15/97

SUPREME COURT OF VICTORIA

GUNES and TUNC v PEARSON

McDonald J

28 May, 13 June, 31 October 1996 — (1996) 89 A Crim R 297; (1997) 21 Crim LJ 238

STALKING – ELEMENTS OF – "COURSE OF CONDUCT" – MEANING OF – CONSTANT ASSAULTS AND HARASSMENT OVER ONE MONTH – WHETHER OPEN TO MAKE AN INTERVENTION ORDER: *CRIMES ACT* 1958, S21A, *CRIMES (FAMILY VIOLENCE) ACT* 1987, SS4, 5, 6.

Upon the return of an interim intervention order, V, a victim, gave evidence that over a period of one month, G & T had entered or loitered outside V's place of employment and had assaulted and threatened him. As a result, V said that he was scared and terrified of going to work. The magistrate found that V was a victim of stalking and that G & T had engaged in a course of conduct which caused harm to the victim or aroused apprehension or fear in the victim for his own safety. Accordingly, the magistrate made an intervention order which, *inter alia,* prohibited G & T from stalking V until further order. Upon appeal—

HELD: Appeal dismissed.
1. Before an intervention order can be made pursuant to s21A(5) of the *Crimes Act* 1958 ('Act'), it is necessary for a magistrate to be satisfied on the balance of probabilities that a person has stalked the victim and is likely to continue to do so or do so again. To be satisfied that a person stalked another, it is necessary for a magistrate to be satisfied that the person had engaged in a course of conduct with the relevant necessary intent.

2. "Course of conduct" includes conduct of the type or nature described and identified in s21A(2)(a)-(g) of the Act and must be conduct which is protracted or is engaged in on more than one separate occasion. For example, a "course of conduct" which includes keeping the victim under surveillance, may comprise conduct which includes keeping the victim under surveillance for a single protracted period of time or on repeated separate occasions.

3. In the present case, it was open to the magistrate to find that:
- **G & T engaged in a course of conduct having regard to s21A(2)(c) and (g) of the Act with the necessary relevant intent;**
- **to conclude that they had stalked V and were likely to do so again;**
- **and to make an intervention order.**

McDONALD J: [1] Each of these proceedings are appeals brought pursuant to s109 of the *Magistrates' Court Act* 1989 against a final order made by the Magistrates' Court at Broadmeadows on 7 February 1996 in separate proceedings brought against each appellant. In the proceedings brought against the appellant Gunes, the respondent to these appeals, a member of the police force, laid a complaint on 24 January 1996 alleging that over the past two months Gunes, another youth, the appellant Tunc, and a number of others had been constantly harassing and assaulting Steven Vella, "the victim of stalking", who was an employee of the Jewel Foodstore at 151 Blair Street Broadmeadows, to the point that he was terrified of going to work; that on 23 January 1996 Vella was at work when Gunes entered the store and punched him in the face; that Vella was also pursued with a pair of scissors and that Vella was "unable to effectively perform his job due to the constant threats made by the defendants (sic)".

In the proceedings brought against the appellant Tunc the respondent laid a complaint on 24 January 1996 in similar terms as that made against Gunes. It alleged that over the past two months Tunc, Gunes and a number of other youths had been constantly harassing and assaulting Steven Vella, "the victim of stalking", to a point that he was terrified of going to work; that on 23 January 1996 Vella was at work when "the defendants (sic) entered the store and punched him in the face; that Vella was also pursued with a pair of scissors and that he was unable to effectively perform his job "due to the constant threat made by the defendants (sic)". **[2]** In each proceeding the respondent sought an intervention order against the respective appellant that he be prohibited from - *[His Honour set out the terms of the order sought and the details of the subsequent final order, and*

continued:]... **[3]** By the *Crimes (Amendment) Act* 1994, s21A of the *Crimes Act* was enacted and added as a new section to the *Crimes Act* 1958. The amending section became operative on 23 January 1995. That section as is relevant to these proceedings provided –

