 3d ed. (Oxford Clarendon Press, 1987) provides the following definition of "serious":

> *serious*: weighty, important, grave; (of quantity or degree) considerable. b. Attended with danger; give cause for anxiety.

Giving the word "serious" its appropriate dictionary meaning, I would interpret "serious bodily harm" as being any hurt or injury that interferes in a grave or substantial way with the physical integrity or well-being of the complainant. Thus, "serious bodily harm" does not require proof of the same degree of harm required for aggravated assault described in s. 268 of the Code; that is to say, the wounding, disfiguring or endangering of the life of the complainant. Yet it requires greater harm than the mere "bodily harm" described in s. 267; that is, hurt or injury that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.

23 Does the phrase encompass psychological harm? I think that it must. The term "bodily harm" referred to in s. 267 is defined as "any hurt or injury." Those words are clearly broad enough to include psychological harm. Since 264.1 refers to any "serious" hurt or injury, then any serious or substantial psychological harm must come within its purview. So long as the psychological harm substantially interferes with the health or well-being of the complainant, it properly comes within the scope of the phrase "serious bodily harm." There can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm. I can see no principle of interpretation nor any policy reason for excluding psychological harm from the scope of s. 264.1(1)(*a*) of the Code.

24 In summary, the meaning of "serious bodily harm" for the purposes of the section is any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant. With that definition of the phrase in mind, it is now appropriate to review the approach to be taken when a court is considering whether the questioned words constitute a threat of serious bodily harm. As a first step, some consideration should be given to the aim and purpose of s.264.1(1)(*a*).

The Aim of s. 264.1(1)(a)

25 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 instil 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.

26 The true nature of the offence was recognized by this Court in *R. v. LeBlanc*, [1989] 1 S.C.R. 1583, 70 C.R. (3d) 94, 96 N.R. 240, 50 C.C.C. (3d) 192, 99 N.B.R. (2d) 449, 250 A.P.R. 449. 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. But if, for example, evidence was led that the accused simply copied words that he did not understand on the direction of another, different considerations would apply. The next step is a consideration of the questioned words.

The Approach That Should Be Taken to Determine if Words Contravene s. 264.1(1)(a)

27 At the outset, I should state that in my view the decision as to whether the written or spoken words in question constitutes a threat to cause serious bodily harm is an issue of law and not of fact. 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.

28 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?

Does the Threat to Rape Contained in These Letters Demonstrate an Intent to Inflict Serious Bodily Harm?

(A) Generally

29 Let us consider a threat to rape in general terms, without reference to the specific language of the letters. Violence is inherent in the act of rape. The element of sexuality aggravates the physical interference caused by an assault. Sexual assault results in a greater impact on the victim than a non-sexual assault. This has been reflected in the penalty provisions for sexual assault, which are significantly higher than for non-sexual assault offences. In addition, this is emphasized by the fact that the definition of a "serious personal injury offence" in s. 752 of the Code includes the commission of sexual assault or an attempt to commit that offence. Thus, Parliament has recognized the gravity of sexual assault.

30 It seems to me that to argue that a woman who has been forced to have sexual intercourse has not necessarily suffered grave and serious violence is to ignore the perspective of women. For women, rape under any circumstance must constitute a profound interference with their physical integrity. As well, by force or threat of force, it denies women the right to exercise freedom of choice as to their partner for sexual relations and the timing of those relations. These are choices of great importance that may have a substantial effect upon the life and health of every woman. Parliament's intention in replacing the rape laws with the sexual assault offences was to convey the message that rape is not just a sexual act but is basically an act of violence. See Kathleen Mahoney, "*R. v. McCraw*: Rape Fantasies v.Fear of Sexual Assault" (1989) 21 *Ottawa L. Rev.* 207, at pp. 215-216.

31 It is difficult, if not impossible, to distinguish the sexual component of the act of rape from the context of violence in which it occurs. Rape throughout the ages has been synonymous with an act of forcibly imposing the will of the more powerful assailant upon the weaker victim. Necessarily implied in the act of rape is the imposition of the assailant's will on the victim through the use of force. Whether the victim is so overcome by fear that she submits, or whether she struggles violently, is of no consequence in determining whether the rape has actually been committed. In both situations the victim has been forced to undergo the ultimate violation of personal privacy by unwanted sexual intercourse. The assailant has imposed his will on the victim by means of actual violence or the threat of violence.

32 Violence and the threat of serious bodily harm are indeed the hallmarks of rape. While the bruises and physical results of the violent act will often disappear over time, the devastating

psychological effects may last a lifetime. It seems to me that grave psychological harm could certainly result from an act of rape.

33 The psychological trauma suffered by rape victims has been well documented. It involves symptoms of depression, sleeplessness, a sense of defilement, the loss of sexual desire, fear and distrust of others, strong feelings of guilt, shame and loss of self-esteem. It is a crime committed against women which has a dramatic, traumatic impact. See David J. Giacopassi and Karen R. Wilkinson, "Rape and the Devalued Victim" (1985) 9 Law and Human Behavior 367; *R. v. Billam*, [1986] 1 W.L.R. 349, [1986] 1 All E.R. 985, 8 Cr. App. R.(S.) 48, 82 Cr. App. R. 347 (C.A.), at pp. 49-50 [Cr. App. R.(S.)]; Patricia Marshall, "Sexual Assault, the Charter and Sentencing Reform" (1988), 63 C.R. (3d) 216, at p. 221; Ann W. Burgess, "Rape Trauma Syndrome" (1983) 1:3 Behavioral Sciences and the Law 97; Charles H. Herd, "Criminal Law: Kansas Recognizes Rape Trauma Syndrome" (1985) 24 Washburn L.J. 653. To ignore the fact that rape frequently results in serious psychological harm to the victim would be a retrograde step, contrary to any concept of sensitivity in the application of the law.

34 In my view there can be no conclusion other than that rape can cause serious bodily harm. It follows that the threat to rape may well, depending on the context and circumstances, constitute a threat to commit serious bodily harm contrary to the provisions of s.264.1(1)(*a*) of the Code. Indeed, it would be ludicrous and contrary to the purpose of s. 264.1 to interpret the section as criminalizing the threat to damage a piece of property or a pet while permitting a threat to rape a woman on the grounds that it did not constitute a threat to commit serious bodily harm.

(B) The Words Used to Express the Threat

35 In this case, quite apart from the effect of the letters as a whole, the words set out earlier, "I am going to fuck you even if I have to rape you," constitute a threat of serious bodily harm. The letters are addressed to young women. The threat is to have sexual intercourse with the woman to whom the letter is addressed, or, as underlined in the letter, to *rape* her. How would that wonderful fictitious legal character, the ordinary reasonable person, understand the word "rape," bearing in mind that at least 50 per cent of the ordinary reasonable people in our society are women? The *Shorter Oxford English Dictionary* defines rape as the "[v]iolation or ravishing of a woman." Rape is non-consensual sexual intercourse. It is the violation of the bodily integrity of a woman. It is hard to imagine a greater affront to human dignity. As noted earlier, rape is a crime that is likely to have serious psychological consequences and may, as well, have serious physical effects. Surely to every fair-minded woman and man the threat of rape constitutes a threat of serious bodily harm. Neither the one uttering or writing the threat to rape nor the person to whom it is directed could have any doubt as to the meaning of the word "rape."

36 The appellant argues that the threat to rape is no more than a threat to have non-consensual sexual intercourse, and not a threat to cause serious bodily harm. It is argued that non-consensual sexual intercourse may or may not involve death or serious bodily harm, depending upon the varying circumstances of each incident of rape and of each victim. It is said that the *Criminal Code* provides for a separate offence when a sexual assailant carries, uses or threatens to use a weapon or causes bodily harm to the complainant (s. 267). It is a separate offence when the sexual assailant wounds, maims, disfigures or endangers the life of the complainant (s. 273). It is then argued that when the letters were received in 1987, the expressed rape threat constituted a threat to do no more than commit sexual assault *simpliciter* and could not refer to the other two sections of the Code which refer to actual or threatened violence.

37 I cannot accept this argument. The particular legal classification of the assailant's threatened act, should it be carried out, is completely irrelevant to the determination of whether the words in question constitute a threat to cause serious bodily harm. We are not, for the purposes of s. 264.1(1)(*a*), concerned with the legal definition of rape. In determining whether the letters contained a threat to cause serious bodily harm, the term "rape" must be construed as it would be by the average reasonable person.

38 People outside the legal profession simply do not communicate to each other in the language of the *Criminal Code*. It would be a rare case indeed if an assailant would threaten his victim in words such as: "Madam, if you don't comply with my requests, I'm going to sexually assault you and cause you bodily harm," or "I'm going to commit aggravated sexual assault upon you." It is equally unlikely that a threat would refer to the specific circumstances which must exist in law for those offences to be made out.

39 In reality, neither the man issuing the threat nor the woman to whom it is directed are concerned with legal definitions. Here, the appellantthreatened *rape*. Neither he nor any of the young women could have had any doubt as to what the word meant. It would be un derstood to mean sexual penetration without consent achieved by means of violence or threats of violence. The fact that the term "rape" is no longer used in the present *Criminal Code* is of no consequence. It does not alter the essential nature of the understanding of the word "rape" to the ordinary reasonable person. Nor does it affect the nature of the threat implied by the use of that word.

(C) Looking at the Letters as a Whole

40 Looking at the letters as a whole strengthens and emphasizes that there was a threat to inflict serious bodily harm on the three victims. The words "I am going to fuck you even if I have to *rape* you" are found towards the end of a letter written to young women graphically describing various sexual acts the appellant intended to perform. The clear inference was that rape would be the means of enforcing compliance with the depicted sexual activity. This was not juvenile, puerile sexual fantasizing, it was a threat of grave violence intended to enforce compliance. The words used are not ambiguous; rather, they are explicit and clear. Taken in the context of the letter, they threaten serious bodily harm emphasized by the use of the underlined word *rape*. The letters could have no other meaning than that these three women would be subjected to forcible sexual penetration without consent through the use of violence. The purpose of the threat was to create a fear of such a degree of bodily harm from the application of force that the victims would not resist the sexual acts of the appellant. There could be no conclusion drawn by the victims other than that they would be subjected to violence should they resist the appellant.

41 In this case it was appropriate to consider the evidence of the complainants as to the effects of the letters upon them as an aid determining what the words would mean to a reasonable person.

42 These young women were forced to live with the threat of being sexually assaulted, and to carry out their activities with the knowledge that they were being stalked by the appellant. No reasonable person looking at the letters could come to any other conclusion than that they constituted a threat to cause serious bodily harm. The threat resulted in the restriction of lifestyle, of movement and of choice of action that the section was designed to alleviate. This is the very type of threat that s. 264.1(1)(*a*) was designed to combat. The evidence of the complainants, coupled with a review of the words of the letter, would inevitably lead to the conclusion that the accused had knowingly uttered a threat to cause the complainants serious bodily harm. The facts of the case required a conviction on the three charges.

Summary

43 For the purposes of s. 264.1(1)(*a*) of the *Criminal Code*, "serious bodily harm" means any hurt or injury, whether physical or psychological, that interferes in a substantial way with the integrity, health or well-being of a victim. To determine whether spoken or written words constitute a threat to cause serious bodily harm, they must be looked at in the context in which they were spoken or written, in light of the person to whom they were addressed and the circumstances in which they were uttered. They should be viewed in an objective way, and the meaning attributed to the words should be that which a reasonable person would give to them. A threat to rape in and of itself, considered in light of the context of the written words or conversation in which the threat was made and of the person to whom the words were addressed, may constitute a threat to cause serious bodily harm. In this case, the threats contained in the letters constitute a threat to cause serious bodily harm.

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Disposition

44 In the result, I would dismiss the appeal and affirm the decision of the majority of the Court of Appeal.

Appeal dismissed.

