23/03; [2003] VSC 283

SUPREME COURT OF VICTORIA

NADARAJAMOORTHY v MORETON

Bongiorno J

1-3 April, 4, 6 August 2003

CRIMINAL LAW – RECKLESSLY CAUSE INJURY – STALKING – CARELESS DRIVING – DEFENDANT CONVICTED OF ALL OFFENCES – WHETHER OPEN TO MAGISTRATE – WITNESS NOT CALLED BY PROSECUTION – INFERENCE TO BE DRAWN – COURT NOT REQUIRED TO DRAW INFERENCE – ELEMENTS OF STALKING – WHETHER COURSE OF CONDUCT PROVED – LOITERING – MEANING OF IN CONTEXT OF STALKING – WHETHER LOITERING SUFFICIENT TO ESTABLISH STALKING – WHETHER EVIDENCE SUFFICIENT TO EXCLUDE ALL INFERENCES REASONABLY CONSISTENT WITH INNOCENCE – DRIVING OF MOTOR VEHICLE BY FOLLOWING TOO CLOSELY AND SIDE BY SIDE FOR SOME DISTANCE – WHETHER CONDUCT SO PROTRACTED AS TO CONSTITUTE A COURSE OF CONDUCT AMOUNTING TO STALKING – WHETHER SUCH DRIVING CONSTITUTED CARELESS DRIVING: *CRIMES ACT* 1958, S21A; *ROAD SAFETY ACT* 1986, S65.

Whilst at a Hindu temple, N. was involved in some protest action which involved the handing out of leaflets and the erection of a banner accusing the president and others of behaviour contrary to the Hindu religion. During the protest, N. assaulted another person causing injury and abused others. Five days later, N. was the driver of a motor vehicle which tail-gated another vehicle and then drew alongside travelling for 3-4 minutes at about 80 km/h. A passenger in N.'s vehicle put his arm out the window and made threatening arm and fist movements. Subsequently, N. was charged with recklessly causing injury, stalking a person at the temple, stalking a person whilst driving his motor vehicle and careless driving. The magistrate found all charges proved and convicted N. Upon appeal—

HELD: Appeal in relation to the stalking charges upheld and orders set aside. Appeal in relation to the remaining charges dismissed.

1. In relation to the charge of recklessly causing injury, the magistrate accepted the evidence of an eye witness notwithstanding that another eye witness was not called as a witness. In respect of the failure to call this witness, the magistrate was bound to instruct himself in accordance with *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395 that he may draw an inference from the failure to call the witness that had that witness been called he would not have assisted the prosecution case. However, the law did not require the magistrate to draw any particular inference and he was not in error in not drawing the adverse inference, accepting the evidence of the eye witness and finding the charge proved.

2. In relation to the first charge of stalking, N. was alleged to have done so by loitering outside the temple. The offence of stalking under section 21A(2) of the *Crimes Act* ('Act') requires a finding in relation to four elements.

(i) There must be a course of conduct.

(ii) That course of conduct must involve one of seven acts.

(iii) The accused must have performed that act with the requisite intention, that is to say with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of another person.

(iv) The course of conduct must have aroused apprehension or fear in the victim for his or her own safety or that of another person.

3. The relevant conduct must be conduct which is protracted or conduct which is engaged in on more than one accasion. There must be a pattern of conduct evidencing a continuity of purpose which requires something more than protracted conduct or conduct on more than one occasion.

***Gunes v Pearson* (1996) 89 A Crim R 297;**

***Berlyn v Brouskas* MC27/02; [2002] VSC 377; (2002) 134 A Crim R 111, applied.**

4. The loitering which was said to be created in this case must mean being near and remaining at or near places specified for at least one or more of the purposes specified in s21A(2)(c) of the Act namely, causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of any other person. In order to find the charge proved the Magistrate had to be satisfied that N. was "loitering" and would have had to exclude all reasonable hypotheses consistent with his not having been "loitering" beyond reasonable doubt. Having regard

to the magistrate's findings as to what the various parties (including N.) were doing at the temple regarding the protest which was in progress and N.'s part in it the magistrate could not have excluded beyond reasonable doubt the possibility that N. was there for a purpose or purposes other than one of the statutory purposes set out in s21A(2). Thus he could not exclude the possibility that he was not loitering within the meaning of the section. The protest, as found by the Magistrate, involved more people than just the appellant, was directed at an audience wider than the alleged victim and involved acts (such as handing out pamphlets) which were inconsistent with the concept of "loitering" as set out in the Act. Thus, there was insufficient evidence to justify the exclusion of all inferences consistent with N.'s innocence of the charge laid beyond reasonable doubt.

