44/01; [2001] VSC 43

SUPREME COURT OF VICTORIA

DPP v SUTCLIFFE

Gillard J

2 February, 1 March 2001

CRIMINAL LAW – STALKING – CONDUCT COMMITTED IN VICTORIA – HARMFUL EFFECT OCCURRED OUTSIDE VICTORIA – FINDING BY MAGISTRATE THAT COURT LACKED JURISDICTION TO HEAR CHARGE – WHETHER ISSUE WAS ONE INVOLVING JURISDICTION – WHETHER PERSON COULD BE GUILTY OF STALKING IF AN ESSENTIAL INGREDIENT OF THE OFFENCE TOOK PLACE OUTSIDE VICTORIA – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S21A.

1. An essential ingredient of the offence of stalking created by the *Crimes Act* ('Act') s21A(1) is proof of intention. The prosecution must establish beyond reasonable doubt that the course of conduct engaged in actually had the result as set out in s21(2) of the Act.

2. The Magistrates' Court has jurisdiction to hear a charge of stalking. Whether or not the defendant could be guilty of the offence in circumstances where an essential ingredient of the offence took place outside the territorial limits of Victoria is a question of the construction of s21A of the Act.

3. Under the common law as it was developed in England, the general rule is that the criminal law applies only in respect of acts committed or omissions made within England. However, by virtue of the *Australia Act* 1986 (Cth) s2(1), the Victorian Parliament has power to pass a law which has extra-territorial operation provided the law is for the peace, order and good government of the State of Victoria.

4. The presumption against extra-territorial operation and effect is rebuttable. Whether the presumption has been rebutted will depend on all the circumstances. Matters of particular relevance are the nature, scope, subject matter and object of the legislation and its anticipated operation to commonplace occurrences. Another matter is whether the legislation would be robbed of much of its purpose by being confined to acts committed within Victoria.

5. The law requires the courts to construe an Act that promotes the purpose or object underlying the Act. When Parliament debated the stalking provision in the Victorian Bill, it was obvious to Parliament that the conduct could take place in a variety of ways, through a variety of means and over a long period of time at times when the offender and victim were in different places and could be in different states or countries. Parliament was well aware in 1994 that with the advent of new technologies, stalking could take many forms including through mediums of e-mail, Internet and computer.

6. Given that knowledge and the purpose of the legislation and the fact that the proscribed conduct is a "course of conduct", in order for the legislation to operate effectively it is necessary that it should have extra-territorial operation and effect. It was the intention of Parliament when it enacted s21A of the Act that it was to operate even though an ingredient of the offence occurred outside the State of Victoria. Accordingly, a magistrate fell into error in dismissing a charge of stalking where the effect occurred outside Victoria on the ground that the Magistrates' Court lacked jurisdiction.

GILLARD J:

1. This is an appeal pursuant to s92 of the *Magistrates' Court Act* 1989 against the dismissal of a charge of stalking by a Magistrate.

Parties

2. The Director of Public Prosecutions ("the appellant") brings the appeal on behalf of the informant who laid the charge, Senior Constable Michael Pena.

3. The charge was laid against Brian Andrew Sutcliffe ("the respondent").

The charge and offence of stalking

4. On 27 August 1999 the informant laid a charge against the respondent and the details of the charge were –

> "The defendant at Brighton did between January 1993 and August 1999 stalk one Sara Ballingall."

5. Prior to 1994 there was no offence of stalking known to Victorian law. It is noted that the charge alleges conduct which occurred prior to the creation of the offence.

6. In common parlance stalking in respect to a person is pursuing or approaching a person in a stealthy manner. Today it covers a myriad of circumstances in which a person annoys or harasses another person to the point where the victim is concerned for his or her own safety. The conduct may be physical presence or through various means of communication and can take many forms.

7. In 1994 the Victorian Parliament amended the law to create the offence of stalking. The new offence is found in the *Crimes Act* 1958 which came into operation on 23 January 1995.

8. Section 21A provides –

> "**21A. Stalking**
> (1) A person must not stalk another person.
> Penalty: Level 5 imprisonment (10 years maximum).
> (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.
> (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.
> (4) This section does not apply to conduct engaged in by a person performing official duties for the purpose of—
> (a) the enforcement of the criminal law; or
> (b) the administration of any Act; or
> (c) the enforcement of a law imposing a pecuniary penalty; or
> (d) the execution of a warrant; or
> (e) the protection of the public revenue -
> that, but for this sub-section, would constitute an offence against sub-section (1).
> (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."

Hearing in Magistrates' Court

9. In addition to the stalking charge, the respondent was charged with nine charges contrary to the *Firearms Act* 1996, three charges contrary to the *Dangerous Goods (Explosive) Regulations* 1988, and one charge of failing to answer bail.