END OF DOCUMENT

Annex B

R v DaSilva, British Columbia Provincial Court, 21 May 2002, 2002 Carswell BC 1154;

10557

2002 CarswellBC 1154
2002 BCPC 168

R. v. **DaSilva**

Regina v. Louis Derrick **DaSilva,** Patrick Plowman, Lemar Wilson

British Columbia Provincial Court

Bruce Prov. J

Heard: May 6, 2002
Judgment: May 21, 2002
Docket: New Westminster 60137-01

Counsel: Wendy Stephen, Sheri Mark, for Crown
Eric Warren, for Accused, DaSilva
Herbert Maier, for Accused, Plowman
Ronald Coumont, for Accused, Wilson

Subject: Criminal; Evidence

Criminal law --- Conspiracy offences -- Conspiracy -- Nature and elements of offence -- What constitutes conspiracy -- Common design or agreement

MV was shot and killed outside nightclub -- Three witnesses to shooting identified LD as shooter -- LD was charged with murder and detained in pre-trial centre -- Police intercepted thousands of telephone calls to and from pre-trial centre involving PP, LW, and LD -- PP and LW visited MT and warned of consequences of testifying against LD -- MT testified and LD was convicted of second-degree murder -- LD, PP, and LW were charged with conspiracy to obstruct justice and obstruction of justice -- LD, PP, and LW were convicted -- Attempt to obstruct justice need not be successful -- Offence is committed when there is proof of act having tendency to defeat, pervert, or obstruct justice -- LD had MT's statement to police and was aware that his friends were in contact with witnesses -- Direct evidence showed that PP and LW were acting on LD's instructions -- PP and LW admitted that they went to see MT and confronted him with his statement to police -- Reasonable person would perceive words or acts of PP and LW as threat even though no overt threat was made.

Criminal law --- Conspiracy offences -- Conspiracy -- Nature and elements of offence -- What constitutes conspiracy -- Common design or agreement

MV was shot and killed outside nightclub -- Three witnesses to shooting identified LD as shooter -- LD was charged with murder and detained in pre-trial centre -- Police intercepted thousands of telephone calls to and from pre-trial centre involving PP, LW and LD -- PP and LW visited MT and warned of consequences of testifying against LD -- MT testified and LD was convicted of second-degree murder -- LD, PP and LW were charged with conspiracy to obstruct justice and obstruction of justice -- LD, PP and LW were convicted -- LD had MT's statement to police and was aware that his friends were in contact with witnesses -- Direct evidence showed that PP and LW were acting on LD's instructions.

Criminal law --- Offences against the administration of justice -- Misleading justice -- Dissuading witness from giving evidence

MV was shot and killed outside nightclub -- Three witnesses to shooting identified LD as shooter -- LD was charged with murder and detained in pre-trial centre -- Police intercepted thousands of telephone

calls to and from pre-trial centre involving PP, LW and LD -- PP and LW visited MT and warned of consequences of testifying against LD -- MT testified and LD was convicted of second-degree murder -- LD, PP and LW were charged with conspiracy to obstruct justice and obstruction of justice -- LD, PP and LW were convicted -- Attempt to obstruct justice need not be successful -- Offence is committed when there is proof of act having tendency to defeat, pervert or obstruct justice -- PP and LW admitted that they went to see MT and confronted him with his statement to police -- Reasonable person would perceive words or acts of PP and LW as threat even though no overt threat was made.

Cases considered by Honourable Judge C.J. Bruce:

R. v. Buzzanga (1979), 49 C.C.C. (2d) 369, 25 O.R. (2d) 705, 101 D.L.R. (3d) 488 (Ont. C.A.) -- considered

R. v. Carter, [1982] 1 S.C.R. 938, 31 C.R. (3d) 97, 137 D.L.R. (3d) 387, 46 N.B.R. (2d) 142, 121 A.P.R. 142, 47 N.R. 288, 67 C.C.C. (2d) 568, 1982 CarswellNB 13, 1982 CarswellNB 55 (S.C.C.) -- considered

R. v. Cheung, 119 C.C.C. (3d) 507, 97 B.C.A.C. 161, 157 W.A.C. 161, 1997 CarswellBC 2241 (B.C. C.A.) -- referred to

R. v. Collins, 1999 CarswellNfld 43, 22 C.R. (5th) 269, 172 Nfld. & P.E.I.R. 1, 528 A.P.R. 1, 133 C.C.C. (3d) 8 (Nfld. C.A.) -- considered

R. v. Falahatchian, 99 C.C.C. (3d) 420, 83 O.A.C. 55, 1995 CarswellOnt 2343 (Ont. C.A.) -- referred to

R. v. Graham, 10 O.A.C. 2, 20 C.C.C. (3d) 210, 1985 CarswellOnt 1373 (Ont. C.A.) -- referred to

R. v. Guess, 2000 BCCA 547, 2000 CarswellBC 1971, 148 C.C.C. (3d) 321, 143 B.C.A.C. 51, 235 W.A.C. 51 (B.C. C.A.) -- considered

R. v. Hearn, 48 C.C.C. (3d) 376, 75 Nfld. & P.E.I.R. 13, 234 A.P.R. 13, 1989 CarswellNfld 99 (Nfld. C.A.) -- considered

R. v. Hughes, [1942] S.C.R. 517, 78 C.C.C. 257, [1943] 1 D.L.R. 1, 1942 CarswellBC 103 (S.C.C.) -- referred to

R. v. Lynch, 40 C.C.C. (2d) 7, 1978 CarswellOnt 1200 (Ont. C.A.) -- considered

R. v. May, 13 C.C.C. (3d) 257, 4 O.A.C. 383, 1984 CarswellOnt 1158 (Ont. C.A.) -- considered

R. v. McCraw, 7 C.R. (4th) 314, 128 N.R. 299, 66 C.C.C. (3d) 517, [1991] 3 S.C.R. 72, 49 O.A.C. 47, 1991 CarswellOnt 113, 1991 CarswellOnt 1024 (S.C.C.) -- considered

R. v. Ménard, 125 C.C.C. (3d) 416, 1998 CarswellOnt 2563, 1998 CarswellOnt 2564, 111 O.A.C. 1, 16 C.R. (5th) 226, 228 N.R. 100, 39 O.R. (3d) 416 (headnote only), 161 D.L.R. (4th) 621, [1998] 2 S.C.R. 109 (S.C.C.) -- referred to

R. v. O'Brien, [1954] S.C.R. 666, 19 C.R. 371, 110 C.C.C. 1, [1955] 2 D.L.R. 311, 1954 CarswellBC 2 (S.C.C.) -- considered

R. v. Stewart, 33 O.R. (2d) 1, 60 C.C.C. (2d) 407, 20 C.R. (3d) 289, 125 D.L.R. (3d) 576, 1981 CarswellOnt 48 (Ont. C.A.) -- referred to

Statutes considered:

10559

Criminal Code, R.S.C. 1985, c. C-46

s. 139(2) -- pursuant to

s. 139(3)(a) -- referred to

s. 465(1)(c) -- pursuant to

s. 655 -- referred to

TRIAL of co-accused on charges of conspiracy to obstruct justice and obstruction of justice

***Honourable Judge C.J. Bruce*:**

Introduction

1 The Plowman, Wilson, and DaSilva are charged as follows:

> Count 1 On or between the 8th day of April, 2001 and the 26th of June, 2001, at or near Surrey and elsewhere in the Province of British Columbia, and the City of Edmonton in the Province of Alberta, unlawfully did conspire together, the one with the other and others of them, and with another person or persons unknown, to commit the indictable offence of willfully attempting to obstruct, pervert or defeat the course of justice in a judicial proceeding by attempting to dissuade persons, witnesses, from giving evidence, contrary to section 139 (2) of the Criminal Code of Canada, thereby committing an offence contrary to Section 465(1) (c) of the Criminal Code of Canada.
>
> Count 2 On or between the 8th day of April 8, 2001 and the 26th day of June, 2001 at or near the City of Burnaby and the City of New Westminster and Surrey, in the Province of British Columbia, did willfully attempt to obstruct, pervert or defeat the course of justice in a judicial proceedings by attempting to dissuade a person, Moses Toe, from giving evidence, contrary to Section 139(2) of the Criminal Code of Canada.

2 Count 3 of the Information charged DaSilva and Donald Vaz with attempting to obstruct justice by attempting to dissuade Moses Toe from giving evidence in a judicial proceeding at or near the City of Edmonton. Count 4 charged DaSilva alone with attempting to obstruct justice by attempting to dissuade witnesses from testifying. The Crown invited the Court to dismiss Counts 3 and 4 on the basis that there was insufficient evidence to prove the offences beyond a reasonable doubt. The Court thus acquitted DaSilva on both Counts 3 and 4 of the Information.

3 Although it was the Crown's intention to proceed against all four accuseds charged in the information, Vaz is still at large and has not yet been located by the RCMP.

Admissions

4 Pursuant to Section 655 of the Criminal Code the following facts were admitted for the purpose of dispensing with the proof thereof at trial:

> 1. Brian Mickelson and Harry Rankin were counsel for Louis DaSilva with respect to a charge of first degree murder in the shooting death of Michael Walker from September 2000 until approximately August 2001. Mr. Mickelson and Mr. Rankin and their respective office staff members disclosed particulars of the murder case, including witness statements, only to their client, Louis DaSilva.
>
> 2. New Westminster Crown Counsel received particulars with respect to the shooting death of Michael Walker from New Westminster police. Crown Counsel Marnie Westbury, Crown Counsel Sheri Mark and staff members of the New Westminster Crown Counsel office only

disclosed particulars of the murder case, including witness statements, to defence counsel for Louis DaSilva.

3. The typed statement of Moses Toe, marked as Exhibit 1 in these proceedings, is a true and accurate photocopy of the statement of Moses Toe provided by the Crown Counsel to defence counsel for Louis DaSilva.

4. Louis DaSilva was an inmate of Surrey Pre-Trial Services Centre located at 14323-57th Avenue, Surrey, British Columbia, from September 15, 2000 up to and including April 26, 2001. From April 27th, 2001 to April 30th, 2001 inclusive he was an inmate of North Fraser Pre-Trial Centre. On May 1, 2001, he returned to Surrey Pre-Trial Centre, where he stayed until October 17, 2001.

5. Louis DaSilva used the telephone while at Surrey Pre-Trial Services Centre, including the telephone having the number 604-599-6135.

6. Lemar Wilson was an inmate of Surrey Pre-Trial Services Centre located at 14323-57th Avenue, Surrey, British Columbia from April 9, 2001 to April 11, 2001. He was released on April 11, 2001.

7. Lemar Wilson and Louis DaSilva were inmates on the same living unit (Unit E) at Surrey Pre-Trial Services Centre from April 9, 2001 to April 11, 2001.

8. The Surrey Pre-Trial Services Centre has a law library which contains a photocopy machine. Louis DaSilva used that law library on March 27, 2001 from 1313 hours until 1500 hours.

9. Lynn Roger, a civilian member of the Organized Crime Agency, electronically copied intercepted communications requested by Detective Jansen of the New Westminster Police Service from a master disc to six clean discs. She gave these discs to Detective Jansen. The intercepted communications recorded on these discs are identical to what is recorded on the master discs of the conversations requested by Detective Jansen. The computer system used by Lynn Roger to electronically copy these intercepted communications does not allow any editing or tampering in the copying process.

10. Lynn Roger, a civilian member of the Organized Crime Agency, tested the audio probe installed in the visiting area at Surrey Pre-Trial Services Centre with respect to this matter on May 1, 2001. That test established that the audio probe in the visiting area and the computer system at the Organized Crime Agency was recording conversations occurring in the visiting area.

5 Plowman, Wilson, and DaSilva admitted that their communications were lawfully intercepted by police pursuant to valid wiretap authorizations issued by Mr. Justice Henderson and Madame Justice Allan of the B.C.S.C. Further, neither Plowman, DaSilva, nor Wilson took issue with the authenticity, accuracy, and integrity of the intercepted communications.

Background

6 Michael Walker, a black male, was shot and killed outside Studio 54, a nightclub in New Westminster, on September 5, 2000. There were three eye witnesses to the murder: Christopher Kyle, Jeremy Lynn, and Moses Toe. All three witnesses provided statements to the New Westminster police.

7 Moses Toe is a black male and, at the time of the murder investigation, he owned a clothing store at the Metrotown Mall in the City of Burnaby called "Unleash the Dragon." Toe's 24 page statement to the police identified DaSilva as the shooter in the Walker murder. The New Westminster police located a copy of this statement in Plowman's residence on June 28, 2001, the day of his arrest. The search was lawful and pursuant to a valid search warrant.

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8 DaSilva was charged with the murder of Walker and detained in the Surrey Pre-Trial Centre on September 15, 2000. The preliminary inquiry was held in New Westminster during the week of March 12, 2001. Toe, Lynn, and Kyle testified at the preliminary inquiry and all three identified DaSilva as the shooter in the Walker murder. DaSilva was committed for trial and remained an inmate of the Surrey Pre-Trial Centre until October 17, 2001 except for April 27 to 30, inclusive, when DaSilva was detained at the North Fraser Pre-Trial Centre.

9 Toe, Lynn, and Kyle testified at DaSilva's trial and all three witnesses identified him as the shooter in the Walker murder. DaSilva was convicted of second degree murder on November 30, 2001.

