

CITATION: R. v. Jeffers, 2012 ONCA 1
DATE: 20120104
DOCKET: C49760

COURT OF APPEAL FOR ONTARIO

Laskin, Gillese and Karakatsanis JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Livingston Jeffers

Appellant

James Lockyer, for the appellant

John Patton, for the respondent

Heard: June 9, 2011

On appeal from the conviction entered on October 14, 2008 by Justice Gail S. Dobney of the Ontario Court of Justice.

Laskin J.A.:

A. OVERVIEW

[1] The appellant, Livingston Jeffers, appeals his convictions for counselling murder and mischief under \$5,000.

[2] Mr. Jeffers is a black man from the Caribbean. In 2007, he and his family faced a number of difficulties in their lives, largely centered on their inability to maintain mortgage payments on their condominium. Using poor judgment, but hoping to get someone's attention for his family's plight, Mr. Jeffers glued numerous posters to road signs, hydro poles and parking meters in the neighbourhood of the Scarborough Town Center. Some of the posters claimed that "*the Jeffers Family fear for their life*" and contained the words "*we have been fraud by York Condocork 98 and representative David Jeph and TD Bank Debora Fredricks*".

[3] Another poster – the poster that precipitated the charges against Mr. Jeffers – showed a photograph of city councillor Michael Thompson, also a black man, and contained the following hand-printed words:

Murder

Help

Councillor Thompson

Jeffers

Help Black

647-436-4476

We Black

[4] A city of Toronto employee complained about the posters. Mr. Jeffers was then charged with counselling members of the public to murder Councillor Thompson and with mischief under \$5,000.¹ At his trial, Mr. Jeffers testified that the posters were a cry for help and that he never intended to harm Councillor Thompson. He said that in the past Councillor Thompson had been the one person who had helped him. The trial judge,

¹ The indictment did not specify how the mischief was committed; however, the parties and the trial judge proceeded on the assumption that the mischief count alleged destruction or damage of property: see s. 430(1)(a).

nonetheless, rejected Mr. Jeffers' evidence and convicted him of both charges. She imposed a suspended sentence and three years probation.

[5] On appeal, the Crown concedes that the conviction for mischief cannot stand because the posters did not cause damage or endanger public safety. However, the Crown seeks to maintain the conviction for counselling murder.

[6] I would allow Mr. Jeffers' appeal, set aside both convictions, and substitute acquittals. In my opinion, the conviction for counselling murder is unreasonable. It is not supported by the evidence and, indeed, is contrary to the evidence. The trial judge's reasons for conviction are undermined by her failure to consider the offending poster and Mr. Jeffers' intention in context. More broadly, I agree with counsel for Mr. Jeffers that our society can accommodate the kind of nuisance caused by the appellant; to convict him of one of the most serious crimes in our criminal law is on its face unreasonable.

B. OTHER RELEVANT FACTS

1) Mr. Jeffers' Background

[7] Mr. Jeffers was born in Montserrat. He came to Canada in 1974. He is married with four children. At the time of trial he was 58 years old.

[8] Mr. Jeffers has a grade five education. He testified that he is "not too great" at reading and writing. He had been a heavyweight boxer and became the "Ontario Champion for Canada" in bodybuilding. Up to the time of trial, he had been working in the scrap metal business.

[9] Mr. Jeffers and his wife bought a condominium townhouse in 1986. Their difficulties began in 1996, when Mr. Jeffers' wife, who was employed as a chambermaid at a hotel, suffered a workplace injury. By 2005 the Jeffers could no longer maintain mortgage payments on their townhouse and the mortgage, which was held by the Toronto Dominion Bank, went into default. His condominium corporation wanted him to move. Mr. Jeffers tried to get help from the fraud squad, police station, community centres, the Jamaican Centre and City Hall. He believed that his problems originated with the bank because its automated system failed. He claimed "they are stealing our property." He blamed the local branch manager, Debra Frederick.