> **[4] "21A. Stalking**
> (1) A person must not stalk another person.
> Penalty: Level 5 imprisonment.
>
> (2) A person (the offender) stalks another person (the victim) if the offender engages in a course of conduct which includes any of the following:
> (a) following the victim or any other person;
> (b) telephoning, sending electronic messages to, or otherwise contacting, the victim or any other person;
> (c) entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person;
> (d) interfering with property in the victim's or any other person's possession (whether or not the offender has an interest in the property);
> (e) giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;
> (f) keeping the victim or any other person under surveillance;
> (g) acting in any other way that could reasonably be expected to arouse apprehension or fear in the victim for his or her own safety or that of any other person—
> 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 any other person and the course of conduct engaged in actually did have that result.
>
> **[5]** (3) For the purposes of this section an offender also has the intention to cause physical or mental harm to the victim or to arouse apprehension or fear in the victim for his or her own safety or that of any other person if that offender knows, or in all the particular circumstances that offender ought to have understood, that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result.
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> (4) ... (5) Despite anything to the contrary in the *Crimes (Family Violence) Act* 1987, the Court within the meaning of that Act may make an intervention order under that Act in respect of a person (the defendant) if satisfied on the balance of probabilities that the defendant has stalked another person and is likely to continue to do so or to do so again and for this purpose that Act has effect as if the other person were a family member in relation to the defendant within the meaning of that Act if he or she would not otherwise be so."

[His Honour then set out the relevant provisions of the Crimes (Family Violence) Act *1987, referred to part of Hansard and the terms of Master's order, and continued]...***[12]** [I]t is necessary to turn to the evidence before the Magistrate and the conclusions and findings made and stated by him. Vella gave evidence that he worked at the Jewel Food Store and had worked there for four months previously. The evidence before the court on the appeal was that the store was situated in Blair Street, Broadmeadows. Vella said that he became aware of the appellants some two months previously and they and their friends "hung" around shops and the Dargie Court shopping centre which was near the Jewel Foodstore. He gave evidence that one month previously they had come into the shop and that Tunc said to **[13]** him that they were going to get him, bash him and said "wait till we've got you". He said that he felt scared and was always looking over his shoulder and that after this incident he was terrified. He gave evidence that a few days later Tunc came into the shop to buy a Coke and that they were standing at the register, that the girl at the register scanned the Coke, said the price and that Tunc said that he did not have enough money and smashed the can and that they walked out of the shop. Vella said that everybody was scared. He gave further evidence that on the next occasion Tunc came into the shop by himself to buy a block of chocolate but after it had been scanned, Tunc said that he did not have enough money to pay for it and dropped the chocolate and walked out. Vella gave evidence that on a later occasion, which on the evidence appears to have occurred on the 23rd January 1996, he entered an aisle of the shop and observed in front of him Tunc being escorted out of the shop by the manager who had Tunc by the arm. He said that Gunes was with him as was someone else. Vella and this group approached each other from opposite directions. Vella gave evidence that he tried to walk to the side of Tunc to avoid him. However, Tunc bumped him, "shouldered him" in the upper rib area and said, "Watch out, next time" and "C'mon, c'mon". Vella gave evidence that the others were making faces and noises. He said that he was terrified. He gave evidence that later on the same day he had served a customer and was shutting down the register and was in the aisle of the

shop. He said that Tunc, who had come back into the shop came up to him and punched him in the face and that the manager then grabbed Tunc. Vella said that Gunes **[14]** was with Tunc and that Gunes approached him with a pair of scissors in his hand. Vella said in evidence that Gunes looked like he was going to stab him and that he thought that Gunes was going to stab him. He said that another employee stopped Gunes, following which, the manager and the other employee took the appellants from the shop and remained outside, stopping them from coming back. He gave evidence that later that same day at about 7.50 p.m., at closing time, he was outside the shop when they came towards him from the direction of other shops. He said that Tunc said, "we are going to get you now", and that the manager came out of the shop to stop Tunc. Gunes tried to restrain Tunc and that the other employee previously referred to came out to stop them. Vella said that he was terrified and that he was pushed back into the shop. He said that he knew he was not going to be safe and they would come and get him anyway. He gave evidence that Gunes pushed the manager. Tunc came towards where he was in the shop but the other employee was stopping them. He further said that when he was outside the shop Tunc had come at him with a stick and that the manager was assaulted by Tunc with the stick.

Vella gave evidence that the group always "hung" around the store and that the latter events had occurred about a month after the first incident when they said that they were going to get him. Vella gave evidence that after this last incident he went to the tea room and waited for the police and then "took out the intervention order". It would appear that the order referred to in his evidence was an interim intervention order **[15]** made by the Magistrates' Court at Broadmeadows on the 24th January 1996 which, by its terms, was to last until the 6th February 1996, which was the return day of the summons in each proceedings and was the first day of the hearing of each proceeding. Vella gave further evidence that before working at the store he did not know them (the appellants) and that during the period between the first incident and the last incident, over the period of a month, they regularly came into the store.