10 DaSilva, Wilson, and Plowman are all black males and they are all acquainted with each other. Wilson and Plowman are cousins.

Wiretap Evidence

11 Many thousands of telephone calls were intercepted from the Surrey Pre-Trial Centre and Plowman's residence between May 1 and June 28, 2001. The Crown introduced seventeen of the taped calls as well as a transcript of each of these calls. In many of the calls, the caller as well as the recipient of the telephone call identify themselves during the conversation. Further, Detective Jansen's evidence provided a solid evidentiary foundation for identity by voice recognition of all the callers and recipients except Vaz and Johnston. In regard to these persons, it is apparent that Vaz is identified by himself and the other participants in the telephone calls. While Johnson is not similarly identified, the relevance of the calls is what DaSilva says to the caller and what the caller says to DaSilva rather than the identity of the caller.

12 After reviewing the transcripts and listening to the taped calls, I find the relevant portions of the telephone calls are as follows:

> 1. telephone call on May 1, 2001 from Plowman to DaSilva at the Surrey Pre-Trial Centre: PP: I have been trying to deal with that shit. LD: Yeah? PP: Yeah man, I've been talking to the boy. LD: Talkin to him, fuck. PP: Yeah, fuckin I am getting there. LD: Seen, you seen him at work, huh? PP: Yeah man, I went in and, and sat down and talked to him. LD: And what does he say? PP: Nothing, me and him are gonna meet up again and we'll figure out how this shit can be solved, if it can be. PP: He's been fuckin' cooperative, but I am gonna deal with it. ... LD: Why did he do that in the first place? PP: That's what I told him, man, but he was just kinda, wooh when I walked in with the book, you know what I mean and that book got around quick, man. I have been fucking carrying it with me, you know what I mean? LD: Yeah, yeah, yeah. PP: So he is just at the point where he don't want it goin around no more and he wants to end it, as simple, as quick as possible, so I told him, I said, you have to go in there and make yourself look like a straight fool, man. He said you gotta. LD: like dumb. PP: Yeah man, I told him, I says, you fuck, I said you man, you've already made a big dent man. I said you gotta fuckin fix it nigger. So this nigger's getting scared and shit, you know what I mean? LD: Yeah, yeah, yeah. PP: But I'm gonna continue dealing with it, man. LD: I appreciate that. ... and I'll look out for you, when I get out too, right. ... PP: That's just man when I read that shit, I was like oh fuck. Yeah That's real man, we're on him man LD: I knew, I knew as soon as I fuckin sent that out, that would fuckin make some niggers buckle at the knees and shit like that. PP: Oh I'm tellin ya, I'm tellin ya, when I first came at him he was trying to talk like he was fuckin still down. I said, man you crossed over, I said it's over now. I said you got to shut up man, you know what I mean? LD: It's hard to tell who is a snitch nowadays, you know what I mean? PP: Dog man, I fuck, I always had a feeling about that boy though, I'm tellin you I never got along with him. ... LD: ... These wires are hot. ... That's why um I have been relaying a lot of shit through our partner, you know who I am talkin about, right? PP: Yeah LD: Yeah, that's why I've been talkin to him and he's supposed to be talkin to you type of thing, and that's why I haven't been callin you, because I, I don't wanna have a triangle goin on, you know what I mean? PP: Yeah, straight up, man. ... LD: I need all my soldiers and shit

and I don't wanna bring the fuckin soldiers down you know what I mean? PP: OK well I'm gonna stay on top of that man. ... LD: Yeah, doll I appreciate everything that's goin on with you doll.

2. telephone call from DaSilva to his wife Tracy DaSilva on May 2, 2001: LD: What I've been thinkin about lately is uhm, getting some of his friends to fuckin come to court and fuckin let them sit in the audience. You know what I mean? See what the fucks goin on.

3. telephone call from DaSilva to Marlon Johnson on May 17, 2001 LD: Make sure, when, when my court case comes through, make sure you pack that fuckin shit with fuckin niggers, you understand me? MJ: What's that? LD: Just pack it up with fuckin real niggers, man. That's if nothin happen before, you know what I mean? MJ: Yeah LD: If nothin happen before the court case and then none, none of the witnesses leave town or anything like that, just pack it up with real niggers, you know what I mean, so that fuckin everyone can hear how much a fuckin hater they is, you understand? MJ: Yeah LD: Make sure all the niggers wake up early in the morning .. come see what is goin on. See all these fuckin rats. See all these fuckin rats pointin fingers and shit.... MJ: I've seen them all, like. LD: I know you're watching them. I was hopin that, you know what I mean, oh fuck.

4. telephone call from DaSilva to Vaz on May 20, 2001 DV: The same guy I been seeing everywhere ... the guy that has the store or something. ... LD: African, right? Bald head? DV: Yeah, yeah ... LD: What'd you say? DV: Don't worry about that guy. That one's down. He's like oh no, no, no, they made me do it, they made me do it, I have to lie. I'm like you bet you will. LD: Yeah, the fool showed up, pointin the finger ... DV: Yeah, I know, that's what he said. Well, you know. Don't worry about that. ... LD: You know, the phones and shit you know what I mean? I shouldn't even be talking about this, whatever.

5. telephone call from DaSilva to Chang (his girlfriend) on May 22, 2001 LD: And fuckin Kyle, we'll have to pack the fuckin court room with fuckin, full of fuckin people that know him. He'll fuckin start stumblin over his words. ... LD: Pointing a finger. With all, with all his people in the courtroom. He won't be able to show his face no more, no where no more.

6. telephone call from DaSilva to Vaz on May 24, 2001 LD: So what's that fool sayin? DV: He said ah, don't worry about him. ... LD: Talk is cheap. DV: I kinda believe him. ... LD: he doesn't even know what he's up against. ...DV: he said there are three other guys worse than him. Two others. LD: Two exactly. I ain't sweatin that.

7. telephone call from Malcolm to Plowman on June 20, 2001 PP: Moses wants me to come down to his store. M: Moses? PP: Yeah the little rat. I guess he wants to talk. Yeah, that'd be good cause when we talk to him we settle that I'm calling Louis. Louis can owe me five grand to deal with it man and if he don't pay I am going to run his bitches off track .

8. telephone call with George Plowman (brother) and Plowman on June 20, 2001 PP: fuckin Moses wants me to come meet him at his store. GP: about what? PP: I don't know man hopefully he's not gonna show up in court so I can put a five grand bill on fuckin Louis man... and if Louis don't pay I'm running all his bitches off every track man. PP: ... I'm gonna tell him I'm gonna come to see him tomorrow. GP: Yeah, man I'll come down there with you. PP: Yeah, we're gonna all mob there man. GP: Yeah, let's mob in there man. PP: Everybody mob in there.

9. telephone call from DaSilva to Plowman on June 25, 2001 PP: Yeah you know home boy? LD: Yeah, I know. PP: Yeah that boy straight fuckin gave me up man. LD: How do you know that? PP: Because they're trying to come and talk to me about it now man. Tellin them I got papers and shit man. So he must have went and told them right after I went and approached him man. ... Yeah nigger I was trying to deal with that for you man but that's just kinda getting heaty. LD: Yeah, professional snitch huh. PP: ... I know fuckin girls who know him and he was all bragging to them that the po bo know, you know what I mean. So whatever nigger

you know what I mean? You know what I mean if I could deal with it anyway I will though. LD: Alright alright. PP: Alright? LD: Whatever dog.

10. telephone call from Cecil to Plowman on June 25, 2001 PP: ... this fuckin nigger Mo is fuckin like bringing some heat into me man. ... That nigger Moses, do you know that Unleash the Dragon and shit? Cecil: Yeah, yeah. PP: That boy he's fuckin told the po everything. ... about me having papers. Cecil: about yeah the novel PP: Yeah, that nigger fuckin snitched out to the police man.

11. telephone call from Nicki to Plowman on June 27, 2001 PP: I aint the fuckin rat. He's the fuckin rat, I don't put people in jail for things that they didn't do. He's the fucking rat man. He doesn't even know what happened that night man. And so he can call the cops tell the cops whatever they want I got a fuckin damn good lawyer I ain't worried. Tell him that man. Just tell him, what goes around comes around, he should watch out. Nicki: Oh my goodness, calm down. PP: Fuck you guys need to tell him man that a lot more people than me know man ... Tell him exactly what I said that a lot more people than me know.

Accuseds' Statements to the Police

13 Plowman and Wilson both gave lengthy, warned statements to Detective Jansen after their arrest on June 28, 2001. The accuseds were interviewed separately and these interviews were videotaped. The videotapes were played for the court and transcripts of the interviews were entered as exhibits in the proceedings. Neither accused objected to the admissibility of the taped statements or the corresponding transcripts on any ground, including voluntariness. DaSilva declined to provide a statement to the police.

14 Plowman's statement contains a number of inculpatory admissions that are not in dispute. Plowman admits he and his cousin Wilson visited Moses Toe's store "Unleash the Dragon" in the Metrotown Mall in Burnaby, BC on or about April 11, 2001. He admits that Wilson gave him a copy of a 24 page statement provided to the police by Moses Toe that implicated DaSilva in the murder of Walker. Plowman admits it was his belief that Wilson received the statement from DaSilva while they were together in the Surrey Pre-Trial Centre. Further, Plowman believed that it was DaSilva's intention that Plowman take the statement and show it around to their friends. Plowman admits that he told Wilson to "bring out" the statement so he could read it and that he did read the statement. Plowman admits that he brought the statement with him to Moses Toe's store and confronted him with it. Plowman admits he told Moses Toe that "a rat is a piece of shit, and you're a piece of shit." Plowman admits that he let all his friends read the statement and that he knew that his friends would be angered by what Moses Toe was saying against DaSilva. Plowman admits he went back to Toe's store on his own about a week after the first visit.

15 Plowman's statement also contains a number of inconsistent admissions, some of which are inculpatory while some are exculpatory. These statements primarily relate to what was said to Moses Toe during the visit to his store, Plowman's intentions in going to the store, and DaSilva's involvement. At p. 10 of the transcript, Plowman says that he told Moses Toe that what he was doing was wrong because DaSilva was not the guy who murdered Walker. Plowman repeats this at p. 14. On p. 19 Plowman admits that when he read Moses Toe's statement he knew he was telling the truth because everything matched up so well. On p. 57 Plowman again says he asked Moses if he was going to help this "nigger" meaning DaSilva because he believed DaSilva was not capable of murder and was innocent.

16 On p. 10 of the transcript Plowman admits he told Moses Toe not to go to court to testify. On p. 15 Plowman says he warned Moses Toe about the consequences of being a rat and that something was bound to happen to him if he went to court. On p. 17 Plowman says he asked Moses Toe why he was ratting out on his friends and, further, that Toe was now considered a "piece of shit" for doing this. On p. 24 Plowman says he told Moses Toe that "if it were him, he would not go to court" because of the consequences for his safety, his social life at nightclubs, and his business. Plowman told Moses Toe that if DaSilva got life he would use his money to get back at Moses. Plowman says on p. 34 that

Toe said he had no choice; that he was forced by the police to go to court and while arguing back and forth with Wilson about the matter they both came up with going to court and forgetting what happened. On p. 38 Plowman denies advising Toe to go to court and say he forgets what happened. Instead, Plowman says he told Toe that if it were him, he would not go to court. He warned Toe that after court there would be no police protecting him. On p. 49 Plowman admits that he told Moses Toe that he was bringing him messages from DaSilva and others. When asked what kind of messages, Plowman says "don't fuckin testify that's it." On p. 64 Plowman admits he told Moses Toe not to go to court because there was an expectation of money in it for him from DaSilva.

17 On p. 12 Plowman says the conversation at the store with Moses Toe did not get heated. On p. 20 he admits that Moses Toe got angry at Wilson and that these two had a heated argument when Wilson called Moses Toe a rat. On p. 31 Plowman says Moses got angry at them and asked if they were threatening him. Wilson got angry at this and Plowman says he told Wilson to calm down and leave the store.

18 On p. 14 Plowman says that DaSilva never said anything to him directly or sent a message through another person to "deal with Moses." On p. 18 Plowman says DaSilva told him to leave Moses Toe alone because he was unreliable anyway as a witness. However, on p. 49 Plowman says he was passing on to Moses Toe messages from DaSilva and that his instructions came from third parties that he would not identify because he feared retaliation. On p. 50 Plowman says the message he was getting from DaSilva through third parties was to tell Moses Toe not to testify. On p. 53 Plowman says that through the telephone calls, and when he got Toe's statement, he figured out that DaSilva wanted him to get rid of Moses. On p. 57 Plowman says he went back to Toe's store a second time and when he talked to DaSilva at the pre-trial centre he said that he was going to continue to ask Moses whether he was going to testify.