5. In relation to the charge of stalking involving the driving of a motor vehicle by N., the findings made by the Magistrate did not justify a conclusion that N. engaged in conduct which was so protracted as to constitute the course of conduct contemplated by the anti-stalking statute. At worst the appellant engaged in an episode of harassment of short duration. Illegal as this might be (as a driving offence) it did not constitute stalking. In the present instance the conduct was not protracted enough to fall within the statutory requirement of a "course of conduct" nor was there a sufficient "pattern of conduct evidencing a continuity of purpose" as referred to by Nettle J in *Berlyn v Brouskos.*

6. In relation to the charge of careless driving, this was constituted by the driving too close and driving parallel. There was clearly evidence to support the charge of careless driving.

7. The charge of careless driving was not duplicitous even though it relied on the same acts as the charge for stalking. The charge of stalking by following was said to be constituted by following the alleged victim in the vehicle with the requisite intent. It was said to be directed towards the placing of the alleged victim in fear or apprehension. The charge of careless driving related to the specific acts of driving too close and driving parallel, and was directed to the safety of N.'s driving for the protection of all road users. There was no duplicity in charging, convicting and punishing the defendant for both offences in these circumstances.

BONGIORNO J:

1. This is an appeal in respect of final orders made on 20 May 2002 by the Magistrates' Court of Victoria at Dandenong where the appellant was convicted of, *inter alia,* the following four offences:

- Recklessly causing injury to Rajavatnam Sivanathan at Carrum Downs on 13 July 2001;
- Stalking another person at the Basin on 22 September 2001;
- Stalking another person at Frankston on 27 September 2001; and
- Careless driving on 27 September 2001.

2. The appellant appeals these orders pursuant to s92 of the *Magistrates' Court Act*. Such an appeal is limited to a question or questions of law. In this case a Master, by order dated 7 October 2002, has identified four questions of law:-

> (a) Was there any evidence on which a reasonable Magistrate could hold that the defendant did recklessly cause injury to Rajavatnam Sivanathan?
>
> (b) Was there any evidence on which the Magistrate could conclude that the defendant committed an act of stalking under section 21A(2) of the *Crimes Act* 1958 on 22 September 2001?
>
> (c) Was there any evidence on which the Magistrate could conclude that the defendant committed an act of stalking under section 21A(2) of the *Crimes Act* 1958 on 27 September 2001?
>
> (d) Was there any evidence to support the Magistrate's finding that the conduct of the defendant in driving his motor vehicle on 27 September 2001 amounted to careless driving under section 65 of the *Road Safety Act* 1986?[1]

3. Mr Carter, counsel for the appellant, made application at the beginning of the hearing of the appeal to expand those questions of law to include the following:

> 1A Did the learned Magistrate err in law in failing to draw an adverse inference against the prosecution as a consequence of its failure to call Mr Rammanan as a witness?

1B Did the Magistrate err in law in:-
(a) failing to find that the respondent had attempted to deter Mr Balachandran from attending Court to give evidence by advising counsel for the appellant that Mr Balachandran would be arrested if he attended Court;
(b) drawing an inference against the defence as a result of the failure of Mr Balachandran to give evidence?

2A Did the Magistrate err in law in relying on evidence as to alleged prior contact between the alleged victim (Mr Somasundaram) and a third party (Mr Pillai)?

2B Did the Magistrate err in law in finding that Mr Pillai was a "discredited witness"?

2C Did the Magistrate err in law by denying the appellant procedural fairness in finding that the appellant knew that the alleged victim had an intervention order against Mr Pillai for good reason and that he organised and drove Mr Pillai to the temple and kept him there for four and a half hours?

3A Did the Magistrate err in law by denying the appellant procedural fairness in finding that there was an alternate route between the residence of Mr Pillai and the Frankston Magistrates' Court on the basis that this finding:
(i) was not canvassed with the appellant or Mr Pillai in the course of the hearing; and
(ii) arises out of independent investigations made by the Magistrate in the absence of the parties?

4A Did the Magistrate err in law by failing to make a specific finding as the basis on which the careless driving charge was proven?

4. I deferred ruling on the question of whether the appellant should be given leave to add the further questions proposed by Mr Carter, indicating that the parties should put submissions on each of those questions as well as those identified by the Master. I did so on the basis that should any of them ultimately be held to raise questions of law the answers to which expose error vitiating the Magistrate's decision the appropriate question or questions could be added by amendment to the Master's order at the time of judgment. Thus the submissions of counsel on the appeal canvassed both the questions of law set out in the Master's order and the proposed additional questions.

Recklessly causing injury on 13 July 2001
Was there any evidence on which a reasonable Magistrate could hold that the Defendant did recklessly cause injury to Rajavatnam Sivanathan?