10. The stalking charge raised a question of jurisdiction because the victim of the alleged stalking resided at all material times in Canada. The alleged actions of the respondent all took place in the State of Victoria. The question came down to whether the offence could be committed by the respondent where the effect of the stalking was experienced outside the jurisdiction.

11. The representatives of the parties informed the Magistrate, Ms Wakeling, on the morning of the hearing, the 24th July 2000, that it was proposed that the court should rule whether or not the charge could be proven in circumstances where the alleged harm was experienced outside the jurisdiction.

12. The parties agreed to a summary of facts and the argument proceeded on the basis that the prosecution could establish the facts set out in the summary. It must be emphasised that neither the informant nor the respondent made any admission as to the facts but the legal argument proceeded on the assumption that the facts would be proven.

13. The Magistrate was informed that if the court was satisfied that it could hear the stalking charge, then the alleged victim and another witness would give evidence at the hearing by way of video link from Canada. The summary was as follows –

14. "**Police v Brian Sutcliffe**
Summary of evidence prepared for the purpose of presentation of argument on the jurisdiction of a Victorian Court to hear the charge of stalking contrary to s21A of the *Crimes Act*. Prepared with the concurrence of both parties as a summary of the prosecution's best case. The defence is not to be taken to have acknowledged or admitted any part of the summarised facts is correct and this document is prepared and accepted solely on a without prejudice basis to both parties.

1. Sara Ballingall acted in the series 'Degrassi Junior High' and later 'Degrassi High' between 1985 and 1990.
2. Brian Sutcliffe visited Canada at some time in the months of September-November 1993. While in Canada he:-
(a) Attended the location used as the back drop for filming of a series known as Degrassi Junior High and took photos.
(b) Attended and photographed other buildings used in the course of filming Degrassi Junior High.
(c) Rang Sally Ballingall.
3. Sally Ballingall gave Sutcliffe Sara Ballingall's address in the course of a telephone call made by Sutcliffe to Sally Ballingall during 1993.
4. During 1994 Sara Ballingall received mail apparently from Sutcliffe the contents of which gave Sara Ballingall the impression that Sutcliffe was:-
(a) Interested in guns;
(b) Interested to the point of obsession in the 'Degrassi High' show and the character played by Sara Ballingall;
(c) Deluded;
(d) Potentially dangerous toward her.
5. Sally Ballingall also received mail from Sutcliffe.
6. Sometime in 1994 or 1995 Sutcliffe sent a 'Degrassi High' book to Sally Ballingall which Sally Ballingal sent back to Sutcliffe.
7. Sutcliffe continued to send letters and on one occasion sent a box described as having a koala bear in it.
8. Sutcliffe re-forwarded the book this time to Sara Ballingall seeking that she sign it. The book was placed in packaging apparently sourced from a rifle supplier in the United States.
9. The correspondence from Sutcliffe has been directed to Sara Ballingall or Sally Ballingall and generally arrived at two month intervals.
10. The content of more recent correspondence from Sutcliffe to the Ballingalls has contained words like 'If this isn't resolved there is going to be trouble' and 'this is your final warning'. Sutcliffe is demanding return to him of the items he sent to Sara Ballingall. The effect of these comments and of references by Sutcliffe to his interest in and use of guns has caused Sara Ballingall to become fearful of Sutcliffe's intentions.
11. In June 1999 Sara Ballingall discovered that Sutcliffe was operating a website devoted to 'Degrassi High'. In E-mails to various people he discussed the killings at Columbine High School in the United States and made disparaging remarks about 'women's rights'.
12. Sutcliffe has sent a series of E-mails to a person he believed to have been involved in the making of the Degrassi High series and appeared not to accept that person's protestations that the person he was contacting had not been involved in the production.
13. On 24 August, 1999 a man rang for Sally Ballingall and spoke to Sara Ballingall identifying

himself as Sutcliffe. Sara Ballingall hung up and Sutcliffe left two messages. The second contained the words 'I don't want to hurt you but the situation is out of control'.
14. Sara Ballingall does not wish to have any contact with Sutcliffe.
15. Sara Ballingall is afraid of Sutcliffe and believes he is obsessional and capable of unpredictable behaviour. Sara Ballingall feels that Sutcliffe's conduct has been threatening and harassing.

Agreed analysis of Jurisdictional Events

1. Sutcliffe has only been to Canada once in 1993 and had no contact with the Complainant at that time.
2. Sutcliffe has authored letters in Australia which were delivered by international mail to the address of Sara Ballingall in Canada.
3. Sara Ballingall is aware of the contents of some of the correspondence from Sutcliffe through comments made to her by Sally Ballingall in Canada.
4. Sara Ballingall has been supplied with some of the letters from Sutcliffe either by direction collection of mail or through Sally Ballingall when in Canada.
5. All letters were collected in Canada.
6. Sutcliffe has set up a web site which is operated in Australia but which can be accessed Internationally.
7. Sutcliffe has attempted to communicate with other persons associated with the Degrassi High production using E-mail sourced from Australia and directed to a recipient in Canada.
8. When in Canada Ballingall has discovered (by being informed by a third party) that Sutcliffe has made attempts to communicate with other persons associated with the Degrassi High."