19 On p. 27 Plowman says DaSilva never offered money to go to see Moses, but his friend Goghi Mann hinted at it. On pp. 28 and 38 Plowman says DaSilva might have hinted money would be there but never said anything to him directly. On p. 75 Plowman says he could not talk to DaSilva directly about money for going to talk to Moses, so he got Mann to ask him about it while they were in the pre-trial centre together. On p. 81 Plowman indicated that he lied to DaSilva about what he said to Moses so that DaSilva would give him money. On p. 82 Plowman says his comments to DaSilva were exaggerated.

20 On pp. 35, 36 Plowman denies he brought a weapon to the store and says if he was going to deal with a guy who ratted out a buddy with the expectation of being paid, he would not bring a gun. On p. 49 Plowman says Moses was going to other people as well as him to end the retaliation; all Toe wanted to do was "end it." Plowman says he told Moses to talk to DaSilva directly when he met with him at the store a second time.

21 Plowman also gave an oral statement to Constable Matsumoto upon his arrest. After being Chartered and warned by the officer, Plowman said, "What's this about?" Constable Matsumoto responded that he was being charged with conspiracy and obstruction. Plowman then said, "Is this because I was talking to people I was not supposed to, someone's in jail, it's about Moses, isn't it, I got the statements at home."

22 In his statement to Detective Jansen, Wilson admits that DaSilva gave him a copy of Moses Toe's statement to the police. Wilson admits he went to Toe's store with Plowman, that he brought the statement with him, and that he showed the statement to Moses. Wilson admits he got upset with Moses and that Plowman told him to calm down.

23 There are a number of inconsistent statements made by Wilson that are also partly exculpatory and partly inculpatory. First, Wilson makes several different statements about what DaSilva did or did not say to him at the time he received the statement. On p. 26 Wilson says he got the statement and DaSilva did not say anything to him. At p. 32 Wilson says DaSilva told him to take the statement and humiliate Moses. On p. 33 Wilson says DaSilva wanted him to get the word out that Moses was ratting him out. On p. 41 Wilson says DaSilva wanted him to do something about Moses because he

ratted him out. He says DaSilva said, "Take care of it for me". Wilson maintains DaSilva wanted him to scare Moses or tell him not to go to court. If that had happened, DaSilva would give him money. However, there was no specific amount mentioned and Wilson did not specifically agree to do anything.

24 On p. 28 Wilson denies that he told Moses not to go to court and that he called him a rat. He believed it was in the Bible not to rat out friends. On p. 41 Wilson says that he knew there would be money in it if he scared Moses and that was half the reason he went to the store. On p. 52 Wilson says he told Moses they had to talk about the 24 page book he wrote and threw it on the table at the store. Moses got upset and stuttered. On p. 55 Wilson admits that his family has a tough reputation and that everyone, including Moses, would know this. On p. 56 Wilson says he knew their actions would shock Moses because if "we have the statement, then fuckin a hundred people know." On p. 59 Wilson says he was, "just lettin Moses' own words scare him". On p. 62 Wilson says he was just letting Moses know the consequences for ratting and that his life would be in danger. Lastly, on p. 67, Wilson says they went to Moses' store to let him know that he is a "piece of shit" [for ratting out DaSilva].

Evidence of Undercover Officers

25 Constable Dosanjh, of the Victoria Police Department, was assigned to pose as a cell mate of Plowman's after his arrest on June 28, 2001. The officer was in the cell with the Plowman from about 1:20 p.m. on June 28, 2001 until about 8:30 am the following morning. The officer also traveled in the paddy wagon to the courthouse in New Westminster with Plowman and Wilson on June 29, 2001. The officer made notes of his conversations with Plowman as well as the conversations he overheard between Plowman and Wilson. The officer's notes were partly made during a short break on the evening of June 28 and while Plowman was interviewed by Detective Jansen. The notes were completed after Plowman and Wilson had been taken to the courthouse on the morning of June 29, 2001.

26 Plowman and the officer had several conversations while in the lockup during which Plowman made certain admissions. Plowman admitted he had received a statement from his cousin and went over to talk to the person who made the statement. He wanted to talk to this "rat" about what he had said in his statement. Plowman said he showed the statement to the rat. Plowman indicated that his cousin had met Louis "inside" and Louis took the cousin into his cell and gave him a statement and the cousin gave this statement to him. Plowman asserted that he did not threaten the rat but asked him why he said these things in the statement. Plowman said he only told the rat that if it were me, I would not do this.

27 Plowman went on to say that the police have him on tape twice saying "can't wait until he changes his story so I can get my five grand." When asked by the officer if this is what the person who wrote the statement had on his head, Plowman replied, "This is what I think it was, but Louis did not say that to me personally." Plowman also said "Louis owed him for all this and better be paying for all the food and everything in pre-trial because all this shit is to do with him." He concluded here by saying that the rat's name was Moses. The officer testified that Plowman appeared to be angry that Louis had dragged him into this and that he did not feel he had done anything wrong.

28 On the morning of June 29, 2001 Plowman learned that his cousin Wilson had been detained on the same charges and expressed the view that Wilson had nothing to do with this; he went to the store but did not say anything. Later that morning the officer overheard the following conversation between Wilson and Plowman in the paddy wagon. Plowman says, "They got the wrong guy, if they think this rat is safe, they're wrong. He'll get what he deserves. There's a lot of people bigger than me." Wilson replies, "We just went there to talk to him, to spank that nigger with his own words. We didn't threaten him." Plowman then says, "You didn't say shit to him. You were just standing there".

29 Plowman continued with a reference to Moses Toe, "He better be careful not to go to any bars, cause there will be more people after him now. Because everybody knows he's a rat and a rat gets what he deserves. A rat gets killed for saying shit. They might as well keep me in here if I rat people

out, because I'd be dead. We just went to the store in Metrotown to talk to him about his words. We asked him not to say this shit."

30 Constable Sandhu, of the Delta City Police Department, was assigned to pose as a cell mate to Wilson after his arrest on June 28, 2001. The officer was in a cell with Wilson from 1:55 p.m. on June 28, 2001 until 6:00 p.m. and again from 6:18 p.m. until Wilson was taken for his interview with Detective Jansen. They were again together from 10:35 p.m. until the following morning at 8:30 a.m. when Wilson was escorted to the courthouse in New Westminster. The constable made his notes during breaks at 6:00 p.m. and 8:00 p.m. on June 28 and after 6:30 a.m. on June 29.

31 No relevant discussion took place with Wilson until after he returned from his interview with Detective Jansen at about 10:35 p.m. on June 28. Constable Sandhu testified that Wilson expressed concern about his situation and explained that he had been in the Surrey Pre-Trial Centre some two months prior to his arrest and met a male who was charged with murder. This person was known to Wilson as a pimp. The male gave Wilson a witness statement and told Wilson to speak to the witness about him coming to court and for doing this the male would give Wilson $5000. Wilson said he took the statement out of the pre-trial centre when he left.

32 Wilson advised the officer that he and his cousin went to the witness' business in Metrotown. The name of the business was Release of the Dragon and they sold hip hop clothing. Wilson said he showed the statement to the man and asked if he was going to show up in court. Wilson referred to this man as the "nigger" and said the nigger better leave the country to Africa and sell giraffe T-shirts because he just got himself into deep shit.

33 In cross-examination the officer acknowledged that he did not record the exact words used by Wilson and, although there would have been no more actual details, some of the words used may not be the same. The officer also indicated that Wilson was slightly more concerned about his situation after the interview with Detective Jansen.

Evidence of Moses Toe

34 The Crown called Moses Toe as a witness. Toe appeared to be a reluctant witness who indicated that he did not wish to be giving evidence. He also indicated that he was not here to make sure Plowman and Wilson went to jail and had no quibble about what they said to him because they had not done anything to him. Toe appeared to be in a hurry to complete his evidence and leave the courtroom. These aspects of Toe's demeanor must be taken into account in assessing the credibility and veracity of his evidence.

35 Until July 2001 when Moses Toe moved out of the Lower Mainland, he owned and operated a hip hop clothing store in the Metrotown Mall in Burnaby, BC called "Unleash the Dragon." Moses Toe was an eye witness to the murder of Walker and provided a 24 page statement to Sergeant Walcott of the New Westminster police department that identified DaSilva as the shooter. Toe gave evidence against DaSilva at the preliminary inquiry.

36 Plowman and Wilson visited Moses Toe's store on April 11 or 12, 2001. Toe was acquainted with Plowman and had been on friendly terms with him for some time. Toe had never seen Wilson before and Plowman introduced him as his cousin. Toe testified that Plowman was talking to him in a normal voice about what could happen if he testified against DaSilva and the consequences for DaSilva and his family if he was convicted. Plowman said Louis is his boy meaning his friend. At some point in this conversation, Toe says that Wilson brought out the 24 page statement Toe had given to the police about the Walker murder and showed it to Toe. Toe says Wilson started yelling at him saying Louis was his boy and calling him a rat. Toe got upset and yelled back at Wilson. Plowman then had to calm Wilson down and he backed off and left the discussion.

37 Toe testified that at some point during the discussion, either Wilson or Plowman, advised Toe that "if he goes to court, he should say he doesn't remember what happened in the case." After a somewhat protracted cross- examination, Toe conceded that he may have misunderstood this

statement; however, he did not know. Also in cross-examination, Toe testified that he asked Plowman what he would do if he saw someone kill a friend. Plowman replied that "if it was him, he would not go to court." In cross-examination, Toe said he understood that by calling him a "rat" it meant he was a liar. Further, he did not get the impression that Plowman was worried about him or his family.

38 About a week after this visit to the store, Ms. Mark from the Crown office telephoned Toe. Toe advised Ms. Mark that he was not going to testify. When asked why, Toe said he told Ms. Mark that it was because they, meaning Wilson and Plowman, had his statement. Toe testified that he was not scared by Plowman and Wilson's visit to his store. He testified that neither Wilson nor Plowman threatened him.

39 Toe testified that on May 18, 2001 he was in Edmonton attending a bar when he met up with Donald Vaz. Vaz said he heard that Toe had gone to court and, in reply, Toe said he was not going to court any more. Lastly, Toe testified that he called Plowman to warn him that the police were aware they had come to his store and that he could be charged for doing that. Toe testified that Plowman never came to his store again.

Law -- Conspiracy Section 465(1)(c)

40 The offence of conspiracy involves proof of an agreement between two or more persons to commit an indictable offence and proof of a common intention to pursue the unlawful object. These two elements, the actus reus and the mens rea of the offence, are described by Tashereau J. in *R. v. O'Brien* (1954), 110 C.C.C. 1 (S.C.C.) in the following passages at p.p. 3-4:

> The two elements of agreement and of common design are specifically stated to be essential ingredients of the crime of conspiracy. ... A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties..... punishable if for a criminal object. ...
>
> The definition of conspiracy presupposes an aim. People do not conspire unless they have an object in view. The law punishes conspiracy so that the unlawful object is not attained. It considers that several persons who agree together to commit an unlawful act, are a menace to society, and even if they do nothing in furtherance of their common design, the state intervenes to exercise a repressive action, so that the intention is not materialized, and does not become harmful to anyone. The intention must necessarily be present because it is the unlawful act necessarily flowing from the intention, that the state wishes to prevent.

41 It is unnecessary for the Crown to prove an act in furtherance of the conspiracy; however, if such acts are proven, they may be used by the trier of fact to infer an earlier agreement.

42 Proof of a conspiracy is a three stage process. First, the Crown must prove beyond a reasonable doubt that the conspiracy charged existed. Second, the Crown must prove, based on the evidence directly receivable against an accused, that a probability is raised that the accused was a member of the conspiracy. Third, the Crown must prove actual membership in the conspiracy beyond a reasonable doubt. See, *R. v. Carter* (1982), 67 C.C.C. (2d) 568 (S.C.C.) per McIntyre J. at p.p. 575-6.

43 During the first stage the Court must consider *all* of the relevant evidence to determine whether the conspiracy charged existed beyond a reasonable doubt: *R. v. Carter* , *supra* at p. 575. At this stage the Court may consider any relevant and admissible evidence, including acts or declarations of an alleged co-conspirator, to establish the existence of the conspiracy. See, *R. v. Collins* (1999), 133 C.C.C. (3d) 8 (Nfld. C.A.) at p. 48:

> While, as an act or declaration of an alleged co-conspirator, that statement was not receivable at trial as proof of Mr. Lorne Collins' membership in the conspiracy charged in the indictment

> in the absence of a foundation of direct evidence establishing his probable membership in it, the statement is nonetheless admissible as direct proof of the conspiracy's existence.

