

The Poet Laureate of Potholes

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Antonio Batista, a 73-year-old retiree, had contacted his city councillor, Pat Saito, about several issues—an amount in his property tax bill that he felt was incorrectly included, and concerns about development issues and illegal parking in his community. He was unable to reach the councillor personally, and a response letter from her staff failed to reach him. This perceived lack of response, and a news item that reported Ms Saito's joking suggestion that potholes could serve the useful purpose of slowing down traffic, prompted Batista to write his first poem about Ms Saito, titled "What is good or bad with Mrs. Pat Saito" (including: "Why why why is She/ Is She looking for Pot/ holes when she showd [sic] be/ in the office doing/ her work?"). The poem, sent anonymously to other councillors (but not Ms Saito), was signed "the Bed Wolf." (Batista later explained he meant "the Bad Wolf".)

Apparently finding this to be an adequate outlet for his frustration, Batista followed this up with a second poem, also about Pat Saito and pot holes, which he posted on mail boxes and newspaper boxes in his neighbourhood. It included the following:

We are going to dig a pot hole
about six feet long and 3 feet wide
and five feet deep to hide
her body and God will take care
of Her Soul, but We can not
forgive her for doing nothing.
She can keep running
at a good pace but
We will make sure
that She is in HEAVEN
and out of the Race

It included a photograph of Saito and the line "Do You know Her?" When Ms Saito learned of the poem, she contacted the police. After Batista admitted he wrote the poem (pointing out that it was meant in fun), he was charged with uttering a threat to cause death and intimidation pursuant to s. 264.1(1)(a) of the *Criminal Code* (every one commits an offence who, in any manner, "knowingly utters, conveys or causes any person to receive a threat (a) to cause death…to any person"). After a two-day trial, he was found guilty on the death-threat charge and received a conditional discharge, subject to a 12-month term of probation. In his reasons, the trial judge referred to Batista's denial of any intention to threaten Ms Saito with the poem, noting the defense position that the poem was only "satire, intended to be in jest." However, he found that Batista had harboured a long-standing animus towards the councillor, and reviewed the last three stanzas of the poem "through the eyes of a reasonable person" before concluding that the poem was actually a threat. The trial judge rejected the freedom of expression argument, finding that a threat was not protected by s. 2(b) of the *Charter of Rights and Freedoms* simply because the target, the councillor, was an elected figure. Batista appealed.

The Ontario Court of Appeal allowed the appeal, set aside the conviction, and substituted an acquittal. In evaluating whether an offence occurred under s. 264.1(1)(a), a court was to look at the words objectively, within the context of all the written words, having regard to the person to whom they were directed, and then decide if the words conveyed a threat of serious bodily harm to an average, reasonable person (specifically, one who was "objective, fully-informed, right-minded, dispassionate, practical and realistic"). Second, the court was to consider whether the Crown had established that the accused made the threat knowing that it would be taken seriously. As to the "reasonable person" element, the court held that the testimony of the parking enforcement officer who reported the poem, the investigating police officer, and Ms Saito concerning their reactions, was not determinative, as "their evidence amounted to a personal opinion that did not necessarily satisfy the requirements of the legal test," and the "perspective of the reasonable person" was different. Nothing in the prior dealings between the parties, the content of the poem as a whole, or the manner of circulating it, supported the conclusion that the "threat" in the poem was meant to be taken seriously. Turning to s. 2(b) of the *Charter*, the court held that, while it had been unnecessary for the trial judge to engage in an in-depth s. 2(b) analysis, it was necessary for him to "consider the poem as political commentary before determining whether it constituted a threat at law." Specifically, the poem's purpose of "denigrating the elected councillor's level of job commitment or competence provide[d] important context for a consideration of whether the impugned stanzas of the poem constitute[d] a threat," as an informed reasonable person would "be cognizant of the right of ordinary citizens to criticize and ridicule their elected representatives." A consideration of all of these elements indicated that the court below erred: "[n]o matter how misguided, offensive, and badly written the poem, the words at issue cannot meet the legal definition of a threat." *R. v. Batista*, 2008 ONCA 804 (Ont. C.A. Nov. 28, 2008). **ML**