15. The police prosecutor and counsel for the respondent made submissions to the court and after a short adjournment the Magistrate dismissed the charge on the ground that the court lacked jurisdiction in the circumstances where the effect of the alleged conduct occurred entirely outside Victoria and the Commonwealth.

16. Her Worship expressed her reasons as follows –

"I have given careful consideration to the authorities to which you referred me in relation to this issue of jurisdiction. And, essentially, I'm not convinced that this court has jurisdiction to proceed with this charge of stalking. It is an essential element of the offence that any course of conduct engaged in, by the defendant, actually did have the effect of arousing apprehension or fear in the victim for her personal safety. This can only have occurred in Canada. In the absence of any express provision in the legislation that is in the *Crimes Act*, this charge cannot proceed in this court. I have considered the decision, particularly in the case of *Lipohar*. I find that nothing to displace the presumption that a penal statute will be taken not to have extra-territorial operation. Where there is an express provision in the legislation of the intention that it have affect, extra-territorially, or where there is a common law offence, it appears then appropriate to look for a real connection with the jurisdiction. I have considered also, Senior, the policy matters enunciated by Professor Lanham, and I consider that they weigh in favour of the defendant, in relation to these issues. I understand that there is like legislation in Canada."

17. The Magistrate dismissed the charge and ordered the Chief Commissioner of Police to pay costs in the sum of $5,000.

Questions of law

18. The appellant made application to Master of the court pursuant to Part 3 of Order 58 of the Rules of Court seeking an order that the Master state, *inter alia*, the questions of law raised by the appellant.

19. The Master ordered that the following questions of law were raised by the appeal –

"(a) Was the Magistrate in error when she ruled that the Magistrates' Court of Victoria did not have jurisdiction to hear or determine the charge of stalking in circumstances where the defendant's acts had occurred wholly in Victoria and the alleged victim was at all material times in Canada?
(b) Was the Magistrate in error in:
(i) Striking out the charge of stalking?

(ii) Ordering the charge not proceed as the Magistrates' Court of Victoria 'lacks jurisdiction in circumstances where the effect of the alleged conduct occurs entirely outside of Victoria and the Commonwealth'?"

Issues on appeal

20. The questions of law and the rival submissions of the parties raise the following issues for consideration and determination –

> (i) What are the elements which constitute the offence of stalking under s21A of the *Crimes Act* 1958?
>
> (ii) Does the Victorian Parliament have the power to pass a law creating an offence in which one of the elements of proof may occur outside the State of Victoria? i.e. Can it create an offence which has extra-territorial operation?
>
> (iii) If the informant can prove the facts set out in the agreed statement of facts, would he prove all the necessary elements of the offence?

Proof of stalking

21. The offence of stalking is created by s21A(1).

22. The word "stalk" bears several meanings. What it means depends upon the context. An early middle English meaning was - "To go stealthily towards (an animal) for the purpose of killing or capturing it. Hence to pursue game by the method of stealthy approach". See *Shorter Oxford English Dictionary*.

23. Sub-section (2) of s21A does define the word "stalk" for the purposes of the offence, but the definition is not exhaustive.

24. To prove the offence, the prosecution must prove –

> "(a) the offender has engaged in a course of conduct;
>
> (b) the course of conduct constitutes stalking which comprise one or more of the types of conduct specified in s21A(2) — it is noted that paragraph (g) is a catch all provision no doubt aimed at all other types of conduct which have the effect of 'arousing apprehension or fear in the victim for his or her own safety or that of any other person';
>
> (c) the offender engaged in the course of conduct '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
>
> (d) 'the course of conduct engaged in <u>actually</u> did have that result'."

25. Proof of intention is an essential ingredient of the offence. Sub-section (3) facilitates the proof which is satisfied if there is an actual intention (subjective test) or if "in all the particular circumstances [the] 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". (The objective test).

26. It is observed that the prosecution must establish beyond reasonable doubt that the course of conduct engaged in actually did have the result set out in sub-s(2). In the present matter, the actual effect of the conduct upon the victim and her sister occurred outside the State of Victoria and in Canada.

27. This raises the important issue on this appeal, namely, if all the facts set out in the agreed statement of facts are established does that constitute an offence under s21A of the *Crimes Act* 1958?

28. An offence under s21A is an indictable offence – see s2B of the Act – which can be determinable summarily. See s53(1A) of the *Magistrates' Court Act* 1989. The respondent consented to a summary hearing.