44 If the alleged conspiracy is found to exist, the Court must then review all of the evidence directly admissible against an accused and decide on the balance of probabilities whether or not he was a member of the conspiracy. An admission by the accused that he is a member of the conspiracy, as well as any other direct or circumstantial evidence admissible against that accused, may be considered at this stage: *R. v. Cheung* (1997), 119 C.C.C. (3d) 507 (B.C. C.A.) at p. 529.

45 At the third stage, the onus rests with the Crown to prove the accused's membership in the conspiracy beyond a reasonable doubt based on all relevant evidence admissible against the accused as well as the acts and declarations of other conspirators made in furtherance of the conspiracy. As explained by McIntyre J. in *R. v. Carter* , *supra* at p. 575:

> If, however, they conclude that a conspiracy as alleged did exist, they must then review the evidence and decide whether, on the basis of the evidence directly receivable against the accused, a probability is raised that he was a member of the conspiracy. If this conclusion is reached, they then become entitled to apply the hearsay exception and consider evidence of the acts and declarations performed and made by the co-conspirators in furtherance of the objects of the conspiracy as evidence against the accused on the issue of his guilt.

46 It is not every act or declaration of a conspirator that is admissible in evidence against co-conspirators. It is only those acts or declarations in furtherance of the conspiracy that are admissible against a co-conspirator: *R. v. Stewart* (1981), 60 C.C.C. (2d) 407 (Ont. C.A.) at p. 419.

47 An act or declaration in furtherance of the conspiracy need not be *necessary* to advance the objects of the conspiracy. Provided the declaration is not a statement about past events, if it tends to promote, advance or achieve an object of the conspiracy, it may be regarded as an act or declaration in furtherance of the conspiracy. This issue is discussed in *R. v. Lynch* (1978), 40 C.C.C. (2d) 7 (Ont. C.A.) at p. 24:

> I observe that the declarations of Freedman and Lynch do not offend against the rule that the declarations of a conspirator that are merely narrative of past events, are not admissible against a co-conspirator, since the declarations in question relate to the future. The question remains, however, whether the declarations in question were admissible against King as declarations "in furtherance" of the conspiracy. The "in furtherance" requirement implies that the declaration of one conspirator is admissible against a co-conspirator only if it is made for the purpose of advancing the objectives of the conspiracy, or constitutes a step in furtherance of the common design, as distinct from a mere statement about the conspiracy made by a conspirator during the course of the conspiracy.

Law -- Attempt to Obstruct Justice Section 139(2) and (3)

48 Although framed in the language of attempt, Section 139(2) of the Criminal Code defines a substantive offence: per Martin J. A. in *R. v. May* (1984), 13 C.C.C. (3d) 257 (Ont. C.A.). The general proscription against obstructing justice is found in Section 139(2) and Section 139(3) deems certain acts to constitute obstruction:

> S. 139(2) Everyone who willfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
>
> S. 139(3) Without restricting the generality of subsection (2), everyone shall be deemed willfully to attempt to obstruct, pervert, or defeat the course of justice who in a judicial proceeding, existing or proposed,
>
> (a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means

10569

from giving evidence ...

49 It is the Crown's contention that the accuseds used threats to attempt to dissuade Moses Toe from testifying at DaSilva's trial. A threat may be expressed or implied by the circumstances and the test is an objective one based upon what a reasonable person would perceive. It is not necessary that the Crown prove that Moses Toe in fact felt threatened. The proper approach to this question is described by Cory J. in *R. v. McCraw* (1991), 66 C.C.C. (3d) 517 (S.C.C.) at p. 525:

> ... 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 ... to a reasonable person?

50 The attempt to obstruct justice does not need to be successful. The offence is committed when there is proof of an act that has a tendency to defeat, pervert or obstruct the course of justice: *R. v. Graham* (1985), 20 C.C.C. (3d) 210 (Ont. C.A.) at p. 213. It is also unnecessary for the Crown to prove that the act having a tendency to obstruct justice had a possibility of success. In *R. v. Hearn* (1989), 48 C.C.C. (3d) 376 (Nfld. C.A.) the Court of Appeal addressed whether a lawyer and his client could be found guilty of obstruction in circumstances where the witness they counseled to give false testimony could not have changed the results of the trial in any event. This argument was not successful:

> The gravamen of the offence under s. 127 [now s.139(2)] is the willful attempt to obstruct justice. It does not matter that the attempt is unsuccessful or, even, that it does not have the potential for success. When there is a willful attempt, however misguided, to influence the outcome of a trial improperly the offence is complete.
>
> ... On a charge of willfully attempting to obstruct justice by counseling false testimony in a pending trial, if the evidence reveals a guilty mind and a willful act designed to fulfill the intention of the guilty mind, it matters not that the intention could not be satisfied by the act undertaken.
>
> ... To amount to an attempt to pervert or obstruct the course of justice there has to be evidence of a course of conduct that had the propensity to defeat the course of justice and was so intended.

51 Lastly, the meaning of willful in the context of a charge of obstruction is discussed by Hall J. in *R. v. Guess* (2000), 148 C.C.C. (3d) 321 (B.C. C.A.). Hall J. concludes that "willful" in this context means other than accidental or unknowing conduct. Whether or not the accused realized his acts might have a tendency to pervert the course of justice is a relevant factor. Hall J. relies on the following passage from *R. v. Buzzanga* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), at pp. 384-385 in support of this proposition:

> ... 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 reluctantly), in order to achieve his ultimate purpose. His intention encompasses the means as well as to [sic] his ultimate objective.

Decision

10570

Count 1 Conspiracy

52 Addressing the first stage, the Crown must prove beyond a reasonable doubt that a conspiracy to obstruct justice by attempting to dissuade witnesses from giving evidence at the murder trial of Louis DaSilva existed. In determining this issue I am entitled to consider all relevant and admissible evidence before me. At this stage the acts and declarations of one accused may be used as evidence against the others.

53 Based on the whole of the evidence before me, I am satisfied beyond a reasonable doubt that the conspiracy alleged by the Crown existed. The circumstantial evidence, from which I may infer the existence of the conspiracy, and the direct evidence in support of the conspiracy, taken together, establish both the agreement and the requisite common intention to carry out the objective; that is, to attempt to dissuade witnesses, including Moses Toe, from testifying at DaSilva's trial.

54 DaSilva was charged with the murder of Walker and was detained in the Surrey Pre-Trial Centre pending the trial. Based upon the Section 655 admissions and the intercepted telephone calls, it is apparent that DaSilva knew the identity of the eye witnesses to the murder and was in possession of their statements to the police, including the statement given by Moses Toe. Indeed, at the time of the intercepted calls Moses Toe had already given evidence against DaSilva at the preliminary inquiry. Further, it is apparent from the intercepted telephone calls that DaSilva was concerned about the evidence these persons may give at his trial and was considering the various options available to deal with this problem.

55 From the intercepted telephone calls between DaSilva and his acquaintances, including Donald Vaz, Marlon Johnson, Chang, and Plowman, I find that DaSilva was aware that these persons were approaching Moses Toe and/or spreading his statement around. Further, DaSilva was appreciative of what Plowman, in particular, was doing for him. In addition, DaSilva had his friends, referred to as soldiers, out in the community assisting him and wanted these persons to do more, such as pack the courtroom during his trial to intimidate the witnesses. (telephone call May 1, 2001 between DaSilva and Plowman; telephone call May 17, 2001 between DaSilva and Johnson; telephone call May 20, 2001 between DaSilva and Vaz; telephone call on May 22, 2001 between DaSilva and Chang).

56 DaSilva, Wilson, and Plowman were all known to each other. They were all part of the same community and had common friends and acquaintances. Plowman and Wilson were cousins. Plowman knew people in custody at the same facility as DaSilva (Ghogi Mann) and Wilson was in the Surrey Pre-Trial Centre with DaSilva in April 2001. Plowman and DaSilva were pimps and each knew the other's "girls".

57 From the intercepted telephone calls, Plowman and Wilson's statements to Detective Jansen, and their disclosures to the undercover officers, there is direct evidence that Plowman and Wilson were acting on DaSilva's instructions with regard to Moses Toe and the distribution of his statement among their common friends. While Plowman says he did not speak to DaSilva directly about these matters, he admitted to Detective Jansen that he was getting instructions through third parties whom he could not identify because he feared retaliation. The instructions from DaSilva were to tell Moses Toe not to testify (p. 49, 50 of the transcript).

58 Wilson admitted to Detective Jansen that DaSilva gave him a copy of Moses Toe's 24 page statement to the police. Although he at first denied any instructions accompanied the statement, Wilson ultimately disclosed that DaSilva asked him to humiliate Moses Toe with his statement (p. 32 of the transcript), to get the word out that Moses Toe was "ratting him out" (p. 33 of the transcript), and to scare Moses Toe and otherwise "take care of him" (at p. 41 of the transcript).

59 Further, it can be inferred from Plowman's statements to undercover officer Dosanjh that he blamed DaSilva for getting him into this trouble and commented that "Louis owed him for all of this and better be paying for all the food and everything in pre-trial because all of this shit has to do with him." Finally, Wilson disclosed to undercover officer Sandhu that DaSilva gave him the statement and

told him to go talk to the witness about coming to court and for doing this DaSilva would give him money.

60 There is also direct evidence from DaSilva during his May 1, 2001 recorded telephone call with Plowman that he sent out the statement and, further, that he knew the public distribution of Moses Toe's statement would scare Toe and that this was his intention. It is also during this conversation that DaSilva refers to getting instructions to Plowman through third parties because he is aware that the telephone lines at the pre-trial centre are being monitored. Further, DaSilva indicates that he does not want his conversations on these telephone lines to implicate the people who are helping him on the outside, "I don't want to bring my fuckin soldiers down, you know what I mean?"

61 A common understanding and intention to bring about the unlawful purpose can also be inferred from the fact that DaSilva's friends, including Plowman, Vaz, and Johnson reported to him about their meetings with Moses Toe, their contact with other witnesses, and what they were doing with the Toe's statement. Further, DaSilva acknowledges an understanding of the object behind the actions of these persons. In particular, during the May 1, 2001 telephone call between DaSilva and Plowman, Plowman reports about his visit to Moses Toe's store, what was said and Toe's reaction to being confronted with his statement to the police. DaSilva acknowledges an understanding of why Toe would be scared by this encounter and admits he believed this would be the consequence of his getting the statement out. Plowman says he will continue to try to deal with [Moses Toe] and DaSilva expresses appreciation for what Plowman is doing.

62 Further evidence of the agreement and common intention is found in the continuing reports DaSilva received on the matter of the witnesses. In the May 17, 2001 telephone call between Johnson and DaSilva, Johnson reports that he has been watching all the rats [witnesses] and DaSilva acknowledges that he knows that has been happening. In the May 24, 2001 telephone call between Vaz and DaSilva, Vaz reports to DaSilva about his encounter with Moses Toe. This encounter is confirmed in Moses Toe's evidence. In the June 25, 2001 telephone call between Plowman and DaSilva, Plowman reports that Moses Toe has disclosed his visit to the store to the police, and although he will try to continue dealing with Moses for DaSilva, it is getting hard because of the "heat" put on by the police.

63 The existence of the agreement and common intention to dissuade Moses Toe from testifying may also be inferred from Plowman and Wilson's admission that they attended at Moses Toe's store and confronted him with his statement to the police, a statement that implicated DaSilva in the Walker murder. Further, the existence of a common intention is evidenced by Plowman's admission that he told Moses Toe he was bringing a message from DaSilva, "not to fuckin testify" (p. 49 of the transcript). Finally, from Plowman's assertion that he expected a reward from DaSilva for dealing with Moses Toe, the Court may infer an agreement to accomplish the common intention of the conspiracy; that is, to dissuade Moses Toe from testifying (June 20, 2001 telephone conversation between George Plowman (brother) and Plowman.).

64 Turning to the second stage, the Crown must prove the membership of each accused in the conspiracy on the balance of probabilities. At this stage, the Court cannot use acts or declarations of alleged co-conspirators to establish the membership of an accused in the conspiracy. Only evidence directly admissible against each accused may be used to establish their membership.