5. The events which gave rise to this charge occurred at a Hindu temple in Carrum Downs. On 13 July 2001 Mr Sivanathan had gone there at about 7.30pm to see another person, one Bipal, to give him some tickets. Whilst there he was approached by the appellant who, he said, proceeded to assault him. He described the assault in some detail in his evidence before the Magistrate.

6. The Magistrate's finding of guilt in relation to this charge is unequivocal, as is the basis for his finding. He accepted the complainant, Mr Sivanathan's, evidence of the events and in particular his encounter with the defendant. To the extent that it differed from Mr Sivanathan's account he rejected the defendant's evidence. This much appears from the concluding paragraph of his judgment relating to this charge where he says:-

> "I was particularly impressed by Mr Sivanathan and I accept his evidence as the truth. The defendant's version is untrue. I am satisfied that the defendant recklessly caused injury to him."

7. There was evidence of injury before the Magistrate and there is no question that the actions of the defendant as described by Mr Sivanathan are capable of constituting the elements of the offence of which he was convicted. Therefore in relation to this question there was evidence upon which the Magistrate could hold that the defendant did recklessly cause injury to Rajavatnam Sivanathan.

8. However, in addition to challenging the fundamental finding in relation to this charge the appellant argued that the Magistrate erred in a number of other respects. Some of these matters are encompassed in the questions of law which were sought to be added by the appellant at the hearing of this appeal to which I have referred. The appellant puts these errors as individually and cumulatively causing a miscarriage of justice and as vitiating the Magistrate's ultimate finding.

Did the learned Magistrate err in law in failing to draw an adverse inference against the prosecution as a consequence of its failure to call Mr Rammanan as a witness?

9. On the complainant's version the events relied upon by the prosecution as constituting the relevant assault occurred in the presence of one Rammanan who was not called as a witness. Mr Carter submitted that the prosecution's failure to call Rammanan should have resulted in the Magistrate's drawing an adverse inference against the prosecution, leading, presumably, to a reasonable doubt as to the appellant's guilt.

10. In his reasons the Magistrate states that the plaintiff's solicitor:–

> "submitted that because the police did not call Mr Balachandran as a witness or give an acceptable explanation for not doing so, I should draw an adverse inference against the prosecution. I reject that submission".

11. It appears from the trial transcript at pages 375-6 that the submission actually made by the plaintiff's solicitor Mr Thapiyal was that the prosecution's failure to call *Mr Rammanan* not Mr Balachandran was a matter which should give rise to an adverse inference. Mr Carter for the appellant submitted that the Magistrate failed to consider whether an adverse inference should be drawn in the circumstances and subsequently erred in law in not drawing such an inference. He stressed the importance of this point in the context of the case as, on the evidence of other witnesses, including Mr Sivanathan the complainant, Mr Rammanan was an eye witness to the events and intervened to stop the altercation.

12. There is no doubt that the Magistrate has incorrectly stated the submission of the defendant's solicitor in his reasons for judgment. Further, those reasons reveal that no adverse inference was drawn against the prosecution for the failure to call a witness. The question before this Court is whether this failure to draw an adverse inference ultimately constitutes an error or law which vitiates the Magistrate's finding.

13. From the evidence of other eye witnesses, there is every likelihood that Mr Rammanan was an eye witness to the event on 13 July 2001. In a jury trial a Judge may well have given a direction to the jury in accordance with *Jones v Dunkel*[2] to the effect that they may draw the inference from the failure to call the witness that had that witness been called he would not have assisted the prosecution case. A Magistrate acting as the tribunal of fact, as in this case, was bound to instruct himself as if he were a jury, although that instruction need not be articulated in his reasons for judgment. However, the law does not *require* that a jury or a Magistrate draw any particular inference. Nor can the inference be any more than that the evidence of the witness would not have assisted the case. It would be impermissible to draw an inference that the witness would have necessarily contradicted the prosecution case.

14. This was not a circumstantial case. There was direct evidence of the actions constituting the offence which was accepted by the Magistrate. While the Magistrate undoubtedly made an error in articulating the defendant's submission, it does not follow that he erred in not drawing the adverse inference. He, like a jury, is entitled not to draw the inference, particularly in a case where there is direct evidence which he accepts. He was concentrating in his fact finding process on the eye witness evidence which was called. He was entitled to do so. In any event the failure to draw an inference in such circumstances could not be an error of law so as to give rise to a right to succeed on an appeal under s92 of the *Magistrates' Court Act* 1989. I reject the appellant's submissions on this point and refuse leave to add question 1A to the Master's order.