Construction question

29. Whilst the argument below described the issue as one of jurisdiction, strictly it is not. The respondent resides in this State, is present in the State, the proscribed acts of the respondent took place in this State and the Magistrates' Court in this State had jurisdiction to hear a charge brought under s21A of the Act. The court does have jurisdiction to hear the charge against the respondent.

30. Whether or not the respondent could be guilty of the offence in circumstances where an essential ingredient of the offence took place outside the territorial limits of Victoria is a question of construction of s21A.

31. In *Thompson v R* [1989] HCA 30; (1989) 169 CLR 1; (1989) 86 ALR 1; (1989) 63 ALJR 447; 41 A Crim R 134, the High Court was concerned with the application of sections of the ACT *Crimes Act* applying to a situation where there were doubts whether the murder was committed in the Territory. Brennan J at CLR p23 after posing the question whether the ACT law did apply said –

> "This is not a question of jurisdiction but of the territorial ambit of the law – a question to be answered by construing the statute."

32. In *R v Treacy* (1971) AC 537; [1971] 1 All ER 110; [1971] 2 WLR 112; (1971) 55 Cr App R 113, the House of Lords was concerned with a convicted person who had posted a letter in England addressed to a woman in West Germany demanding money with menaces. The question arose whether the offence of blackmail had been committed as soon as the appellant had written and posted the letter.

33. At AC p559 Lord Diplock said –

> "In view of the way in which the question is framed and the wide ranging argument about 'jurisdiction' before Your Lordships' House, I am prompted to state at the outset that the question in this appeal is not whether the Central Criminal Court had jurisdiction to try the defendant on that charge but whether the facts alleged and proved against him amounted to a criminal offence under the English Act of Parliament."

34. His Lordship added –

> "The fact that the appellant was arrested in Greater London and committed for trial at the Central Criminal Court unquestionably gave to that court jurisdiction to decide whether or not he was guilty of the offence for which he was indicted. That offence was the statutory offence of 'blackmail' as defined in s.21 of the *Theft Act* 1968. ... The only question for Your Lordships' House is what did Parliament mean when it enacted in 1968 that: 'A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces'?" (Emphases added). See also Lord Hodson at p557.

35. Returning to *Thompson's case* and the judgment of Brennan J, His Honour said at CLR p19 –

> "The Full Court described these grounds as raising the question of the court's jurisdiction and so, in a sense, they did. But they also raised the question of the territorial ambit of the law of the Australian Capital Territory which defines the crime of murder. The jurisdiction of a court to hear and determine a charge of criminal offence and the territorial ambit of a law which creates or defines the offence charged are two distinct questions ... "

See also *R v Franke* [1929] VicLawRp 53; [1929] VLR 285 at 287; 35 ALR 230 (Full Court) and Tadgell J in *McDonald v Baskovic* [1987] VicRp 33; (1987) VR 387 at p390.

36. This brings me to the second question which concerns the power of the Victorian Parliament to create an offence which may have extra-territorial operation.

Authority of Victorian Parliament

37. Before considering the power of the Victorian Parliament, it is necessary to briefly consider the common law concerning criminal offences and acts which occur outside the territory of the State Parliament and the State courts. Brennan J discussed the principles in *Thompson's case* at CLR p23 *et seq* –

38. His Honour said –

> "Under the common law as it was developed in England, the general rule is that the criminal law applies only in respect of acts committed or omissions made within England. In *Cox v Army Council*

> Viscount Simonds said: 'apart from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England.'

and:

> "with rare exceptions the whole body of our criminal law is 'domestic' in the sense that it is made for the order and good government of this country and is applicable only to acts done on English soil. This rule may be overridden by statute but, in the construction of an offence-creating statute, the presumption is that the legislature did not intend to proscribe acts done outside the territory of the legislature. Thus, in *Air-India v Wiggins* [1980] 2 All ER 593; [1980] 1 WLR 815; (1980) 71 Cr App R 213 Lord Diplock said: 'in construing Acts of Parliament there is a well established presumption that, in the absence of clear and specific words to the contrary, an 'offence creating section' of an Act of Parliament (to borrow an expression used by this House in *Cox v Army Council* [1963] AC 48; (1962) 46 Cr App R 258) was not intended to make conduct taking place outside the territorial jurisdiction of the Crown an offence triable in an English criminal court ... The presumption against a Parliamentary intention to make acts done by foreigners abroad offences triable by English criminal courts is even stronger. As Lord Russell of Killowen CJ said in *Jameson*: 'One other general canon of construction is this, that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting.'