65 On the basis of the evidence directly admissible against Wilson, I am satisfied on the balance of probabilities that he was a member of the conspiracy. Wilson admitted to Detective Jansen that he went to Moses Toe's store and confronted him with a copy of the statement Moses Toe gave to the police. Wilson also admitted that he obtained this statement from DaSilva while they were together in the Surrey Pre-Trial Centre. Further, Wilson admitted that part of the reason for confronting Moses Toe with this statement was to make some money. Moses Toe testified that Wilson confronted him with the statement and called him a rat. Wilson disclosed to Plowman in the presence of undercover officer Dosanjh that the reason he went to Moses Toe's store was to "spank that nigger with his own words." Finally, Wilson's statements to undercover officer Sandhu show that he was part of a plan to speak to Moses Toe about testifying against DaSilva. Wilson said he had received Toe's statement

while in the Surrey Pre-Trial Centre from a pimp who was charged with murder. This person told Wilson to go talk to the witness and he would get money for this.

66 On the basis of evidence directly admissible against Plowman, I am satisfied on the balance of probabilities that he was also a member of the conspiracy. Plowman admitted to Detective Jansen that he was getting instructions from DaSilva indirectly through third parties and hints in telephone conversations. The message being to relay to Moses that he should not "fuckin testify". Plowman admits he went to Moses Toe's store and showed him a copy of the statement Toe gave to the police. Plowman admitted that he called Moses Toe a rat and said that a rat was "a piece of shit." Plowman admitted that he told Moses Toe not to go to court for his own good and because if it was him, he would not go to court. Lastly, Plowman admitted to Detective Jansen that he expected to make some money from DaSilva for going to see Moses Toe (p. 64 of the transcript).

67 Plowman's disclosures to undercover officer Dosanjh also tend to support an inference that he was a member of the conspiracy. Plowman told the officer that "Louis owed him for all this [trouble] and that he better be paying for all the food and everything in pre-trial". Later in the police van, in conversation with Wilson, Plowman called Moses Toe a rat and suggested he will not be safe now because there are "bigger people out there than me". Further, Plowman says Moses Toe will get what he deserves for being a rat and that "rats get killed for saying shit."

68 Finally, the intercepted telephone calls between Plowman and DaSilva and between Plowman and others provide evidence from which the Court can infer his membership in the conspiracy. First, in the lengthy telephone conversation with DaSilva on May 1, 2001 Plowman reports to DaSilva about his meeting with Toe at the store. Both the fact that he is reporting this information to DaSilva and that he says he has been trying to deal with that shit, meaning Toe, suggests there was some type of arrangement between these persons concerning Toe. Further, he tells DaSilva he is going to continue to deal with it [meaning Toe]. Second, in Plowman's telephone calls to his brother George (June 20, 2001) and Malcolm (June 20, 2001) he indicates an expectation of $5000 from DaSilva for talking to Toe and Toe not going to Court. Moreover, in a telephone conversation with DaSilva on June 25, 2001, Plowman reports that Moses has told the police about the visit to his store and that he was trying to deal with that for you man [meaning DaSilva] but things are getting heaty [meaning the police are involved].

69 On the basis of the evidence directly admissible against DaSilva I am satisfied on the balance of probabilities that he was a member of the conspiracy. The probative evidence includes circumstantial evidence providing DaSilva with a motive for attempting to dissuade witnesses from testifying and the lack of opportunity to take care of this problem directly. In this regard, I refer to the fact that DaSilva was charged with the Walker murder and was detained pending trial at the Surrey Pre-Trial Centre. DaSilva was in possession of the three eye witnesses' statements to the police, including Toe's statement, and had the opportunity to make a copy of these statements while at the pre-trial centre. Further, the events giving rise to the charges occurred after the preliminary inquiry, at which Moses Toe testified against DaSilva.

70 In addition, statements made by DaSilva in the intercepted telephone calls, taken together, provide evidence from which the Court can infer he was probably a member of the conspiracy. In the May 1, 2001 telephone conversation between DaSilva and Plowman, DaSilva expresses appreciation for Plowman's confrontation with Toe and says that he will "look after you [meaning Plowman] when I get out, right". I infer this to mean some kind of reward for Plowman. Further, DaSilva acknowledges sending out Toe's statement knowing that it would scare him: "I knew as soon as I fuckin sent that out, that would fuckin make some niggers buckle at the knees". Lastly, DaSilva alludes to sending messages out to Plowman about this matter through a partner because the telephone lines are monitored and he does not want to get his soldiers out there into trouble: "I need all my soldiers and shit and I don't wanna bring the fuckin soldiers down, you know what I mean?"

71 DaSilva's telephone conversations with Vaz on May 20 and 24, 2001, about Vaz's encounters with Toe, also suggest a pre-arranged understanding that Vaz would be talking to Toe for DaSilva. In the later conversation, DaSilva also says he is not worried about the other eye witnesses. Coupled

with the statement DaSilva makes to Johnson in the May 17, 2001 telephone call, that he knows [Johnson] is watching them [the witnesses], it can be inferred that DaSilva has other persons dealing with those witnesses. Lastly, in several telephone conversations with Chang, Johnson, and his wife, DaSilva enlists their support in packing the courtroom during his trial with friends sympathetic to his cause in an attempt to intimidate witnesses.

72 Turning to the third stage, the Crown must prove that each of the accused were members of the conspiracy beyond a reasonable doubt. In determining this issue, the Court is entitled to consider all the evidence directly admissible against each accused as well as acts or declarations in furtherance of the conspiracy made by those found to be members of the conspiracy on the balance of probability. Statements about past events are not within the co-conspirators' exception to the hearsay rule. Only acts in furtherance of the conspiracy and declarations about on-going or future acts are admissible pursuant to this exception.

73 In addition to the evidence summarized above, Toe's evidence concerning Plowman and Wilson's visit to his store on or about April 11, 2001 is admissible against all three accused as an act in furtherance of the conspiracy. During this encounter, Wilson showed Toe a copy of his statement to the police implicating DaSilva in the Walker murder. Wilson called Toe a rat and Wilson understood this to mean he was a liar. Both Wilson and Plowman referred to DaSilva as their "boy" or friend. Toe also testified that he asked Plowman what he would do if it was his friend who got killed and Plowman replied, "if it was me, I would not go to court". I am not satisfied beyond a reasonable doubt, based on Toe's evidence standing alone, that Plowman or Wilson said to Toe, "if you go to court, say you don't remember what happened". Toe ultimately conceded that he may have misunderstood what was said in this regard. Thus this statement cannot be regarded as a declaration in furtherance of the conspiracy and admissible against all three accused.

74 Similarly, I cannot rely on Toe's evidence concerning the statements made to him by Vaz as an act in furtherance of the conspiracy because I am not satisfied on the balance of probabilities that Vaz was a member of the conspiracy. What DaSilva says to Vaz is, however, relevant to the determination of DaSilva's involvement in the conspiracy.

75 Plowman's assertion that he is going to continue to deal with it [meaning Toe] in the telephone conversation with DaSilva on May 1, 2001 is a declaration concerning a future act in furtherance of the conspiracy. DaSilva's response that he will take care of Plowman when he gets out is also a declaration about a future act in furtherance of the conspiracy in the sense that DaSilva will be rewarding Plowman for his actions.

76 Plowman's statement to DaSilva in the telephone conversation on June 25, 2001 is also a declaration of a future act in furtherance of the conspiracy. In this regard, Plowman says he can't do anything about Toe right now because the police are putting heat on him, but "if he can deal with it" [meaning Toe] "he will" [implying some time in future].

77 When Plowman discovered that Moses Toe had reported his actions to the police, he became angry and gave orders to Nicki in their telephone conversation of June 25, 2001. Plowman says "tell him [Moses Toe], what goes around comes around, he should watch out. ... you guys need to tell him man that a lot more people than me know man ... Tell him exactly what I said that a lot more people than me know." Viewed in context it is apparent Plowman is referring to a lot of people knowing about Toe's statement to the police. The orders given to Nicki constitute an act in furtherance of the conspiracy because they tend to advance the purpose of the conspiracy; to intimidate witnesses, including Moses Toe, who were to testify against DaSilva at his trial. The fact that the contents of the statement were known to other people within their community was intended to intimidate Toe and operate as a disincentive to testifying because in their world a rat is "a piece of shit" and, consequently, placed at risk of harm.

78 Finally, DaSilva's references to "packing the courtroom" during his trial in conversations with Johnson on May 17, 2001 and with Chang on May 22, 2001 are declarations in furtherance of the conspiracy as they indicate future attempts to intimidate witnesses as a back up plan. In the

telephone call to Johnson, DaSilva says, "when my court case comes through, make sure you pack that fuckin shit with fuckin niggers...That's if nothing happen before, ... none of the witnesses leave town or anything like that, ... so everyone can hear what fuckin haters they is ... See these fuckin rats pointin fingers ...". In the telephone call to Chang, DaSilva specifically refers to Kyle, another eyewitness, and says, "pack the fuckin courtroom with people who know him. He'll start stumblin over his words ... with all his people in the courtroom he won't be able to show his face no more, no where, no more."

79 Considering all of the admissible evidence against each accused, including the acts and declarations in furtherance of the conspiracy described above, I am satisfied beyond a reasonable doubt that DaSilva, Wilson, and Plowman were members of a conspiracy to attempt to obstruct justice by dissuading witnesses, including Moses Toe, from testifying at DaSilva's murder trial. Although each piece of evidence, like the pieces of a puzzle, are insufficient standing alone to establish the membership of the accuseds to the standard required, I find the evidence as a whole establishes the guilt of the accuseds to the required certainty. As the Supreme Court of Canada reiterates in *R. v. Ménard* (1998), 125 C.C.C. (3d) 416 (S.C.C.) , "...the standard of proof beyond a reasonable doubt applies only to the jury's final evaluation of guilt or innocence and is not to be applied piecemeal to individual items or categories of evidence."

80 Although it is apparent the acts of the accuseds did not accomplish the objectives of the conspiracy, this is not a necessary element of the offence. Further, the fact that dissuading Moses Toe from testifying, standing alone, may not have been enough to have an impact on the outcome of DaSilva's trial is not a defence.

81 In addition, even if the evidence of what Plowman and Wilson said or did at Moses Toe's store does not establish proof of an unlawful act, the visit nevertheless constitutes a step in furtherance of the common design. The visit to the store, given the subject of testifying was raised by Plowman and Wilson, their reference to Toe as a rat (whether or not they meant he was a liar it had the same negative connotation), their reference to DaSilva as their "boy", and the fact that Toe was confronted with his statement, was a step toward the ultimate objective of attempting to dissuade him from testifying. Finally, even if I accept that Plowman attempted to defraud DaSilva of money by exaggerating what he said to Toe, this version of the events still tends to show that Plowman had an understanding with DaSilva concerning attempts to dissuade Toe from testifying.

82 I thus find all three accused guilty of Count 1.

Count 2 Attempt to Obstruct Justice

83 To find Plowman and Wilson guilty of the substantive offence, I must conclude, beyond a reasonable doubt, that they willfully attempted to obstruct justice by attempting to dissuade Moses Toe from testifying against DaSilva at his murder trial by the use of threats. In regard to the actus reus of the offence, it is not necessary to prove that the attempts were successful or even capable of succeeding as long as the acts have a tendency to pervert or obstruct the course of justice in the form of dissuading him from testifying. Thus the fact that Moses Toe was not dissuaded from giving evidence against DaSilva is irrelevant.

84 Further, the fact Moses Toe testified that he did not perceive a threat or did not feel threatened by Plowman and Wilson is inconclusive. The question is whether, considering all the relevant circumstances, a reasonable person would perceive the words or acts as a threat. See, *R. v. McCraw* , *supra* at p. 525.

85 It is common ground that no overt threats were made against Toe by either Wilson or Plowman during their visit to the store. Thus it is incumbent upon the Crown to prove beyond a reasonable doubt that the acts and words of Plowman and Wilson implied a threat designed to dissuade him from testifying against DaSilva at his murder trial.

86 As a reluctant witness, Toe's evidence establishes very little direct evidence of an implied

threat. Toe could not say with complete certainty that Plowman had said anything about going to court and forgetting what happened. Of significance, however, is Toe's evidence that both Wilson and Plowman referred to DaSilva as their "boy" meaning their friend. Further, Wilson called Toe a "rat" which has the same negative connotation in their world, whether it meant he lied to the police or or simply reported DaSilva to the police. Further, Wilson raised his voice to Toe and pulled out his statement to the police. This caused Toe enough concern that he began to yell back at Wilson and threaten to fight him. Wilson responded by continuing to argue until Plowman calmed him down. Later, when Toe spoke to the Crown, he said he was not going to testify because Plowman and Wilson had his statement.