Did the Magistrate err in law in failing to find that the respondent had attempted to deter Mr Balachandran from attending Court to give evidence by advising counsel for the appellant that Mr Balachandran would be arrested if he attended Court?

15. Mr Balachandran is alleged to have been a co-offender in the assault on Mr Sivanathan on 13 July 2001. He was called by the appellant at the trial but did not appear. In discussion, the appellant's solicitor raised with the Magistrate matters which had occurred outside the Court. He submitted that some unfairness had been suffered by his client because the police informant had told him that if Mr Balachandran came to Court he would be arrested and that upon his communicating this to Mr Balachandran he, Balachandran, had subsequently not appeared to give evidence. In his reasons for judgment the Magistrate stated:

> "The police have not interviewed Mr Balachandran despite appointments and efforts being made to do so. I was informed some days into the hearing by Mr Thapliyal, of counsel that he intended to call Mr Balachandran as a defence witness. Discussion occurred on the 16th during which I remarked that it would be desirable for Mr Balachandran to obtain independent legal advice, and this could have occurred with a Legal Aid lawyer at the Court. I also remarked that in any event the Court would have to explain to him his rights not to answer any question that may incriminate him. However, I was informed by Mr Thapiyal on the 17th, after Mr Balachandran did not appear when called, being the last intended witness, that he had not only advised Mr Balachandran of his rights against self-incrimination but he had also told him that if he appeared to give evidence he may be arrested by the police According to the prosecutor there was no basis to suggest that the police intended to arrest him and apparently there was no discussion between Mr Thapiyal and the prosecutor about this possibility."

16. It is submitted by counsel in this case that the finding in the third paragraph was erroneous and contrary to what the Magistrate was told by the prosecution. This passage appears in the trial transcript page 380 to 381:

> "Prosecutor: The other issue sir, probably more importantly is that Mr Balachandran at no stage was told by the prosecution or any of the prosecution witnesses that he was to be arrested here today. That was indicated to counsel that after he had been given the opportunity to give evidence, he would at some stage today, be arrested and interviewed in relation to his part in the offences, but that was extended if he was not directed told that or approached by (indistinct) His Worship: Well, counsel has indicated that that's what he told Mr Balachandran. Prosecutor: I'm not sure whether counsel told Mr Balanchandran His Worship: That's my understanding, that he was told by counsel that he may be arrested. It's not put that any prosecution person has passed that on."

17. The error by the Magistrate is evident. The police, through the informant, *had* informed defence counsel that Mr Balachandran would be arrested if he came to Court. However this does not amount to the error suggested in the appellant's proposed question 1B(a). The question as posed suggests that the Magistrate should have found that the motive of the informant in making the comment to defence counsel was to deter Mr Balachandran from attending Court. This was not the submission of the defence solicitor at trial. He put to the Magistrate that his client had "suffered some unfairness because of the dilatory conduct on the part of the prosecution"[3]. While stating that he believed the witness had not appeared because of the comment of the informant passed on to him by the solicitor that he would be arrested, the submission of "dilatory conduct" appears to be a reference to the prosecution's failure to interview Mr Balachandran in the ten months preceding the trial.

18. The informant's communication to the appellant's solicitor was on its face, no more than a statement of the intention of the police to take a particular course. In the circumstances, given the evidence which the police had regarding Mr Balachandran it is not surprising that the informant intended to arrest him. Nor is there anything necessarily untoward about that intention being communicated by the informant to the solicitor for the appellant. The fact that the Magistrate raised the issue of self-incrimination only adds to that proposition. There was no error by the Magistrate in not making the finding contended for. The whole issue seems to have been something of an irrelevance arising as it did, not from any admissible evidence before the Magistrate, but as a result of statements made by the appellant's solicitor and the police prosecutor (probably inappropriately) from the bar table. I refuse leave to add question 1B(a) to the Master's order, there being no substance to the submission.

Did the Magistrate err in law in drawing an inference against the defence as a result of the failure of Mr Balachandran to give evidence?

19. There are two issues raised by this proposed question; firstly whether the Magistrate did in fact draw an adverse inference against the defendant for failing to call Mr Balachandran as a witness and secondly, if such an adverse inference was drawn, whether the Magistrate erred in law in doing so.

20. The appellant points to two passages in the Magistrate's reasons as demonstrating that an adverse inference was drawn. The first is:

> "During the course of the defendant's cross examination, Counsel explained that he had obtained the above instructions for the events involving Balachandran from Balachandran. As explained earlier, Mr Balachandran did not give evidence."

The second is:

> "Further allegations were put to the effect that he (Sivanathan) tried to get Balachandran to tell lies and give a version of events... these allegations were denied and of course the defendant did not call or subpoena Balachandran."