2) The Posters

[10] Mr. Jeffers glued about 50 posters to road signs, hydro poles and parking meters. None of the posters interfered with the operation of the signs, poles or meters. Moreover, the posters were easily traced to Mr. Jeffers because his name and telephone number were written on all of them, and his address on some of them.

[11] The posters were of two types. The first type, of which there were two variations, showed a photograph of Mr. Jeffers when he was a much younger man. Superimposed on his chest and stomach were pictures of the heads of his wife and two of his grandchildren. These posters claimed that Mr. Jeffers and his family had been the victims of house fraud, and targeted their condominium corporation and the Toronto-

Dominion Bank. I attach as Appendices 1 and 2 to my reasons copies of the two posters of this first type.

[12] The second type of poster is the one with a photograph of Councillor Thompson and the word “murder” on it. I attach as Appendix 3 a copy of this poster.

[13] Mr. Jeffers, whose speech was at times colourful, testified that he used the word “murder” because in his vernacular it meant a cry for help; he and his family were being murdered.

A. Okay. I like what I say, I say, murder, now murder is me that. Me crying for murder. When we in the Caribbean and anything - - anything would happen to anybody that is wrong, that is the only way you could - - if somebody is beating somebody badly.

Q. Yes.

A. Somebody yell murder, murder.

Q. Okay.

A. That is what we - - that is the phrase we use. So what I am really saying, is very simple, murder, help Jeffers, that is what I am saying.

[14] He said that he was asking Councillor Thompson, a fellow black man, to help him. He never intended to harm the councillor in any way.

3) Mr. Jeffers’ Interaction With Councillor Thompson

[15] Mr. Jeffers met Councillor Thompson in 2006. Councillor Thompson was then Mr. Jeffers’ local city councillor and helped him with a sewage problem.

[16] Mr. Jeffers said that he never had a problem with Councillor Thompson. He was asked why he did not phone the councillor directly about his problems with his condominium corporation and the bank. Mr. Jeffers explained:

He done his best. He do what he could done and I didn't want to keep bothering him up. He do his part, I said him get we back in our home and we thank him very much for that.

[17] Councillor Thompson did not testify at trial. And the Crown called no evidence to suggest that Mr. Jeffers held a grudge against him or to contradict Mr. Jeffers' evidence that he viewed Councillor Thompson as a good person.

C. THE CONVICTION FOR MISCHIEF

[18] The Crown proceeded under s. 430(a) of the *Criminal Code*.² It alleged that Mr. Jeffers committed mischief by willfully damaging property. In convicting him, the trial judge held:

In my view, damaged property can include things like defacing, putting graffiti on, sticking posters up, things that interfere with the manner in which the owner of the property had had his property originally set out.

...

The fact that it can be remedied subsequently by someone coming along and taking the glue off and scraping the posters or tearing them down, doesn't change the fact that for the time being damage was done by gluing things to a parking machine and I find the accused guilty of that offence.

² *Supra* note 1.

[19] The trial judge erred in her appreciation of the meaning of “damage” under the mischief provisions of the *Code*. To criminalize mischief, the damage must be more than negligible, more than a minor inconvenience. To prove damage the Crown must show that the usefulness or value of the property has been impaired, at least temporarily. Proulx J.A. set out the test in *R. v. Quickfall* (1993), 78 C.C.C. (3d) 563, at p. 566 (Q.C.A.):

Without disagreeing with this definition of the word “damage” according to which the thing is “rendered less suited for its intended purpose”, I would add, on the basis of my reading of the dictionaries, that “damages” means that at least temporarily, *the usefulness or the value of the property is impaired, whether or not the property was harmed or ruined*. In this sense and, with respect for the contrary opinion, I do not believe that “the least bit of damage” is sufficient to constitute mischief. [Emphasis in original.] [Footnotes omitted.]

