

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Kerr v. Ladner***,
2009 BCSC 321

Date: 20090311
Docket: S072708
Registry: Vancouver

Between:

Kim Kerr

Plaintiff

And

Peter Ladner

Defendant

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for the Plaintiff:

J. Gratl

Counsel for the Defendant:

G. Macintosh, Q.C.
N.T. Hooge

Date and Place of Trial/Hearing:

March 2 - 4, 2009
Vancouver, B.C.

Introduction

[1] This is an action brought by Mr. Kerr in defamation against Mr. Ladner.

[2] The essence of the claim is set out in the statement of claim, where Mr. Kerr pleads that on April 12, 2007, Mr. Ladner stated on CBC Radio One:

Kim Kerr, after the meeting in the Council Chambers, came up to Councillor [Elizabeth] Ball, and said “you’d look good lying in an alley, on your back in an alley, with that red scarf tied tight around your neck”.

Mr. Kerr pleads that he actually said:

Maybe you can take your red shawl and give it to a woman who is going to be cold on the street tonight, because as nice as it may look on you, it could come in handy.

[3] Mr. Kerr pleads that the broadcast of the defamatory statement caused serious damage to his personal credit, character and reputation. He relies on s. 2 of the ***Libel and Slander Act***, R.S.B.C. 1996, c. 263, and seeks damages.

[4] The defendant replies that the words attributed to him are true, and that they were said without malice on an occasion of qualified privilege.

Background

[5] The incident which gives rise to these events occurred on the night of October 19, 2006, at the end of a long day of committee and council meetings. The contentious issue on the agenda that day was a motion to place a moratorium on conversions of single resident accommodation (“SRA”). The meeting of the

Standing Committee of Council on Planning and Environment started at 2:00 p.m. on October 19, 2006, and it is common ground that there were a number of speakers who were in favour of a moratorium on such conversions. It is also common ground that it was a very emotional meeting and that a number of people were outspoken through the course of the day. The committee meeting concluded with a resolution “that speakers having been heard, discussion and decision on the motion moratorium on SRA conversions be referred to the future meeting of council which will include the staff report on SRAs”. That motion was carried and the committee meeting adjourned at 9:30 p.m. A council meeting followed immediately. The council meeting completed at 9:35 p.m.

[6] There was a filmmaker, Conrad Schmidt, who attended the meeting and took videotape of at least some portions of the meeting. Part of that video was introduced in evidence. That video clip catches the end of the committee meeting. A number of the spectators in the gallery are heard making loud comments. Amongst them is Mr. Kerr, who says, amongst other things, “Maybe you can take your red shawl and give it to a woman who is going to be cold on the street tonight, because as nice as it may look on you, it could come in handy.”

[7] The primary factual issue in this trial is whether that was the extent of Mr. Kerr’s comments with respect to the red shawl, as he asserts, or whether he made the additional comments, as stated by Mr. Ladner.

The Evidence

[8] Five people testified with respect to the statement in question.

[9] Conrad Schmidt is an independent filmmaker. He was present at the meeting, taking video that he hoped to use in his film "Five Ring Circus".

Mr. Schmidt testified that he had attended that meeting because of the agenda item regarding the moratorium on SRAs. He thought that there would be a connection to his film. He said that he had arrived very early and left at the very end. He said that he had not been aware that he had footage of the events until Mr. Eby (one of the other participants at the meeting of October 19, 2006) brought it to his attention after April 12, 2007. Mr. Eby told him that he, Mr. Schmidt, had been there for the statement about Elizabeth Ball. He found the portion of his recording and posted that clip to Youtube. He said that he started recording after the decision was made at the committee hearing regarding the SRAs. He said that the crowd was becoming more rowdy. After the video ended, he was there one or two minutes, possibly another three minutes, packing his bags. He said that he did not see Mr. Kerr return after he finished filming. He did not film the council meeting.