21. Counsel for the respondent, Ms K Judd, submitted that these passages are doing no more than pointing out that the Magistrate did not have recourse to Mr Balachandran's evidence. She noted that the Magistrate misapprehended the defence adverse inference submission, but as he had specifically ruled on it, it was unlikely, she said, that he would have drawn an adverse inference against the defence without directly stating it.

22. Each of the above passages follows a description of matters put in cross examination to Mr Sivanathan by the appellant's solicitor. The Magistrate notes in each case that those matters were denied by the witnesses cross-examined and no evidence was led from Balachandran. The Magistrate has not drawn the inference that Mr Balachandran's evidence would not have helped the accused. He has noted that there was no evidence before him of the version of events put in cross examination to Mr Sivanathan. The error contended for has not been made out. If it had been made out I doubt whether it could be characterised as a question of law in any event but it is unnecessary to consider the matter further or review the authorities in relation to the drawing of adverse inferences against an accused for the failure to call witnesses. I refuse leave to add question 1B(b) to the Master's order.

23. It follows that the appellant's appeal in respect of his conviction for recklessly causing injury to Sivanathan on 13 July fails.

Stalking on 22 September 2001

Was there any evidence on which the Magistrate could conclude that the Defendant committed an act of stalking under section 21A(2) of the* Crimes Act *1958 on 22 September 2001?

24. This charge related to the appellant's involvement in a protest outside the Basin Temple on 22 September 2001. The appellant was charged and convicted of stalking by loitering.

25. The offence of stalking under section 21A(2) of the *Crimes Act* requires a finding in relation to four elements. There must be a course of conduct. That course of conduct must involve one of seven acts. The accused must have performed that act with the requisite intention, that is to say with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of another person. The course of conduct must have aroused apprehension or fear in the victim for his or her own safety or that of another person. The appellant submits that there was no admissible evidence in this case on which the Magistrate could have found the first three elements of the offence proved.

26. Firstly the appellant submits that there was no evidence which could establish a course of conduct by the defendant.

27. The first case in this Court to deal with this point was *Gunes v Pearson*[4] a decision of McDonald J. The facts of the case were easily categorised as a course of conduct, however, his Honour observed that:

> "In my view, in order for conduct which is engaged in to be a "course of conduct" the relevant conduct must be conduct which is protracted or conduct which is engaged in on more than one separate occasion"[5]

28. In *Berlyn v Brouskos*[6], an unreported decision of this Court, Nettle J adopted the above passage from *Gunes v Pearson*, but, confronted with a more marginal case on the facts, he looked to the origins of the legislation and found that "there must be a pattern of conduct evidencing a continuity of purpose" which requires something more than protracted conduct, or conduct on more than one occasion.

29. The Magistrate's findings on this aspect of the case were extensive. They rehearse a complex history of relationships between the various persons who were ultimately all at The Basin temple

on 22 September 2001. The question for this Court is whether the facts found by the Magistrate justify the conclusion that the defendant engaged in an act of stalking one Somasundaram.

30. The relevant findings of the Magistrate which go directly to the question of stalking were that the defendant arrived at the temple around 11.30 am on 22 September and left about 2.30 pm, that there was a protest action by some temple members and others going on throughout that time which involved the handing out of leaflets and the erection of a banner accusing the president of the temple, the priest and others of criminal, immoral and other bad behaviour which was said to be contrary to the Hindu religion. The Magistrate found that this offended Somasundaram, as did abuse which the defendant and one Pillai (in respect of whom Somasundaram and others had ongoing animosity) directed towards him. Much of the Magistrate's reasons canvass the rights and wrongs of the ongoing dispute between various members (and some non-members) of the temple. He concluded that the appellant attended the temple and engaged in conduct which harassed and intimidated Mr Somasundaram and put him in fear. Materially, he found that such activity was designed to effect that result.

31. The charge in relation to this offence was stalking by loitering near a place frequented by the victim. Thus the charge cites actions falling within s21A(2)(c) of the *Crimes Act* 1958. The appellant contends that his actions on 22 September 2001 as found by the Magistrate cannot constitute loitering under that section. Counsel submitted that loitering must involve an illegal purpose and relied on the case of *Wynne v Lockyer*[7], a decision of Harris J, on the meaning of "loiters" in the *Vagrancy Act* 1966.