[20] In the present case, none of Mr. Jeffers’ posters interfered with the utility of the signs, poles or parking meters, or impaired their value. All of the city’s property remained functional. At most, the glue affixed to the posters made them somewhat difficult to remove. This minor difficulty does not amount to damage under s. 430(a) of the *Code*.

[21] The test for damage amounting to criminal mischief reflects an appropriate balance between individual and societal rights. Individuals have long used posterings as an effective and inexpensive means of communicative expression – whether to give

notice of a lost pet, an upcoming local concert, or a person's availability to do home repairs. Criminalizing this kind of conduct is not in society's interest.

[22] On the other hand, local municipalities have a legitimate interest in ensuring that posters do not become a nuisance or impair the safe operation of their signs, poles and meters. For this reason, the regulation of postering on public property – be it the size, appearance or location of the poster – is best left to local by-law legislation: see *Peterborough Corp. v. Ramsden*, [1993] 2 S.C.R. 1084.³

[23] The conviction for mischief must be set aside, and in its place an acquittal entered.

D. THE CONVICTION FOR COUNSELLING MURDER

[24] In *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432, the Supreme Court of Canada set out the *actus reus* and *mens rea* for counselling the commission of an offence. Fish J., writing for the majority, said at para. 29:

In short, the *actus reus* for counselling is the *deliberate encouragement or active inducement of the commission of a criminal offence*. And the *mens rea* consists in nothing less than an accompanying *intent or conscious disregard of the substantial and unjustified risk inherent in the counselling*: that is, it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct. [Emphasis in original.]

³ My reasons apply to the affixing of posters on public property. Postering on private property is not before us and may call for a different assessment.

Thus, to establish Mr. Jeffers' guilt, the Crown had to prove that: (a) an ordinary reasonable person viewing the poster objectively would take it as an invitation to kill Councillor Thompson; and (b) Mr. Jeffers either intended or knowingly counselled Councillor Thompson's murder while aware of the unjustified risk that murder was likely to be committed.

[25] I agree with the Crown that in her oral reasons for conviction, the trial judge correctly set out both the *actus reus* and the *mens rea* for counselling murder. However, I do not agree that she correctly applied these elements of the offence.

[26] The trial judge was required to approach her analysis of the poster from the perspective of the ordinary, reasonable person. In doing so, she was required to look beyond the words on the page to consider the context or circumstances in which the poster was made, including the manner in which the words were communicated and the relationship between the writer and the subject of the alleged invitation to kill: see *Hamilton*, at paras. 15 & 74; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 56; and *R. v. Batista*, 2008 ONCA 804, 238 C.C.C. (3d), at paras. 19 & 20.

[27] She was also required to inquire into Mr. Jeffers subjective state of mind. She had to take account of not only Mr. Jeffer's direct evidence, but as well of the various pieces of circumstantial evidence that told of his intention.

[28] Although the trial judge gave reasons that are seemingly thorough, her analysis failed to go beyond the poster itself. After analyzing the poster (at Appendix 3) the trial judge concluded that Mr. Jeffers' testimony was not believable:

In my view, his explanation is utterly and entirely inconsistent with what is on the face of this document. Indeed it was meant to be read down, being "murder Councillor Thompson" to "help black" was or could be certainly read as being an incitement or a solicitation to others to murder Councillor Thompson, the reason why, to help Jeffers, both of those things set out there. It is clear to me that Mr. Jeffers holds a significant group of grievances against a number of people. He has problems with his condominium association. He has problems with his bank. He has problems with various other people who were named on this. I find it implausible, his explanation that Councillor Thompson, who had previously helped him by a simple phone, would be incited to assist him or asked to assist him by putting up a poster around the city, which there was no guarantee would ever come to Councillor Thompson's intention of asking help by saying, "murder Councillor Thompson". I do not accept that. I reject his evidence on that completely.

[29] She also concluded that the words on the poster:

... are deliberately written in that way to act as a deliberate encouragement or act of inducement to the commission of a criminal offence. It may have been put there as a threat to Councillor Thompson to get his assistance but it also has the dual purpose of attempting to solicit someone to commit the offence.