See also per Lord Scarman. And in *Treacy* Lord Reid said:

> "It has been recognised from time immemorial that there is a strong presumption that when Parliament in an Act applying to England, creates an offence by making certain acts punishable it does not intend this to apply to any act done by anyone in any country other than England." His Honour concluded by saying at p25 - "When the language of an offence-defining or an offence-creating statute is quite general, the statute is construed as embracing conduct in apparent contravention of its terms only if an act is done or an omission is made or a result occurs within the domestic territory. Whether it is the locality of the act or of the omission or of the result which brings conduct within the ambit of the statute is a question of construction, but there must be some local element of the offence. In this sense it is right to say as Lord Halsbury LC said in *Macleod v Attorney-General (NSW* [1891] AC 455; 66 P 28*)*: 'All crime is local'." (Emphasis added.)

39. All the parliaments of Australia whether they be Federal, State or Territory must keep within the bounds set by the Australian Constitution and the Constitutions which create them.

40. The Parliament of Victoria has full power to enact criminal laws for the peace, order and good government of this State subject to the overriding power of the Commonwealth Parliament to pass legislation and subject to the Australian Constitution.

41. Section 2(1) of the *Australia Act* 1986 passed by both the Commonwealth and the Imperial Parliaments expressly recognises that a State may pass extra-territorial laws for the "peace, order and good government" of the State.

42. Section 2(1) provides:

> "2(1) It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation". (Emphasis added).

43. This means that the Victorian Parliament does have the power to pass a law which has extra-territorial operation. The power is not unlimited. The limitation is imposed by the requirement that the law be "for the peace, order and good government" of the State of Victoria. It follows that there must be a link between the crime and the State of Victoria. In *Union Steamship Co of Australia Pty Ltd v King* [1988] HCA 55; (1988) 166 CLR 1; (1988) 82 ALR 43; (1988) 62 ALJR 645, the High Court expressed the connection in this way at p14 –

> "Be this as it may, it is sufficient for present purposes to express our agreement with the comments of Gibbs J in *Pearce* where His Honour stated that the requirement for a relevant connection between the circumstances on which the legislation operates and the State should be liberally applied and that even a remote and general connection between the subject matter of the legislation and the State will suffice."

44. Gibbs J in *Pearce v Florenca* [1976] HCA 26; (1976) 135 CLR 507; (1976) 9 ALR 289; (1976) 50 ALJR 670 at CLR p517 described the connection as follows –

> " ... it has become settled that a law is valid if it is, connected, not too remotely, with the State which enacted it, or, in other words, if it operates on some circumstances which really appertains to the State." See also Dixon J in *Broken Hill South Ltd v Commissioner of Taxation (NSW)* [1937] HCA 4; (1937) 56 CLR 337 at 375; [1937] ALR 221; (1937) 4 ATD 163 and *Thompson v Commissioner of Stamp Duties* (1969) 1 AC 320 at 335-36.

45. In *Re Hamilton-Byrne* [1995] VicRp 8; (1995) 1 VR 129 Tadgell J said at p142 –

> "The legislature could have chosen, but has not, to extend the justiciability in Victoria of extra-territorial common law conspiracies. I particularly note that by s80A of the *Crimes Act* 1958 (enacted in 1988) certain extra-territorial offences were rendered justiciable by reference to acts or omissions outside Victoria having a 'real and substantial link' with Victoria."

46. In my opinion the Victorian Parliament does have power to enact a criminal law for the peace, order and good government of this State even though the commission of the offence may involve acts which take place outside this State.

47. The Victorian Parliament has on occasions passed laws with respect to criminal offences where an essential ingredient of the offence is established by facts which occurred outside the State. See by way of example s9 of the Act which is concerned with the provision for trial for murder or manslaughter in Victoria where death or cause of death, *inter alia*, occurs at any place out of Victoria and s80A which is concerned with fraud and blackmail offences and which expressly provides for situations where some of the acts occur outside the State. However, under these statutory provisions there must be "a real and substantial link" between the doing or omitting to do the act or thing and the State of Victoria.

Is the offence committed in this State?

48. It is common ground between the parties that the effect of the stalking conduct occurred in Canada and outside the State of Victoria. The question is, if the effect facts were proved to have occurred solely outside this State, could the respondent be convicted in this State of the offence?

49. This does come down to a question of construction of s21A. Was it the intention of the Victorian Parliament that the offence would be committed in this State in circumstances where an essential element of the proof occurred outside this State?

50. There is a strong presumption against the appellant. It is stated by Lord Reid in *R v Treacy supra*, at p551 –

> "It has been recognised from time immemorial that there is a strong presumption that when Parliament, in an Act applying to England, creates an offence by making certain acts punishable it does not intend this to apply to any act done by anyone in any country other than England. Parliament, being sovereign, is fully entitled to make an enactment on a wider basis. But the presumption is well-known to draftsmen and where there is an intention to make an English Act or part of such an Act apply to acts done outside England that intention is and must be made clear in the Act."