32. The matters set out in s21A(2)(a) to (f) are actions which are not necessarily unlawful. It is the confluence of these actions in a course of conduct directed to a person with a specific intent and a specific result which constitutes the criminality. The purpose of the section is to extend the law and render illegal actions which did not constitute offences at the time it was enacted. There is no basis for reading into the word "loitering" as it appears in this section any notion of necessarily unlawful purpose. However, it does seem that the word must mean more than simply "be and remain at". It conveys a concept of idleness, lack of purpose or indolence. In the context of the statutory provision under consideration, s21A(2)(c), loitering must mean being and remaining at or near the places specified for at least one or more of the purposes specified in s21A(2), namely causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of any other person. In other words it must have a similar meaning to that which Harris J, held it had in the *Vagrancy Act* in *Wynne v Lockyer*[8] save that the intent which must be proved here is not the intention to commit a felony but rather the intention set out in the sub-section. Where the person accused is engaging in activities at the relevant time which render a description of "loitering" inapt in the circumstances he will not be guilty of stalking by engaging in the activity described in s21(A)(2)(c) of the *Crimes Act*, whatever else he may be guilty of.

33. As in order to find the charge proved the Magistrate would have had to be satisfied that the appellant was "loitering", in a circumstantial case such as this he would have had to exclude all reasonable hypotheses consistent with his not having been "loitering" beyond reasonable doubt. Having regard to his findings as to what the various parties (including the appellant) were doing at the temple on the relevant date regarding the protest which was in progress and the appellant's part in it he could not have excluded beyond reasonable doubt the possibility that the appellant was there for a purpose or purposes other than one of the statutory purposes set out in s21A(2). Thus he could not exclude the possibility that he was not loitering within the meaning of the section. The protest, as found by the Magistrate, involved more people than just the appellant, was directed at an audience wider than the alleged victim and involved acts (such as handing out pamphlets) which were inconsistent with the concept of "loitering" as set out in the Act.

34. The question whether a particular inference is open upon facts found is a question of law: *Hope v Bathurst CC*[9]*; Australian Gas Light Co v Valuer-General.*[10] Where, in order to draw a legitimate inference as to the intention of the appellant, all inferences reasonably consistent with innocence must be excluded beyond reasonable doubt, the question as to whether there is evidence supporting the exclusion of such reasonable inferences is a question of law. In this instance the Magistrate erred in law.

35. In this case there is insufficient evidence to justify the exclusion of all inferences consistent with the appellant's innocence of the charge laid beyond reasonable doubt. He is entitled to succeed on the third question in the Master's order. Having reached that conclusion it is not necessary to further examine other difficult issues in relation to this charge, namely the legitimacy of the conclusions arrived at by the Magistrate in relation to the conduct of Pillai being attributable to the appellant, his conclusions as to and the relevance of the appellant's knowledge of prior antipathy between Pillai and Somasundaram, whether the appellant's conduct, on the facts found, was sufficiently protracted as to be able to be characterised as stalking and a number of others.

36. There is also no need for further consideration to be given to the appellant's proposed questions 2A, 2B and 2C.

Stalking on 27 September 2001

Was there any evidence on which the Magistrate could conclude that the Defendant committed an act of stalking under section 21A(2) of the* Crimes Act *1958 on 27 September 2001?

37. This charge was again one of stalking Mr Somasundaram. However, the conduct alleged to have been engaged in on this occasion was following rather than loitering. It related to incidents outside the Frankston Magistrates' Court and on the Frankston-Dandenong Road. Similar submissions were made by counsel for the appellant in relation to this charge as were made in relation to the events at the temple on 22 September i.e. that there was nothing which could constitute a course of conduct; there was no evidence of following; there was no evidence from which an inference could be drawn that the appellant had the requisite intention supported by a submission that the Magistrate erred in allowing evidence to be led of the relationship between Pillai and Somasundaram and erred in using that evidence to impute an intention to the defendant.

38. In respect of this incident the Magistrate made many findings involving the appellant, the alleged victim of the stalking and the ubiquitous Mr Pillai. The principal findings of the Magistrate upon which the conviction of the appellant is based were that on the relevant day Somasundaram was a front seat passenger in a motor vehicle travelling on the Dandenong-Frankston Road driven by his solicitor. A van driven by the defendant drove too close and tail-gated the car driven by Somasundaram's solicitor. It drove for some distance side by side with the solicitor's car during which time Pillai projected his arm out of the vehicle and made threatening arm and fist movements. Both vehicles were travelling at about 80 kilometres per hour. The Magistrate accepted that when tail-gating the defendant's vehicle was six to seven feet away and that it ran parallel to the car in which the alleged victim was travelling for three or four minutes. Eventually the van overtook the car and, presumably, no further harassment occurred. He found the other necessary elements of the offence proved against the appellant.

39. The findings made by the Magistrate do not justify a conclusion that the appellant engaged in conduct which was so protracted as to constitute the course of conduct contemplated by the anti-stalking statute. At worst the appellant engaged in an episode of harassment of short duration and, happily, of no ultimate consequence. Illegal as this might be (as a driving offence) it does not constitute stalking.