87 The Court is not limited to Toe's evidence in determining what occurred at his store during the meeting with Plowman and Wilson. Plowman and Wilson's admissions concerning what occurred at the store and their motives for attending the store may also be considered. In this regard, both their inculpatory and exculpatory statements or admissions constitute the evidence I may consider; however, it is up to the Court to accept or reject any part of this evidence based on a proper assessment of its credibility. See, *R. v. Hughes* (1942), 78 C.C.C. 257 (S.C.C.) at p. 261.

88 Addressing first Plowman's evidence, there are a number of contradictory statements made throughout his confession to Detective Jansen concerning what occurred at Toe's store. This factor in itself is sufficient to cause me concern with regard to the veracity of his statement as a whole. There is, however, a version of the events I find credible because it is supported by Toe's evidence, as well as the intercepted telephone calls between Plowman and DaSilva, and between Plowman and other persons. Further, it is supported by the disclosures Plowman made in the presence of the undercover officers. In both the latter situations, Plowman was unaware that his statements were being monitored.

89 I am satisfied beyond a reasonable doubt that Plowman implicitly threatened Toe by the production of his statement to the police while at the store. In this 24 page statement, Toe identified DaSilva as the shooter in the Walker murder. Plowman appreciated that Toe would know that if they had a copy of his statement, so did a lot of others in their community of friends or associates. It must be emphasized that Plowman and Toe were acquainted with each other and socialized in the same community. It was the threat implicit in Plowman's possession of the statement that scared Toe and gave rise to his decision to tell the Crown that he was not going to testify. It is apparent that Plowman knew his possession and disclosure of the statement was a serious concern to Toe and the reason he had decided to "co-operate" on the matter of giving evidence. Further, the reason this was such a concern to Toe was that what he said against DaSilva in the statement labeled him a rat and in their world a rat was a piece of shit. The danger was obviously apparent to Plowman and Wilson as evidenced by their disclosures to the undercover officers and in the intercepted telephone calls.

90 For example, Plowman says to Wilson in the police van on the way to Court on the morning after his arrest, "If they think this rat is safe, they're wrong. He'll get what he deserves. There's a lot of people bigger than me." On p. 38 of his confession to Detective Jansen, Plowman says he warned Toe of the dangers of giving evidence against DaSilva; that there would be no police protecting him after court.

91 Plowman's appreciation of the significance of confronting Toe with his statement is evident in Plowman's conversation with DaSilva on May 1, 2001. Plowman says, "wooh when I walked in with the book, you know what I mean and that book got around quick, man. I have been carrying it with me ... So he [Toe] is just about at the point where he don't want it goin around no more and he wants to end it, as simple, as quick as possible, so I told him ... you have to go in there and make yourself look like a straight fool, man. He said, you gotta. ... I said man, you've already made a big dent man. I said you gotta fuckin fix it nigger. So this nigger's getting scared and shit..."

92 Further, the significance of the distribution of Toe's statement is also evident in Plowman's telephone conversation with Nicki on June 27, 2001 after he realized that Toe had disclosed his visit to the police. In this conversation Plowman orders Nicki to pass on a message to Toe that he should watch out because "a lot more people than me know". In my view this is an obvious reference to

knowing what Toe says about DaSilva in the statement. Plowman again places emphasis on Toe's disclosure to the police that he had possession of Toe's statement in his telephone in a conversation with Cecil on June 25, 2001. In this telephone conversation, Plowman says, "That boy has fuckin told the po everything ... about me having papers and ... Cecil: About yeah, the novel? PP: Yeah, that nigger fuckin snitched out to the police man."

93 Lastly, the significance of Plowman having the statement and showing it to Toe during the visit to the store is evidenced by Plowman's admissions to Detective Jansen. Plowman admits that he let all his friends read the statement and he knew that they would by angered what it said. Plowman admits that he confronted Toe with the statement during the visit to the store and asked him why he said these things against DaSilva. Upon his arrest, Plowman immediately volunteered that he had the statements at his residence. From these admissions, I infer that Plowman was aware of the significance of his possession and distribution of the statements.

94 Moreover, the threat reasonably perceived as associated with Plowman's possession of the statement, and its further distribution, is heightened by Plowman's statements to Toe during the visit. What Plowman said to Toe can be distilled from his admissions to Detective Jansen, coupled with his telephone conversation with DaSilva on May 1. 2001. Plowman admits telling Toe that he believed him to be a rat and that a rat was a piece of shit in his world. Whether Plowman meant a liar or someone who simply reports another to the police is inconsequential because both meanings carry a negative connotation and ultimately place the "rat" in a potentially dangerous situation.

95 Plowman admits that he told Toe that he was passing on a message from DaSilva and others and that message was "don't fuckin testify". In this context, Plowman admits he described to Toe all the dangers inherent in testifying against DaSilva, including the fact that DaSilva had the resources to retaliate against him even if he was convicted of murder. Additional evidence of the context of the discussion is found in Plowman's telephone conversation with DaSilva on May 1, 2001 in which Plowman says, "Oh, I'm tellin ya, ...when I first came at him he was trying to talk like he was fuckin still down. I said, man you crossed over, I said it's over now. I said you got to shut up man, you know what I mean?"

96 Thus, in all the circumstances, including the context of Plowman's statements to Toe, the production of the statement during their conversation, Toe's membership in the same community as Plowman, Plowman's association with DaSilva, and the seriousness of the charge against DaSilva, as well as Toe's role as an eyewitness to the murder, I find a reasonable person would have perceived a threat had been made.

97 Lastly, in regard to the mens rea required, the Court must be satisfied that Plowman acted willfully, which means his conduct must be intentional rather than accidental or unknowing. Given Plowman's admissions concerning his knowledge of the significance of his possession of Toe's statement, as well as the description he gave to DaSilva about the visit to Toe's store, I find it is beyond any reasonable doubt that he intended to threaten Toe in the manner described above.

98 In summary, I am satisfied beyond a reasonable doubt that Plowman willfully attempted to dissuade Toe from testifying at DaSilva's murder trial by threats. He is thus found guilty of Count 2 attempt to obstruct justice.

99 I am also satisfied beyond a reasonable doubt that Wilson willfully participated in the same implied threat against Toe in an attempt to dissuade him from testifying against DaSilva. While Wilson's statement to Detective Jansen contains inconsistencies, the version of the events I accept as credible is supported by Toe's evidence and the disclosures made by Wilson to the undercover officers. First, Wilson admits he went to Toe's store with Plowman and that he threw Toe's statement on the table and told Toe they had to discuss this "24 page book". Second, Wilson admits the discussion became heated and I accept Toe's evidence that Wilson called him a rat. Third, Wilson admits he went to the store to tell Toe he was a piece of shit for ratting out DaSilva.

100 Fourth, I accept Toe's evidence that Wilson said DaSilva was his boy. Fifth, Wilson admits he

10577

knew their actions in producing the statement would shock Toe, because, "if we have the statement, then fuckin a hundred people know." Sixth, Wilson admits he thought there would be money in it for him to scare Toe and that was half the reason he went to the store. Finally, in Wilson's discussion with Plowman in the police van, he says, "we just went there to talk to him, to spank that nigger with his own words." Taken in context I conclude this meant that Wilson went to the store to scare Toe with the knowledge that they, and probably others, had or knew about his statement to the police.

101 Based on all of the above factors, as well as the contextual circumstances surrounding the visit to Toe's store, I am satisfied beyond a reasonable doubt that the Crown has established the actus reus and the mens rea of the offence of attempt obstruction in relation to Wilson and I thus convict him on Count 2.

102 Finally, I am satisfied beyond a reasonable doubt that DaSilva willfully attempted to dissuade Toe from giving evidence at DaSilva's murder trial by the same implied threat as described above. The evidence establishes beyond a reasonable doubt that DaSilva sent out Toe's statement while at the Surrey Pre-Trial Centre. DaSilva had possession of the statement and the opportunity to make a copy of it. Wilson ended up with a copy of the statement and he was in the pre-trial centre at the same time as DaSilva. DaSilva had a motive for sending out the statement; that is, to intimidate Toe as an eyewitness to the murder of Walker. Further, this circumstantial evidence is corroborated by DaSilva's admission, during a telephone conversation with Plowman on May 1, 2001, that he sent out the statement. During this conversation, DaSilva says, "I knew as soon as I fuckin sent that out, that would make some niggers buckle at the knees and shit like that". This admission also clearly shows an awareness of the impact the distribution of the statement would have on Toe.

103 Furthermore, the evidence surrounding the visit to Toe's store by Plowman and Wilson is admissible against DaSilva as an act in furtherance of the conspiracy by co-conspirators. The evidence of a common design is established beyond a reasonable doubt and described above in regard to the conspiracy charge. The offence of conspiracy is inextricably linked to the substantive charge of attempt to obstruct justice because this was the very object of the conspiracy. Thus the co-conspirator's exception to the hearsay rule applies to the substantive offence: *R. v. Falahatchian* (1995), 99 C.C.C. (3d) 420 (Ont. C.A.)at p. 438. Accordingly, the acts of Plowman and Wilson while at Toe's store must be attributed to DaSilva. This evidence, coupled with the fact that DaSilva sent out Toe's statement knowing that it would "make him buckle at the knees", establishes beyond a reasonable doubt both the actus reus and the mens rea of the offence. I thus convict DaSilva on Count 2.

Accused found guilty.

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Annex B

R v Patrascu, Court of Appeal (Criminal Division), 14 October 2004, [2004] EWCA CRIM 2417;

10579

[2004] EWCA CRIM 2417, [2004] All ER (D) 167 (Oct), (Approved judgment)

R v Patrascu

COURT OF APPEAL (CRIMINAL DIVISION)

[2004] EWCA CRIM 2417, [2004] All ER (D) 167 (Oct), (Approved judgment)

HEARING-DATES: 14 OCTOBER 2004

14 OCTOBER 2004

CATCHWORDS:
Criminal law - **Intimidation of witness** - Scope of offence - Threat and violent conduct towards victim not putting him in fear - Sufficient basis for conviction.

HEADNOTE:
This judgment has been summarised by LexisNexis UK editors.

The victim was a witness at the defendant's trial for an offence of begging. He came across the defendant at court before the trial started, and the defendant contended that they were acquainted. The victim disputed the connection and defendant was encouraged by police officers to move away and did so. The trial was adjourned and the victim contended that the defendant ran after him in the street and asked if he was going to give evidence that he knew him. The victim contended that when he told the defendant that he would tell the court that he did not know him and could not lie, the latter became aggressive, leaning firmly on his shoulder and shouting in his ear as they continued walking. The victim contended that he was nervous because he was unsure whether the defendant would have become violent. The victim further contended that the defendant pleaded for his assistance and offered to do anything for him. Subsequently they came across a plain clothed police officer, who called the defendant to him and the victim reported the incident to the police. The defendant was charged with and denied intimidating a witness, contrary to s 51(1) of the Criminal Justice and Public Order Act 1994. The victim gave evidence including that he had found the defendant's behaviour intimidating but that he had not been intimidated by it. The judge rejected a submission of no case to answer on the basis that an offence of intimidation was sufficiently wide to encompass the circumstances in which a defendant was so irritating and annoying to a witness in a way designed to unsettle the witness even though the conduct had not put the witness in fear. The judge subsequently directed the jury, inter alia, that intimidation could have included being pressurised to change evidence. The defendant was convicted and appealed against conviction.

The defendant contended, inter alia, that there was no case to answer because the victim had not been intimidated and the judge had misdirected the jury on the elements of the offence.

The appeal would be dismissed.

An act might amount to intimidation and would be sufficient to constitute an act which 'intimidates' although the victim was sufficiently steadfast not to be intimidated. The apparent contradiction arose from the different shades of meaning of the active and passive use of the verb to intimidate.

10580

The offence of intimidation was capable of including acts where the intimidator had not succeeded in putting the victim in fear or deterring the victim from giving evidence. However, mere pressure on a victim to change his evidence was insufficient to constitute an offence without fear, or an element of threat or violence which resulted in improper pressure. In the instant case, the victim had been nervous that the defendant could be violent and there was some evidence of violence and threatening behaviour. In those circumstances, there had been sufficient evidence to be left to jury and for a properly directed jury to convict the defendant of intimidation.

The conviction would be upheld.

Per curiam: There could only rarely be an offence of attempting to commit this statutory offence.

INTRODUCTION:
This is the first approved version handed down by the court. An edited official transcript or report will follow.

COUNSEL:
John Butterfield for the defendant.; Ian Ball for the Crown.