51. But the presumption is rebuttable.

52. In *R v Franke, supra*, the Full Court said at p288 the following –

> "It is, of course, a penal section, and there is a rule of interpretation which we think can be applied to this section and which is sufficient to decide this case. We take the statement of this rule from an article by Sir John Salmond, in the *Law Quarterly Review*, volume XXXIII, at p119 - 'It is well settled that, at least in a penal statute, general words will not be given an extra-territorial operation unless an intention to give such operation to the statute appears expressly or by necessary implication. All references, therefore, in such a statute to persons, acts, or things will prima facie be restricted to persons, acts and things within the territorial limits of the jurisdiction of the legislature'." (Emphasis added).

53. Lord Scarman expressed the same principle in *Air-India v Wiggins* [1980] 2 All ER 593;

(1980) 1 WLR 815 at 820-821; (1980) 71 Cr App R 213.

> "There are ... two canons of construction to be observed when interpreting a statute alleged to have extra-territorial effect. The first is a presumption that an offence-creating section was not intended by Parliament to cover conduct outside the territory or jurisdiction of the Crown ... The second is a presumption that a statute will not be construed as applying to foreigners in respect to acts done by them abroad. ... Each presumption is, however, rebuttable: and the strength of each will largely depend upon the subject matter of the statute under consideration." (Emphasis added.)

54. Mr McArdle QC for the appellant submitted that when one considered the subject matter of s21A, namely stalking, that it is a course of conduct and the fact that the very nature of the criminal offence is such that in many cases elements of the offence may occur outside the State of Victoria that not to extend extra-territorial operation to the section would rob it of much of its effect and defeat the obvious intention of Parliament.

55. Counsel for the respondent, Mr Forbes-Nicholson, on the other hand submitted that the draftsmen and the Parliament of Victoria could not possibly have overlooked the principle of extra-territorial prohibition and if the Parliament intended to give extra-territorial effect to the section it could have very easily said so. It did not. This was despite the fact that the legislation was bipartisan and was extensively debated in Parliament. Further, there is the effect upon the victim which has to be proved. Parliament must have understood that the effect could occur outside this State and yet there is no express provision in the Act giving it an extra-territorial operation.

56. Mr Forbes-Nicholson contrasted s21A with other provisions in the *Crimes Act* where the Victorian Parliament did expressly provide for extra-territorial operation.

57. He submitted that the Parliament had not intended to make it an offence where an essential ingredient of the offence occurred outside Victoria.

58. He relied upon the presumption against extra-territorial operation.

59. The presumption against extra-territorial operation and effect was laid down and applied in an era where it was accepted as a general proposition that "all crime is local" (see *Macleod v Attorney-General for New South Wales* (1891) AC 455 at 458; 66 P 28) and there was emphasis on the fact that most crimes were committed at a single location.

60. But in the past 100 years crimes have ceased to be confined to single locations.

61. Criminals are not respecters of borders. State and international boundaries do not concern them. They commit their evil acts anywhere and without thought to location.

62. Movement between countries is much greater now than in the past and subject to less restrictions. Technology has reached the point where communications can be made around the world in less than a second. The Internet provides a speedy, relatively inexpensive means of communication between persons who have access to a computer and a telephone line. Access is not confined to ownership of a computer and businesses have sprung up offering access to the Internet for a small charge.

63. The law must move with these changes.

64. In *Liangsiriprasert v United States* (1991) 1 AC 225; (1991) 92 Cr App R 77, Lord Griffiths, speaking for the Privy Council, stated –

> "Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face the new reality."

65. Earlier, Lord Wilberforce stated in *R v Doot* (1973) AC 807 at p827; [1973] All ER 940 the following –

> "But there are many crimes (I use the word without prejudice at this stage) the elements of which cannot be so simply located. They may originate in one country, be continued in another, produce effects in a third."

66. The ability to move between States and countries speedily, the means of communication and the speed with which they can be effected, and the fact that stalking is a course of conduct crime were all known to the Victorian Legislature when it passed the Act in 1994. The Parliamentary debates bear this out as does the general but non-exclusive definition of stalking in s21A. Parliament appreciated the difficulty of covering all forms of stalking.

67. It is accepted that s21A does not expressly state that it may have extra-territorial operation. But as has been recognised the presumption against extra-territorial effect can be impliedly rebutted.

68. Whether the Legislature has done so will depend on all the circumstances. Matters of particular relevance are the nature, scope, subject matter and object of the legislation and its anticipated operation to common place occurrences. Would the legislation be robbed of much of its purpose by being confined to acts committed within this State? These are all matters that must be taken into account in considering whether the Legislature intended that s21A should have extra-territorial operation.

69. In the present matter the respondent is a resident of this State and the acts which constitute the alleged stalking were all perpetrated by him in this State. All the ingredients of the offence save for the final ingredient of harmful effect occurred in this State. The respondent did not have to do anything more to achieve what he set out to do. He set it all in train from this State. His conduct and presence in this State provide a real connection with this State and its laws and clearly the Magistrates' Court has jurisdiction to hear the alleged offence.