40. The offence of stalking carries a maximum penalty of 10 years imprisonment. It is a serious indictable criminal offence. The conduct comprising it must be unambiguously a course of conduct engaged in for the prohibited purpose and which actually has the intended result. This is not to say that there would never be occasions when harassment on the highway could constitute stalking. If the course of conduct engaged in was protracted enough and had the other requisite characteristics then it would be open to a tribunal of fact to find that such conduct engaged in by driving a motor vehicle in a particular way could constitute stalking. In the present instance the conduct was not protracted enough to fall within the statutory requirement of a "course of conduct" nor was there a sufficient "pattern of conduct evidencing a continuity of purpose" as referred to by Nettle J, in *Berlyn v Brouskos*.[11]

41. Having reached that conclusion it is not necessary for me to consider the proposed further questions advanced by counsel for the appellant concerning the Magistrate's findings about alternative routes which the appellant might or ought to have taken between Frankston and his destination, nor is it necessary for me to consider, in the context of this charge, the Magistrate's findings attributing the conduct of Mr Pillai to the appellant.

42. The appellant's appeal in respect of this charge will be upheld.

Careless driving on 27 September 2001

Was there any evidence to support the Magistrate's finding that the conduct of the Defendant in driving his motor vehicle on 27 September 2001 amounted to careless driving under section 65 of the* Road Safety Act *1986?

43. In relation to this count there was clearly evidence that as the appellant's vehicle was alongside the vehicle in which Mr Somasundaram was a passenger Mr Pillai wound down the window and made hand gestures at Mr Somasundaram. The dispute here is whether there was any evidence from which the Magistrate could conclude that the appellant was driving too close or draw the inference that he drove parallel for the purposes of allowing Mr Pillai to make such gestures out the window.

44. The evidence of Mr Somasundaram was that "the van was very close to our car" and described the distance with reference to objects in the courtroom which the Magistrate took to be a distance of 10 feet. The finding that this was driving too close so as to constitute careless driving was a matter for the Magistrate. It raises no question of law. There was clearly evidence to support the charge of careless driving.

45. Counsel for the appellant also submitted that this charge was duplicitous as it relied on the same acts as the charge of stalking by following. Ms Judd for the respondent submitted that two offences can be committed by the one act and that here the two different types of offences had different elements and were charged to reflect the whole of the criminality of the appellant. In *Environmental Protection Authority v Australian Iron & Steel Pty Ltd*[12] Gleeson CJ, dealing with this problem said:

> "Where two or more different statutory prohibitions apply to the same set of primary facts, this will often be because each prohibition fastens upon some different aspect of those facts and makes it the gist or gravamen of the offence. It may be that one particular feature of the facts is immaterial for the purpose of one prohibition and material for another."

46. This is just such a case. The charge of stalking by following was said to be constituted by following the alleged victim in the vehicle with the requisite intent. It was said to be directed towards the placing of the alleged victim in fear or apprehension. The charge of careless driving relates to the specific acts of driving too close and driving parallel, and is directed to the safety of the appellant's driving for the protection of all road users. There is no duplicity in charging, convicting and punishing the defendant for both offences in these circumstances, although, as I have found the prosecution on the stalking charge fails anyway.

4A Did the Magistrate err in law by failing to make a specific finding as to the basis on which the careless driving charge was proven?

47. In his reasons for judgment the Magistrate stated:

> "I am satisfied that the course of driving in travelling too close and or alternatively, travelling parallel for the purpose of permitting Pillai to protrude his body out of the window and to indulge in intimidatory behaviour, amounts to careless driving."

48. The appellant submits that the Magistrate was bound to make a specific finding as to the conduct which constituted careless driving. I take it from the Magistrate's reasons that he found that the defendant had both driven too close and travelled parallel to allow Pillai to protrude his body out of the window and that both could amount to careless driving and that in any event the course of driving as a whole constituted careless driving. There was no obligation on the Magistrate to specify only one action which constituted careless driving if in fact he made findings of two actions either or both of which satisfied the elements of the offence. The appellant's appeal in respect of this charge must be dismissed and there is no reason to add his proposed question to the Master's order.

Conclusion

49. The questions of law raised by Master Wheeler in his order of 7 October 2002 should be answered as follows:-

> (a)Q: Was there any evidence on which a reasonable Magistrate could hold that the defendant did

recklessly cause injury to Rajavatnam Sivanathan?
A:Yes

(b) Q: Was there any evidence on which the Magistrate could conclude that the defendant committed an act of stalking under s21A(2) of the *Crimes Act* 1958 on22 September 2001?
A: No

(c) Q: Was there any evidence on which the Magistrate could conclude that the defendant committed an act of stalking under s21A(2) of the *Crimes Act* 1958 on 27 September 2001?
A: No.