The manager of the store was also called as a witness and gave evidence. He said that Tunc and Gunes had been asked to leave the store on several occasions. He said that on the 23rd January 1996 the appellants were walking around the store. They were browsing and doing nothing, that he watched them and then asked them to leave and went to escort them out of the shop. He said that Vella came around a corner and was walking towards them and that Tunc gave him a deliberate bump with his hip and shoulder and that he "shouldered" Vella. He said that Tunc again came back into the store and was taken out following which Gunes ran back into the store with a pair of scissors. He said that Vella was some twenty feet from Gunes but he was five feet from him and that there were others who intervened. He said that Gunes became involved in the fight after Tunc had started it. As to the events that occurred outside the shop that day, the manager said that Tunc went to "go at" Vella and he stepped in and was punched in the face. He said that he punched Tunc back and then Gunes "jumped in". He said that **[16]** the appellants withdrew but they returned, that Gunes struck him, that he retaliated and that Tunc grabbed a stick and "went" at him. He said that Vella was being restrained, that he tried to come out of the store, that he seemed very frightened and scared and that he was very upset. He gave further evidence that he was aware of the appellants and a group who gathered around the shops for some three months and that they came into his store every second or third day. When asked if the appellants came into the shop every two or three days he said that they were causing a disruption to his store. He said that he requested them not to come back and told Tunc not to come back. That concluded the evidence called on behalf of the complainant.

Neither appellant gave evidence and no evidence was called on their behalf. The complaints fell to be determined on the evidence called on behalf of the complainant, respondent. *[After referring to the nature of the question of law under appeal, His Honour continued]*...**[17]** Before the magistrate could make orders against the appellants by application of s21A(5) of the *Crimes Act* it was **[18]** necessary for him to be satisfied on the balance of probabilities that in the case of each appellant he had "stalked" Vella and was likely to continue to do so or do so again. To be satisfied that the respective appellant had "stalked" Vella it was necessary for the magistrate to be satisfied on the evidence, and to the required standard, that the appellant had engaged in "a course of conduct" which included any of the forms or types of conduct described and identified in sub-ss(2)(a)-(g), with the intention of causing physical or mental harm to Vella or arousing apprehension or fear in him for his own safety or that of any other person and that the course of conduct engaged in actually did have that result.

For a person to engage in conduct which attracts the application of s21A of the *Crimes Act* that which must be engaged in must be a "course of conduct". 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. The "course of conduct" the subject of proceedings such as these is a "course of conduct" which includes any conduct of the type or nature described in sub-ss2(a)-(g). For example, a "course of conduct" which includes keeping the victim under surveillance, may comprise conduct which includes keeping the victim under surveillance for a single protracted period of time or on repeated separate occasions. It is to be observed that in sub-ss2(a)-(f) particular forms or types of conduct are identified whereas, **[19]** in sub-s2(g) the conduct is described and identified as – "acting in any other way that could reasonably be expected to arouse apprehension or fear in the victim for his or her own safety or that of any other person". On the evidence in these cases that sub-section and the conduct described in sub-s(c) were of particular relevance. Next the magistrate was required to be satisfied as to the relevant intent of the respective appellants. That intent was the intent 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 any other person.

It was submitted on behalf of the appellants that with respect to this element, that which the magistrate was required to be satisfied as to and to be found by him, was, that the respective appellants engaged in conduct of a particular type or description identified in sub-ss2(a)-(g) with the necessary relevant intent. I do not accept this submission. In my view, on a proper reading of sub-s(2) that which needed to be established to the satisfaction of the magistrate was that the appellant engaged in a "course of conduct" with the relevant necessary intent. A relevant course of conduct within that sub-section is a course of conduct which includes conduct of the type or nature described and identified in sub-ss2(a)-(g). As part of the reasoning process of the magistrate, to the extent that one or other or a number of types of conduct described in sub-ss(a)-(g) was engaged in and formed part of the course of conduct engaged in by the appellant, it was necessary for the magistrate to be satisfied that that conduct was engaged in with the relevant intent but having so reasoned that which the magistrate was required to be satisfied as to, on the evidence, was that the conduct engaged in by the appellant was conduct which satisfied the description of a "course of conduct" and that the "course of conduct" was engaged in with the relevant **[20]** intent. In my opinion that interpretation of sub-s(2) is supported by the further words comprising the last phrase within that sub-section, for it is provided that in order to attract the operation of s21A, not only must it be established that the alleged offender engaged in a "course of conduct", with the relevant intent, but further that, "the course of conduct engaged in actually did have that result", that is the causing of physical or mental harm to the victim or arousing apprehension or fear in the victim for his or her own safety or that of any other person.