[10] Mr. Kerr said that he had attended with a large group to speak against closures of the SRAs. He said that he would have spoken officially for about five minutes. To the best of his recollection, he left after the statement caught on the Schmidt video was made. The business of the group was finished and he did not know what was on the remainder of the schedule. He was adamant that he did not make a death threat. He denied ever crossing into the body of the Council Chambers. He said that he had no recollection of what he did during the day before attending the meeting, or who he went to the meeting with. His best recollection would be that he went alone. He said that he did not recall who he left with. He may

have accepted a ride with Jean Swanson. His habit is to go directly home and he had no memory of doing anything different. He thought that he would recall had he done something different. Mr. Kerr said that his only conversation with Councillor Ball was recorded in the video taken by Mr. Schmidt.

[11] Elizabeth Ball testified that she did not know Mr. Kerr before that night. However, she recognized Kerr as he had spoken earlier in the meeting and had been identified. She said that at the end of the committee meeting, she had stood to leave but had been called back by Councillor Capri. After a brief council meeting, she and Councillor Lee stood to clear their desks. Mr. Kerr came directly over in front of her desk in the Council Chambers. He was very angry and bouncing on the balls of his feet. He said to her, "Oh, you'll look great lying in an alley with that red scarf tied tight around your neck". She said that Kerr then turned to face Councillor Lee to her left and said something to the effect of "and your children should die". She did not hear the whole of the comment to Councillor Lee. She said that Mr. Kerr's comments to her had upset her, that her ears were red, and her blood pressure was up. She said that Mr. Kerr then left, still talking and shouting as he went out the Council Chamber door. Councillor Lee told her to write it down, and said "let's get out of here".

[12] Councillor Ball's chambers were immediately outside of the Council Chambers, and they went into her office. She sat down at her desk and wrote down the statement. Then, she and Councillor Lee went to see staff members to tell them to ensure that a copy of the tape of the council meeting was kept. (Ultimately, because of glitches in the system, the recording was lost.) After that, she and

Councillor Lee spoke with Councillors Anton, Ladner and Capri and told them what had happened. She said that in her twenty years of attending council chambers, she had never seen anything like it.

[13] She went home, spent a long time talking to her husband. She was terrified. She was not able to sleep that night, and at approximately 4:00 a.m. she got up to try to write out what had happened.

[14] She went to work on the 20th and again wrote it all out just before she went to work. Later, she spoke with Police Chief Graham in Council Chambers about the incident. He said to her words to the effect that without the tapes, she would not be able to go forward legally, it would be a “he said/she said” situation. She decided not to pursue the matter further without the recordings. She told the NPA caucus of Graham’s remarks and of her feelings, and that she did not want to proceed with charges.

[15] Bar-Chya Lee, known as B.C. Lee, testified. He was a member of council from December 2005 to December 2008. He attended the council meeting and the committee meeting of October 19, 2006. He identified himself and Mr. Kerr as well as others in the “Youtube” video. He explained that at the end of the committee meeting, he thought that the meeting was over, but then was reminded that there would be a short council meeting following. He returned to his seat, as did Councillor Ball. After the council meeting, Mr. Lee again stood up to leave, as did Ms. Ball. Mr. Kerr arrived in front of them and spoke to Elizabeth Ball. He heard Mr. Kerr speaking in an elevated voice and recalls the words “red scarf around

neck”, “lying down”, and “back lane”, although he was not certain of the entire conversation. Mr. Lee said that he was quite shocked and said to Elizabeth Ball, “Did you hear that?” He confirmed that Mr. Kerr said something to him about his children and he should watch out, but he does not have children and did not feel threatened by the comment. Mr. Lee walked out with Ms. Ball. He said that she was obviously disturbed and that he said to her “You will write this all down”. He said that Ms. Ball has the habit of making her own notes, in any event. They went to her office. They went as well to the mayor’s office and asked staff to check for the tape to see if the comments were recorded. Mr. Lee was present when Ms. Ball spoke with Chief Graham about the incident. There was an NPA caucus meeting shortly after October 19 where Ms. Ball raised the issue and Mr. Lee verified that it had happened. Mr. Lee knew who Mr. Kerr was. He described him as an active and enthusiastic participant at council meetings. Mr. Lee heard what Mr. Kerr said, but cannot quote it exactly. He does recall three points: red scarf, around neck, lying in back lane.