PANEL: MAY LJ, EADY AND HUGHES JJ

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

JUDGMENTBY-1: MAY LJ

JUDGMENT-1:
MAY LJ:

1. On 28th May 2004, in the Crown Court at Birmingham before Mr Recorder Marsh and a jury, the appellant was convicted of intimidating a witness contrary to section 51(1) of the Criminal Justice and Public Order Act 1994. He was sentenced to 6 months imprisonment to run consecutively with a sentence of 12 months imprisonment for an unrelated matter. He appeals against his conviction by leave of the single judge, Morland J, who considered that it was at least reasonably arguable that the Recorder gave too wide an interpretation of intimidation in section 51(1) of the 1994 Act in his direction to the jury.

2. On 28th August 2003, Philip Chapman, the victim, was at Birmingham Magistrates' Court to give evidence at a trial of the appellant, who was charged with begging money from him in Birmingham City Centre during the previous month. The appellant and Mr Chapman encountered each other at court before the trial started. The appellant said that he had known Mr Chapman for ages. Mr Chapman says that this was not right. The appellant was then encouraged by police officers to sit elsewhere, which he did.

3. The trial was adjourned. Mr Chapman left court. His evidence was that the appellant called after him and came running to catch him up in Corporation Street. It was a busy afternoon. The appellant asked if Mr Chapman was going to say in evidence that he knew him. Mr Chapman said that he would say that he did not. Mr Chapman found the appellant a bit aggressive. The appellant was leaning firmly against his shoulder as they were walking down the street, so that he could only walk in one direction around other pedestrians. There was some pressure on his shoulder, but he could walk in a straight line. When Mr Chapman told the appellant that he was not going to stand up in court and lie, the appellant became a lot more forceful. He was talking more loudly, shouting in his ear. Mr Chapman said he was

nervous, because he did not know whether the appellant was going to be violent. The appellant was pleading with him to lie for him. He would do anything for Mr Chapman. He said that the police were trying to ban him from the city centre, and he said he would be "fucked if the police get a banning order". As they reached High Street, the appellant was called over by a plain clothes officer and the incident ended. Mr Chapman went straight to a police station and reported what had happened.

4. The recorder's summing up of further evidence by Mr Chapman was as follows:

"When he was asked further questions about the incident, he said he found it awkward. Not embarrassing; he just found it awkward. He said it went through his mind: Is this man trying to intimidate me? And at one point he said: "I did form the view I was being intimidated", but then, when pressed on that, he said: "No, I was not intimidated." What he said when he was asked again about that was that he said he found the behaviour intimidating, but he was not intimidated by it. He said it annoyed him, and said it made him concerned about meeting Mr Patrascu again in court, but it didn't in fact intimidate him."

5. The appellant did not give evidence. In interview, he said that he knew Mr Chapman. He did have a conversation with him, but he said that he had not intimidated him in any way.

6. Section 51 of the Criminal Justice and Public Order Act 1994 provides:

"(1) A person commits an offence if -

(a) he does an act which intimidates, and is intended to intimidate, another person (the victim),

(b) he does the act knowing or believing that the victim is assisting in the investigation of an offence or is a witness or potential witness or a juror or potential jury in proceedings for an offence, and

(c) he does it intending thereby to cause the investigation or the course of justice to be obstructed, perverted or interfered with."

It is immaterial that the act is done otherwise than in the presence of the victim, or to a person other than the victim (section 51(3)). By sub-section 4, "an intimidatory act which consists of threats" may threaten financial as well as physical harm. If it is proved that a defendant did an act falling within section 51(1)(a) with the requisite knowledge or belief, he is presumed, unless the contrary is shown, to have done the act with the intention required by sub-section (c) - (section 51(7)). By sub-section (6), a person guilty of an offence under the section is liable on conviction on indictment to imprisonment for a term not exceeding 5 years or a fine or both.

7. Section 51(2) makes it a separate offence intentionally to harm or threaten to harm a person whom the defendant knows or believes has assisted in an investigation into an offence, given evidence in proceedings for an offence, or acted as a juror in proceedings for an offence.

8. The statutory offences in section 51 of the 1994 Act are related to but not, we think, identical with contempt of court and perverting or attempting to pervert the course of justice. For the offence in section 51(1), the defendant has both to intimidate the victim and to intend to do so.

9. The appellant's grounds of appeal are that the recorder was wrong to reject a submission on his behalf that there was no proper case to go to the jury; and that the recorder misdirected the jury as to the meaning of "an act which intimidates" in section 51(1)(a). The

main factual case in support of each submission is that Mr Chapman said that he was not intimidated. The broad issue in this appeal is whether an act can intimidate a victim, when the victim himself does not feel intimidated.

10. When the recorder rejected the submission of no case, he identified evidence of Mr Chapman (apart from his evidence that he did not feel intimidated) which was in our judgment capable of supporting a finding by a properly directed jury that the appellant did an act which intimidated Mr Chapman. We have referred to this evidence earlier in this judgment.

11. The recorder considered that, in the absence of a statutory definition of what intimidation is, the definition was wide. It did not need just to be intimidation in the sense of being put in fear. It was "behaviour which does and is intended to have a material effect on the way in which a witness gives their evidence or [on] whether they give that evidence at all." Commonly intimidation would comprise putting a witness in fear. But if a defendant is so irritating and annoying to a witness in a way designed to unsettle the witness, that was capable of amounting to intimidation even though the conduct does not put the witness in fear. The recorder said that he had not yet formulated the direction he would give the jury. But he considered it proper to direct them that Mr Chapman did not need to have been intimidated in the sense that he was put in fear. A wide definition was appropriate and there was sufficient evidence to support a conviction on that basis. The recorder also rejected as being too late an application by the prosecution to add a count to the indictment of attempting to intimidate a witness.

12. As will appear, we consider that the recorder was entitled to conclude that Mr Chapman's evidence was capable of supporting a conviction under section 51(1) of the 1994 Act. We agree with him that "an act which intimidates" does not have to result in the victim being put in fear. We do not consider that the recorder's eventual construction of the section in his summing up was entirely correct. But, since we consider that the evidence was capable of supporting a conviction upon a correct construction of the section, we reject this ground of appeal.

13. The recorder directed the jury to consider whether the appellant told Mr Chapman to change his evidence; whether he tried to persuade him to say that he knew the appellant. The jury also had to be sure that the appellant's actions intimidated Mr Chapman, and that the appellant intended to intimidate Mr Chapman with the intention of obstructing or interfering with the course of justice. He did not direct them as to the statutory presumption in section 51(7), but that omission was favourable to the appellant. He then said this:

"What does the word 'intimidation' mean in this charge? You have to consider both whether Mr Chapman was intimidated and whether Mr Patrascu intended to intimidate him. It is right that you consider the question of intimidation from Mr Chapman's point of view. You have to consider what effect Mr Patrascu's actions actually had on Mr Chapman, and indeed what effect they were intended to have. If Mr Chapman was not intimidated you must acquit this defendant.

Intimidation can mean different things. It can, for example, mean to be made fearful or frightened. That might be the result of actions much more aggressive than those which were alleged against Mr Patrascu in this case - for example, a witness who is threatened with serious harm unless they change their evidence. That is not the case here. But intimidation can be something less than causing someone to be frightened or in fear. It can include being pressurised to change evidence.

When you are considering all the evidence - and, in particular, Mr Chapman's - consider whether it amounts to him being and feeling pressurised by the defendant. If you conclude that [Mr Chapman] felt pressurised by the defendant and the defendant intended to

pressurise him with a view to Mr Chapman changing his evidence, you may conclude that the effect on Mr Chapman, and the intended effect, was to intimidate him." (We have added the italics in these paragraphs.)

The Recorder emphasised that the jury should give considerable weight to Mr Chapman's evidence that he did not feel intimidated. But they had to consider the evidence as a whole.

14. Mr Butterfield, on behalf of the appellant, submits that the usual meaning of "to intimidate" is to put someone in fear. It should be so construed in section 51(1). This would not unduly diminish the scope of the section, since a charge of attempting to pervert the course of justice would encompass conduct which did not succeed in intimidating the victim. In the present case, the prosecution had proceeded on the wrong charge. Mr Butterfield conceded that inappropriate approaches to witnesses should be regarded as a serious problem, but it would be illogical and unfair to conclude that evidence of a witness who states that he was not intimidated can support a conviction for intimidation. The appellant may have been intimidating, but Mr Chapman was not intimidated. He submits that the editors of Archbold are correct to submit at 28-148 of the 2004 edition that the requirement in sub-section (1)(a) that the act must actually intimidate would not extend to conduct which was simply likely to intimidate.

15. Mr Ball, for the prosecution, submits that there is more than one meaning of "to intimidate". He accepts that one meaning is to put someone in fear. He points to what the Oxford English Dictionary 2nd (1989) edition refers to as a "modern use" as "to force to or deter from some action by threats or violence". He submits that the meaning should include behaviour which falls short of actually putting someone in fear. It is sufficient if someone finds themselves coerced, discouraged, cowed, restrained or daunted by the behaviour of another.

16. "Intimidation" and "to intimidate" are ordinary English words with a normally understood primary meaning of putting someone in fear. Fear is part of the Latin derivation. As with most words, there are shades of possible meaning, such that to attempt a definition which is intended to be comprehensive is unnecessary and undesirable. An intention by the defendant to intimidate is not alone enough, for that is the other limb of the relevant part of the statutory offence. Accordingly we consider that the appellant was entitled to be acquitted if "an act which intimidates ... another person" is limited to circumstances where in consequence the victim is intimidated in the sense that he is put in fear.

17. We accept, however, that the Oxford English Dictionary's modern usage of "to intimidate" as including "to force to or deter from some action by threats or violence" is capable of embracing a shade of meaning whereby the intimidator does not in fact succeed in putting the victim in fear. For this meaning, some element of threat or violence is necessary.

18. In our judgment, a person does an act which intimidates another person within section 51(1)(a), if he puts the victim in fear. He also does so if he seeks to deter the victim from some relevant action by threat or violence. A threat unaccompanied by violence may be sufficient, and the threat need not necessarily be a threat of violence. The act must be intended to intimidate. The person doing the act has to know or believe that the victim is assisting in the investigation of an offence or is a witness or potential witness or juror or potential juror in proceedings for an offence. He has to do the act intending thereby to cause the investigation or the course of justice to be obstructed, perverted or interfered with. If the other ingredients are established, this intention is presumed unless the contrary is proved (sub-section (7)). The intimidation does not necessarily have to be successful in the sense that the victim does not have actually to be deterred or put in fear. But it will obviously be material evidence if the victim was not in fact deterred or put in fear. A person may intimidate another person without the victim being intimidated. This apparent contradiction arises from different shades of meaning of the active and passive use of the verb. An act may

amount to intimidation and thus intimidate, even though the victim is sufficiently steadfast not to be intimidated.

19. In the present case, the recorder's directions to the jury did not include this element of threat or violence. He only referred, in the passages we have italicised earlier in this judgment, to the victim being and feeling pressurised. In our judgment pressure to change evidence alone is insufficient. Pressure alone might be unexceptionable and entirely proper, at least if applied in the honest belief, for instance, that what was sought was evidence which would be truthful. Alternatively, pressure might be improper, but lack any element of intimidation, for example a bribe. For a person to intimidate another person, the pressure must put the victim in some fear, or, if it does not, there must nevertheless be an element of threat or violence such that the pressure is improper pressure. Mere pressure is insufficient. The recorder's direction was to this extent insufficient.

20. In the light of this, we have to consider whether the appellant's conviction was safe. We conclude that it was safe. The jury plainly accepted Mr Chapman's evidence, which we have summarised earlier in this judgment. The appellant was plainly seeking to deter Mr Chapman from giving true evidence. The appellant was aggressive and Mr Chapman was nervous because he did not know whether the appellant was going to be violent. The appellant's actions were to an extent violent. The violence was not great, but probably amounted to an actionable assault. His behaviour was to an extent threatening. We bear well in mind that Mr Chapman, who no doubt had a fair understanding of the meaning of intimidation, said that he was not intimidated. But he also said that the appellant's behaviour was intimidating. He thus recognised the different shades of meaning between the active and passive use of the word. In our judgment, this evidence was entirely sufficient to support a finding by a properly directed jury that the appellant intimidated Mr Chapman. We consider therefore that the appellant's conviction was safe. For these reasons, the appeal against conviction is dismissed.

21. It is not therefore necessary to address Mr Ball's submission that the recorder should have acceded to his application to amend the indictment by adding a count of attempting to intimidate a witness. We only observe that our construction of section 51(1) means that there could only rarely be an offence of attempting to commit this statutory offence.

DISPOSITION:
The appeal would be dismissed.

SOLICITORS:
Registrar of Criminal Appeals; Crown Prosecution Service

[2004] EWCA CRIM 2417, [2004] All ER (D) 167 (Oct), (Approved judgment)

10585