It was further submitted on behalf of the appellants that the magistrate could only be satisfied that the required intention existed by application of sub-s(3) that is by it being established that the appellant knew, or in all the particular circumstances that the appellant ought to have understood that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it did actually have that result.

I do not accept that submission. To do so would be to ignore the word "also" in the first line of sub-s(3). That sub-section may be had resort to by a court in determining whether a person alleged to have stalked another did have the necessary intent to attract the operation of s21A, but a court may also be otherwise satisfied that the **[21]** alleged offender had a specific intent as is relevant. That an alleged offender had that specific intent may be established by an admission made by the alleged offender or may be established as a matter of inference drawn from relevant evidence. In the circumstances of the proceedings the subject of these appeals for an order to be made by application of sub-s(5) it was necessary for the magistrate to be satisfied as to these elements on the balance of probabilities. At the conclusion of the evidence counsel, who appeared on the trials for the appellants, submitted to the magistrate that to satisfy s21A of the *Crimes Act* a "course of conduct" must be established. His Worship said that the conduct must be looked at in a general manner and further stated that he was more than satisfied on the evidence before him that there had been a relevant course of conduct. His Worship proceeded to say that the actions of the appellants on the first occasion did not form a course of conduct, however there was clear evidence that Vella had been further assaulted and threatened on later occasions and that these actions together formed a course of conduct. His Worship specifically referred to the

occasion when both appellants waited near the store and attempted to assault Vella as he was going about his duty to close the store. This occasion is clearly a reference to the events which last occurred on 23 January 1996 outside the store.

In response to further submissions made on behalf of the appellants the magistrate stated that on the evidence he was satisfied that the appellants had stalked and were likely **[22]** to stalk again. He stated that he only had to be satisfied on the balance of probabilities and that the appellants were "not in the race". In an exchange between counsel and the magistrate counsel submitted that there had been no conduct since 23 January and that there was no "course of conduct". His Worship said that the fact that the appellants being around on the 23rd was bad enough and that they should have had the sense to leave. He further said that he was satisfied that the appellants had a faulty attitude in life and that he was satisfied that the incidents on 23 January were sufficient to constitute a course of conduct.

It was submitted to the magistrate that there must be an intention to cause fear. His Worship stated that the conduct of the defendants was that which the legislation was designed to prevent. He stated that there was an intent to cause fear in the victim, that in fact fear was caused, and further stated that he was satisfied that the appellants were acting in concert. His Worship then said that he would make an intervention order, he stated the terms of the same and said that they were necessary to effectively protect Vella. Insofar as His Worship said that he was satisfied that there was a relevant course of conduct and further said that the conduct of the appellants was that which the legislation was designed to prevent, I am of the view that that which the magistrate must have been referring to was, on the evidence before him, was a course of conduct which included conduct of a type and nature identified and described in sub-s(2)(a) and (g) and that in substance His Worship said **[23]** that he was satisfied that the appellants had engaged in a course of conduct which included conduct of that type.

In *Foenander v Dabscheck* [1954] VicLawRp 6; [1954] VLR 38; [1954] ALR 168 it was held that when reviewing an order of a magistrates' court, that every reasonable presumption must be made in favour of the decision of the magistrate and it should be upheld if it can be supported on any reasonable view of the evidence. In my view there was evidence upon which the magistrate might reasonably have come to the conclusion that he did, that each of the appellants engaged in a "course of conduct". On the evidence that course of conduct would include conduct of the nature described in sub-s(2)(c) and (g).