[30] In my opinion, these conclusions are not supportable. Mr. Jeffers had neither the *actus reus* nor the *mens rea* for counselling murder, and to conclude that he did is unreasonable. No reasonable person viewing the words on the poster could think that

they were encouraging someone to murder Councillor Thompson. On their face, they were a cry for a fellow black man to help the Jeffers family, not an exhortation to kill.

[31] The trial judge's analysis did not take account of the context of the alleged offence, including the collective message of the posters, the appearance of the words, the lack of motive, the steps Mr. Jeffers took to ensure that he could be identified, and Mr. Jeffers' personal background.

(i) The collective message of the posters

[32] The poster in question cannot be considered in isolation. It has to be looked at in the context of the other posters. The other two posters share a common theme, a complaint of "house fraud". They mention the TD Bank and the condominium corporation, but do not refer to Councillor Thompson. Obviously, Mr. Jeffers' grievances are not with Councillor Thompson, but with his condominium corporation and the bank.

(ii) The appearance of the words on the poster

[33] Mr. Jeffers explained his use of the word "murder" as meaning a cry for help. That intention seems obvious from the juxtaposition of "murder" with "help Jeffers" and the phone number. These items are related. Indeed the relative thinness of the pen strokes of these words, as compared to the words "help black", "we black" and "Councillor Thompson" supports this interpretation and suggests that they were written in sequence. In contrast, the words "help black" and "we black" are related to "Councillor Thompson".

(iii) Absence of motive

[34] The trial judge held that Mr. Jeffers' motive was irrelevant. She said:

And what may have been in his mind and why he thought this was going to help, in my view is more of a question of motive and it is not something that I have solve here.

[35] However, as evidence motive is always relevant to the issue of intention and this case is no different: see *Lewis v. The Queen*, [1979] 2 S.C.R. 821. The existence of a motive makes it more likely that a person committed the crime. Persons do not usually act without a motive. Mr. Jeffers had no motive to want Councillor Thompson murdered. The councillor had helped him in the past and had never done him any harm. Mr. Jeffers lack of motive to want Councillor Thompson killed is a strong piece of circumstantial evidence that he never intended to encourage his murder.

(iv) Mr. Jeffers was easily identified

[36] The trial judge did not take into account that Mr. Jeffers made sure he could easily be identified and found. His name and telephone number were displayed on the offending poster.⁴ When the police arrived at his home, he was open and co-operative with them, and, indeed, delighted to see them. Even during his testimony, both in chief and under cross-examination, Mr. Jeffers was more than candid about his postering campaign, advising that he had about ten thousand flyers printed, including others that did not make it to the posting stage. This is not the normal conduct of a person who

⁴ The other two posters also contained his home address.

intends to counsel the murder of another human being. Instead, this conduct is another piece of circumstantial evidence supporting the appellant's lack of intent.

(v) Mr. Jeffers' personal background

[37] Mr. Jeffers' personal background was also highly relevant to the question of his intent. Mr. Jeffers' limited level of literacy, his rudimentary English, his grade five education and his Caribbean background all should have been considerations in evaluating his intent, and more specifically his credibility: see *Batista*. Rather than rejecting the appellant's explanation of what he intended to convey through the offending poster as being "implausible", the trial judge ought to have evaluated his evidence with these subjective characteristics in mind. Had she done so, it would have been clear that Mr. Jeffers had no intention of encouraging Councillor Thompson's murder.

[38] For these reasons I would set aside the conviction for counseling murder. It is not supported by the evidence, and in my opinion, it is contrary to the evidence.

[39] The Crown submits, in the alternative, that we ought to substitute a conviction for threatening death. Accepting that we have the jurisdiction to do so, I would not give effect to the Crown's submission. Mr. Jeffers no more intended to threaten Councillor Thompson's death than he intended to counsel his murder.