(d) Q: Was there any evidence to support the Magistrate's finding that the conduct of the defendant in driving his motor vehicle on 27 September 2001 amounted to careless driving under s65 of the *Road Safety Act* 1986?
A: Yes.

50. It follows that the appellant's appeal will be upheld in respect of the two charges of stalking in respect of which he was convicted by the Magistrate on 20 May 2002 and will be dismissed in respect of the charges of recklessly causing injury and careless driving found against him on the same day.

51. A perusal of the certified extracts of the Dandenong Magistrates' Court reveal that the fines imposed on the appellant in respect of the stalking charges by the Magistrate ($1,500 in each case) were said to be "part of an aggregate order". Similarly, the costs awarded against him on each of the charges in respect of which he was convicted appears to be in an amount intended to cover the costs of all proceedings. Accordingly, I shall hear counsel further on the appropriate orders to be made on this appeal having regard to these matters.

6 August 2003
Following the delivery of this judgment on 4 August 2003 the parties agreed upon the following orders in disposition of the appeal in accordance with it:

1. This appeal be allowed in part.
2. The questions of law set out in the order of Master Wheeler of 7 October 2002 be answered as follows.
a) Q: Was there any evidence on which a reasonable Magistrate could hold that the defendant did recklessly cause injury to Rajavatnam Sivanathan on 13 July 2001?
A: Yes.
b) Q: Was there any evidence on which the Magistrate could conclude that the defendant committed an act of Stalking under s21A(2) of the *Crimes Act* 1958 on 22 September 2001?
A: No.
c) Q: Was there any evidence on which the Magistrate could conclude that the defendant committed an act of Stalking under s21A(2) of the *Crimes Act* 1958 on 27 September 2001?
A: No.
d) Q: Was there any evidence to support the Magistrate's finding that the conduct of the defendant in driving his motor vehicle on 27 September 2001 amounted to careless driving under s65 of the *Road Safety Act* 1986?
A: Yes.
3. The order of the Magistrates' Court of Victoria at Dandenong of 20 May 2002 whereby:
a) the appellant was convicted of 1 charge of stalking on 22 September 2001 and fined $2,000;
b) the appellant was convicted of 1 charge of stalking on 27 September 2001 and fined $1,500 (such fine having been imposed as an aggregate fine in respect of that charge and 1 charge of careless driving on the same date);
b) the appellant was convicted of 1 charge of stalking on 27 September 2001 and fined $1,500 (such fine having been imposed as an aggregate fine in respect of that charge and 1 charge of careless driving on the same date);
c) the appellant was ordered to pay $2,739 costs in respect of a number of offences of which he was convicted;
be set aside.
4. The appellant's appeal in respect of 1 charge of recklessly causing injury on 13 July 2001 and 1 charge of careless driving on 27 September 2001 be dismissed.
5. The matter be remitted to the Magistrates' Court of Victoria (such Court to be constituted by Mr L Brear, Magistrate) for:
a) The determination of an appropriate penalty to be imposed on the appellant in respect of the charge of careless driving on 27 September 2001 in respect of which his appeal has been dismissed; and

b) The hearing and determination according to law of any application for costs.
6. The respondent pay the appellant's costs of this proceeding.
7. This order be signed by a Judge pursuant to RSC r 60.04.

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[1] Orders were made on the first day of the hearing of this appeal correcting certain errors in the original order of the Master. These questions are taken from the Order as amended.
[2] [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395.
[3] Transcript page 376.
[4] (1996) 89 A Crim R 297.
[5] at 306.
[6] [2002] VSC 377; (2002) 134 A Crim R 111.
[7] [1978] VicRp 30; [1978] VR 279.
[8] [1978] VicRp 30; [1978] VR 279.
[9] [1980] HCA 16; (1980) 144 CLR 1; (1980) 29 ALR 577; (1980) 12 ATR 231; (1980) 54 ALJR 345; (1980) 41 LGRA 262.
[10] (1940) 40 SR (NSW) 126; 14 LGR (NSW) 149; 57 WN (NSW) 53.
[11] [2002] VSC 377; (2002) 134 A Crim R 111.
[12] (1992) 28 NSWLR 502 at 508; (1992) 64 A Crim R 124; (1992) 77 LGRA 373.

APPEARANCES: For the appellant Nadarajamoorthy: Mr L Carter, counsel. Challenge Legal, solicitors. For the respondent Moreton: Ms K Judd, counsel. Office of Public Prosecutions.