70. In order to determine the intention of Parliament, the primary source is the words of the statute interpreted in their ordinary and plain meaning, taking into account context and reading the statute as a whole.

71. That approach does not enable the court to determine whether it was the intention of Parliament that s21A applied in circumstances where one of the ingredients of the offence occurred outside this State.

72. In those circumstances it is permissible to consider the purpose of the legislation. What was the policy of the legislation? What were the scope and object of the section? More relevantly, what mischief was Parliament seeking to remedy?

73. In order to answer these questions it is permissible to go beyond the four corners of the statute. The law has allowed evidence of the history of the law and the legislation. The court will also put itself in the shoes of the authors and take into account what those authors knew concerning the subject matter of the proposed legislation.

74. In *R v West Riding County Council* (1906) 22 TLR 783, Farwell LJ said –

> "The court must, of course, in construing an Act of Parliament, as in construing a deed or will, do its best to put itself in the position of the authors of the words to be interpreted at the time when such words were written or otherwise became effectual."

75. Lord Blackburn in *Wear River Commissioners v Adamson* (1877) 2 AC 743 at 763; [1874-80] All ER 1 said-

> "In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without enquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from these circumstances which the persons using them had in view."

76. Jessel MR in *Holme v Guy* (1877) 5 Ch D 901 said –

> "On this principle the court is not to be oblivious of the history of law and legislation, although it is not at liberty to construe an Act of Parliament by the motives which influence the Legislature."

77. More recently, Denning LJ in *Magar and St Mellons RDC v Newport Corporation* (1950) 2

All ER 1226 at p1236 said –

> "We sit here to find out the intention of Parliament and of Ministers and carry it out and we do so the better by filling up the gaps and making sense of the enactment than by opening it up to destructive analysis."

78. In my respectful opinion a court would not "fill up the gaps" because to do so may involve carrying out the function of Parliament, a course not open to courts, but nevertheless, "making sense of the enactment" rather than destroying the operation of a section is an appropriate rule to follow.

79. Today, legislation requires the court to construe an Act that promotes the purpose or object underlying the Act – see s35, *Interpretation of Legislation Act* 1984 – and in construing a provision consideration may be given to a variety of extrinsic materials including reports and Parliamentary debates.

80. What then did the Legislature know and what mischief was it seeking to cure?

81. In the second reading speech, the intention of the provision was expressed as follows –

> "It is the intention of this provision to offer protection to people who have been followed, placed under surveillance, contacted, or been sent offensive items in circumstances where the offender intends to cause the person physical or mental harm or apprehension or fear for his or her safety, or that of another person. The current criminal law does not adequately provide protection for people in these circumstances. Under the criminal law the offender must actually threaten or physically attack the victim before there is any redress." See *Hansard* 20 October 1994 at p1384.

82. The Victorian Parliament was not the first Parliament to address this antisocial conduct. The first Legislature to address the problem was the State of California where much of the stalking conduct was aimed at celebrities. It passed legislation in 1991. The States of Queensland, South Australia and New South Wales introduced legislation during 1993 and following as did the Northern Territory.

83. When Parliament debated the stalking provision in the Victorian Bill, the Legislature had available to it the legislation of other States.

84. A difficulty which faced all Legislatures was to determine what conduct constituted the offence of stalking. As the section demonstrates, the offence is to, "stalk another person". The word hitherto is invariably used in the context of stealthily pursuing a quarry or prey, usually under cover. The Legislature had to define what conduct constituted stalking in a human context bearing in mind the ordinary social and private contact between individuals on the one hand and conduct which went beyond what was acceptable and became a source of danger to the physical and mental wellbeing of the person, the focus of the conduct.

85. The Legislature appreciated, as is apparent from the Parliamentary debates and the general non-exclusive definition of "stalking", that the offence can be committed in a myriad of ways with a range of effects.

86. This is borne out by reference to another part of the second reading speech –

> "Stalking is practised by a range of individuals in very different circumstances. Consultation has revealed the diversity of situations where people have been stalked and the strong support for not limiting the legislation to any particular group. Nevertheless, it is true to say that the legislation will be particularly useful in protecting women from harassment and other threats to their physical and mental safety by former partners or strangers."

87. Importantly, the Legislature decreed that the offence could only be committed as a result of a course of conduct which was intentional and which produced harm. It was obvious to Parliament that the conduct could take place in a variety of ways, through a variety of means, and over a long period of time at times when the offender and victim were in different places and could be in different states or different countries. Stalking could occur by use of the telephone, Internet, e-mail and computer and in circumstances where the victim and offender could be many thousands of

kilometres apart. Parliament in 1994 was well aware that with the advent of new technologies stalking could take many forms including through mediums of e-mail, Internet and computer.