E. CONCLUSION

[40] I would allow Mr. Jeffers' appeal, set aside his convictions for mischief and counselling murder, and in their place enter an acquittal on each charge.

“John Laskin J.A.”
I agree E.E. Gillese J.A.”
“I agree Karakatsanis J.A.

RELEASED: January 4, 2012

Appendix 1

THE JEFFERS FAMILY FEAR FOR THEIR LIFE

0023

WE HAVE BEEN USED ABUSED AND REFUSED

NO LEADERSHIP IN CANADA

JUSTICE SYSTEM
NEEDS TO CHANGE

THE STORY HAS BEEN
KEPT HIDDEN
FOR 12 YEARS

WE ARE INNOCENT

THE MOTIVE IS TO SHUT WE UP

ANYONE WHO
GET THIS
FLYER MUST
MAKE SURE THE
WORLD HEARS
THIS STORY!

HELP
HOUSE
FRAUD!

COMMUNITY MEMBERS
CALL YOUR LEADERS

THE JEFFERS STORY
MUST BE TOLD

AFTER CATCHING
!THEM!

1021 MIDLAND SOBABUNT 11

Tel:647.436.4476

Appendix 2

**THE JEFFERS FAMILY FEAR
FOR THEIR LIFE** 0025

WE HAVE BEEN USED ABUSED AND REFUSED

**WE HAVE BEEN FRAUD
BY YORK CARD CORK 98**

HELP
HOUSE
FRAUD!

The Story
Has Been
Kept Hidden
For 12 Years

AND REPRESENTATIVE
THE MOTIVE IS TO SHUT WE UP

DAVID JEPB

SOCIETY AND
AUTHORITIES
FRAUD
CONSPIRACY
DESTROYING
WE!

ANYONE WHO
GET THIS
FLYER MUST
MAKE SURE THE
WORLD HEARS
THIS STORY!

AND TD BANK
THE JEFFERS STORY
MUST BE TOLD

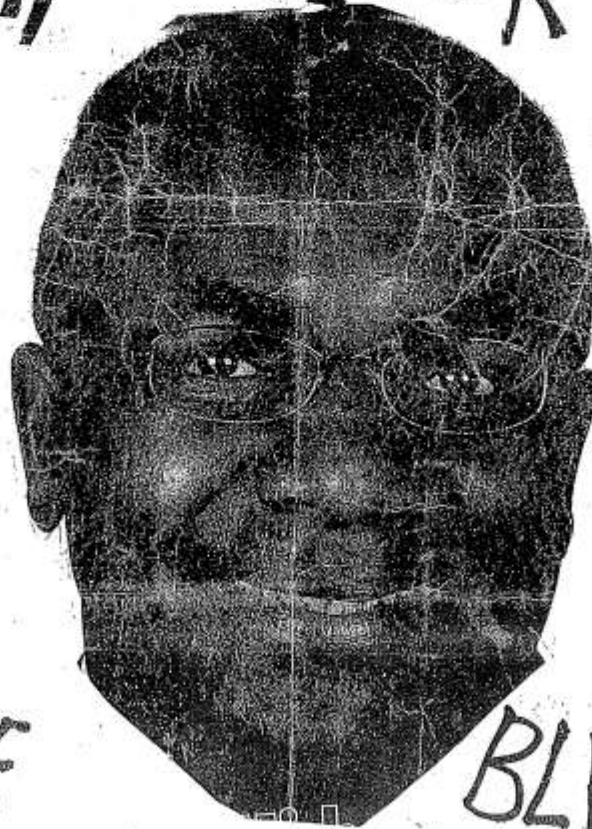
DEBRA FEDRICKS WITH THEM
MIDLAND SOBABUNT 11



Appendix 3

MURDER 0027 HEIP
COUNCILLOR JEFFERSON
THOMPSON 647-436
4476

HEIP BLACK



WE

BLACK