The relevant conduct of the appellants commenced a month before the final event which occurred when Vella was engaged in closing up the shop for the day. On the first occasion both appellants were in the place of business of Vella. It was on this occasion when they were both together that Tunc said to Vella that they were going to get him, bash him and made the further threat, "Wait 'til we've got you". Thereafter the evidence is that they regularly came into the shop and, as described by the manager, caused a disruption in consequence of which he told them not to come back. However on 23 January when the appellants were in the shop again and the manager had requested that they leave and commenced to escort Tunc from the store, Tunc deliberately bumped or shouldered Vella. He later came back into the store and punched Vella in the face which incident was followed by Gunes approaching Vella with a pair of scissors in his hand, so as **[24]** to appear to Vella that he was going to stab him. These actions of Tunc and Gunes that day together with the events that occurred outside the store, when Vella was engaged in closing the store were actions which in my view can be properly described as conduct of the nature and kind referred to in sub-s(2)(g). In His Worship's findings, he stated that there was an intent to cause fear in the victim. The question arises is whether, on making such finding, it can be concluded that His Worship addressed the relevant consideration with respect to the element of intent as I have previously referred to. It was submitted on behalf of the appellants that it should be concluded that this had not been done by the magistrate.

In *Yendall v Smith Mitchell and Co. Ltd* [1953] VicLawRp 53; [1953] VLR 369; [1953] ALR 724 it was held by Sholl J, as expressed in the Head Note to the report, that "in considering, on order to review, whether a magistrate did or did not in fact consider certain matters, the true principle must be, not that everything relevant which a magistrate does not refer to is to be taken to have been overlooked, or on the other hand, that it is to be taken to have been considered, but that, if something which should have been considered is not referred to, and the nature of the

decision suggests some error, which may have been due to the matter not having been considered as it should have been, or if the magistrate's observations indicate, on a comparison of what he said with what he did not say, that the matter in question has not been considered as it should have been, the appellate tribunal may properly draw that inference.

[25] The fact that a magistrate does not state every process of his reasoning does not mean that he or she has not engaged in the necessary process of reasoning to come to the conclusion stated, nor by failing to state the process of reasoning in arriving at a conclusion does it mean that the reasons expressed are insufficient in the particular case. cf *Mountview Court Properties Ltd. v Devlin* (1970) 21 P & CR 689 at 692; *Body Corporate Strata Plan No. 4166 v Stirling Properties Ltd* [1984] VicRp 73; [1984] VR 903 at 911; (1984) 56 LGRA 227. Rather, it is appropriate to consider the nature of the decision and to determine whether on the evidence it appears that the decision suggests some error has occurred which may be due to the magistrate overlooking a matter or not engaging in a necessary process of reasoning.

In the circumstances of this case His Worship addressed the question of intent. As I have referred to earlier it was necessary before being able to make the relevant order that the magistrate be satisfied that each of the appellants engaged in a course of conduct which included one or other of the types of conduct referred to in sub-paragraphs (a)-(g) with the necessary intent. As previously expressed this was a matter which was able to be determined by the magistrate as a matter of inference, having regard to the evidence before him. The fact that neither appellant gave evidence disputing the evidence called on behalf of the respondent was a matter which the magistrate could have been taken into account in determining whether in the circumstances such inference should be drawn. — *Jones v* **[26]** *Dunkel* [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395; *O'Donnell v Reichard* [1975] VicRp 89; [1975] VR 916 at 929. I am of the opinion that there was evidence against each of the appellants which entitled the magistrate to infer as a fact that each appellant engaged in a course of conduct relevant to s21A of the Act with the intent of arousing fear in Vella for his own safety.

The magistrate addressed and made a finding as to intent. His decision on that issue, when regard is had to the evidence, does not suggest that he was in error when addressing the question of intent. From the findings expressed by the magistrate it is apparent that he addressed the question whether it had been established that the appellants had engaged in a relevant "course of conduct". This is apparent from his statement that the conduct of the appellants was that which the legislation was designed to prevent. I am satisfied that the magistrate's finding on the question of intent ought to be read and understood to be that he found that the appellants had engaged in a relevant course of conduct with the intent of arousing fear in the victim.

I am further satisfied that on the evidence it was open to the magistrate to conclude that the course of conduct which each appellant had engaged in did actually have the result of causing Vella to be fearful for his own safety.

The findings of the magistrate as expressed by him provided the necessary foundation for his conclusion that the appellants had stalked Vella. In my view there was evidence on which the magistrate was able to conclude that they were likely to stalk him again. **[27]** The decision of the magistrate does not support the submission that he had been in error in failing to address a necessary matter in order to reach the conclusion that the appellants had stalked Vella and were likely to do so again. For these reasons, it is my conclusion that each appeal should be dismissed.

APPEARANCES: For the Appellants: Mr H Berkeley, QC and Ms J Birch, counsel. Solicitors: Victoria Legal Aid. For the Respondent: Mr B Dennis, Counsel. Solicitor: Victorian Government Solicitor.