88. Given that knowledge, given the purpose of the legislation and the fact that the proscribed conduct is "a course of conduct", in order for the legislation to operate effectively it is necessary that it should have extra-territorial operation and effect. It would have been apparent to all members of Parliament that some of the conduct which constituted the stalking could occur within this State and some outside this State and that the effect upon the victim could occur partly within this State and partly without. To pass a law which confined all the ingredients constituting the offence to occur in this State would rob the provision of much of its effect.

89. Parliament would have appreciated that the effect on the victim could take some time. In other words, the course of conduct would gradually impact on the victim and not reach the stage of actual physical or mental harm or apprehension or fear until after a prolonged course of conduct.

90. The conduct which eventually brought the victim to that point may have impacted on the victim after leaving this State. It would make nonsense of the legislation if it could not operate in those circumstances.

91. To so confine the legislation would be to stultify it or make it unworkable in respect to certain conduct which was clearly stalking.

92. In my opinion it was the intention of Parliament when it enacted s21A that it was to operate even though an ingredient of the offence occurred outside this State. As long as some of the circumstances which constitute an element of the offence occurred in this State and the accused person was amenable to the process of this State the court in this State could hear and determine the charge.

93. In other words, the subject matter, the purpose and scope of the legislation considered in the context of what was known to Parliament and the fact that it is a "course of conduct" offence leads to the conclusion that the presumption against extra-territorial operation has been rebutted. To construe the provision in a restricted way would not only reduce the operation of the legislation but also defeat its purpose.

94. My conclusion is reinforced by a consideration of the wording of sub-s(2).

95. Sub-section (2) sets out the types of conduct which constitute stalking and provides not only for contact between the offender and victim in close proximity – see sub-ss(2)(a), (c), (d) and (e) – but also provides for communications where the victim and offender could be separated by a large distance. I refer to paragraphs (b) and (e). If the sub-section was confined to a communication reaching the victim inside this State then it could have absurd consequences in that a message may be sent by e-mail which was received whilst the victim was on the other side of the border or in another country, albeit temporarily.

96. Parliament was aware of the ease of travel, communication and the myriad ways an offender could stalk another person and would not pass a law which could be ineffectual.

97. The Legislature is presumed not to pass laws which are ineffective or produce absurd results and in my view the Victorian Parliament did not intend to confine this legislation to actions and effect occurring solely in this State.

98. Mr Forbes-Nicholson referred the court to a number of sections in the *Crimes Act* which have the effect of making it clear that the particular provision was to operate extra-territorially. He referred to ss70B, 80A, 90, 181, 252, 317A and 321O.

99. Each of those sections is concerned with conduct occurring outside this State and not the effect of the conduct. The sections demonstrate a legislative pattern to put beyond doubt that an offence can be committed by conduct which occurs outside this State but which has an effect either inside this State or involves a Victorian citizen.

100. Whilst the common law rule is that if the effect of criminal conduct is experienced in the State then as a general proposition the courts of that State have jurisdiction to hear the charge against any person amenable to its process, the Legislature has legislated to make it clear in respect to certain statutory offences that the offence can be the subject of conviction and punishment in a State court in circumstances where the offending conduct occurred outside this State. The Legislature has adopted a policy of expressly providing for extra-territorial operation and effect where the offending conduct occurred outside the State.

101. The present matter is the converse. The respondent at all relevant times was present in the State and all his actions which could constitute stalking occurred within this State. The harmful effect occurred outside the State.

102. These provisions do not establish a legislative pattern leading to the conclusion that unless the Victorian Parliament expressly enacts that a statutory provision creating an offence may have extra-territorial operation, it does not do so. In my opinion there are compelling reasons which lead to the conclusion that the Legislature intended s21A to have extra-territorial operation.

Conclusion

103. It follows in my opinion that the Magistrate was wrong in dismissing the charge of stalking against the respondent on the ground that the Magistrates' Court lacked jurisdiction. In my opinion it does have jurisdiction to hear the charge against the respondent even though the essential ingredient of the offence, namely proof of the harmful effect, will involve proving the effect of the alleged stalking on a person who at all relevant times was resident in Canada.

104. Subject to the submissions of counsel I propose to make the following order –

(i) that the order made on 24 July 2000 by Ms S. Wakeling M dismissing the charge against Brian Andrew Sutcliffe under s21A of the *Crimes Act* 1958 be set aside;

(ii) that the charge be remitted to the Magistrates' Court at Melbourne for determination in accordance with the law.

105. I will hear the parties on the question of costs.

APPEARANCES: For the appellant DPP: Mr JD McArdle QC, counsel. Solicitor for Public Prosecutions. For the Respondent Sutcliffe: Mr A Forbes-Nicholson, counsel. Wilson Potter Nicholson, solicitors.