[16] Sister Elizabeth Kelliher testified. She is the chairperson of the Downtown Eastside Residents Association (“DERA”). She testified that she went to the council meeting on October 19 regarding the moratorium. She left immediately after the vote was taken. Mr. Kerr had remained behind and she recalls him speaking loudly. She knew that he was very upset and “really tried” to get him to come along with her. She heard him say something about a red scarf. He was behind her and she does not know exactly where. He eventually did follow her. They left together and rode the bus home together. She was not aware that there were two meetings and the

vote she recalls was the vote against the moratorium. She did not stick around for more. She was on her way to the elevator until she heard Mr. Kerr's voice and then she turned back, she estimates approximately 1-2 minutes later.

Discussion

[17] I accept the evidence of Mr. Lee and Ms. Ball regarding the events of that evening. Their evidence is entirely consistent with each other and the two of them were present and heard the comments that Mr. Kerr made. Mr. Lee knew Mr. Kerr from various council meetings. Ms. Ball knew Mr. Kerr because he was introduced earlier in those proceedings.

[18] Ms. Ball made detailed notes of the events. She immediately noted down what was said and then made lengthy notes of the events later that night and the following morning.

[19] I do not accept the plaintiff's submission that Mr. Lee and Ms. Ball are confused, that they are thinking of the comment made by Mr. Kerr and caught on the Schmidt videotape. Ms. Ball was clearly upset by the impugned comment, as her notes made contemporaneously indicate, and as apparent when she was giving her evidence at trial. The events had a strong effect on her. It is likely that she would remember them and not be confused. Furthermore, in viewing the Schmidt videotape, Ms. Ball is not paying particular attention when Mr. Kerr makes his comments about the red scarf, and does not appear upset. Nor does Mr. Lee demonstrate any concern as a result of those comments. This is completely at odds

with their description of their response to Mr. Kerr's later comments about the red scarf. I am satisfied that there were two separate incidents.

[20] I reject the plaintiff's contention that Ms. Ball's faculties were impaired and she is not able to correctly perceive and recall events. There is no evidence that Ms. Ball's perception and recollection of events such as these was impaired in October 2006.

[21] With respect to the evidence of Sister Kelliher, I have no doubt that she is accurately stating her recollection of events. I accept that she and Mr. Kerr rode home together on the bus. However, these events took place 2½ years ago. There would be no reason for her to recall the details in the intervening period. It was a very short time between the end of the committee meeting and the end of the council meeting, five minutes according to the minutes of the meetings. This is far too short a time to rule out the possibility that Mr. Kerr returned to the Council Chambers again, after the Schmidt video clip, and made further comments to Councillor Ball and Councillor Lee. Sister Kelliher was not with Mr. Kerr throughout.

[22] With respect to Mr. Kerr's evidence, he has a vague recollection of that day. He does not recall how he got to the meeting or who he travelled with; his evidence is as to his usual practice. Similarly, he had no recollection of how he left or who he travelled home with. He too had no reason to have a detailed memory of events. The matter first came to his attention in April 2007, whereas the events in question took place in October 2006. He did not make notes of the events and, as I say, obviously has a vague memory of the day. In my view, Mr. Kerr is honestly mistaken

about events. When the Schmidt video was produced, he believed that to reflect what he said at the meeting. In my view, his memory is faulty.

[23] For the reasons stated above, I prefer the evidence of Councillors Ball and Lee. I accept that the impugned statements were made. This being so, the defence of justification succeeds and I do not need to deal with the other aspects of the pleadings. The action is dismissed. The parties may make submissions as to costs if they are not able to reach agreement.

“B.J. Brown J.”

The Honourable Madam Justice B.J. Brown