

PROVINCIAL COURT OF NOVA SCOTIA
Citation *R v Rehberg*, 2010 NSPC 101

Date: 2010-11-05
Docket: 2150655
Registry: Kentville

Between:

Her Majesty the Queen

v.

Justin Chad Rehberg

DECISION

JUDGE: The Honourable Judge Claudine MacDonald

HEARD: November 5, 2010

CHARGE: Section 319(1)(a) *Criminal Code*

COUNSEL: Darrell Carmichael, Crown Attorney
Chris Manning, Defence

By the Court:

[1] We are here for the decision in relation to Mr. Rehberg on the first count on the Information. Mr. Rehberg is charged that:

“he did on or about February 21, 2010 at or near Avondale, Hants County, Nova Scotia did in a public place, did by communicating statements incite hatred against an identifiable group with the likelihood of leading to a breach in peace contrary to Section 319(1)(a) of the *Criminal Code*.”

[2] The facts as agreed to by Crown and Defence are as follows:

1. About 12:30 a.m. on the 21st day of February 2010, the accused and his brother erected a wooden cross which had been soaked with a liquid accelerant on the front yard of a home at 738 Avondale Road, Avondale, Hants County, Nova Scotia and set it afire. The cross was about five feet tall and it burnt brightly in clear sight of the occupants of the home and passersby on Avondale Road.
2. To the knowledge of the accused and his brother, the home was lived in and at the time occupied by a bi-racial couple and their five children. The couple were Shayne Howe, a man of African-Canadian descent and Michele Lyon, his Caucasian spouse. The children ranged in age from two years to 17 years. The couple and several of

their children saw the burning cross in their yard and one of the older children heard someone in the area of the cross shout, “Die, nigger, die”. All of the occupants of the house who were old enough to understand took this to be a threatening statement of racial hatred and were appalled and terrified by it. Shayne Howe’s immediate reaction was to grab a baseball bat and rush out of the house to confront the cross-burners but he not gone very far before he thought better of it and went back inside.

3. The accused and his brother had planned this act at least two days before and had assembled the cross in advance and dragged it down the road together to the spot where they set it up.
4. News of this event spread rapidly, it was reported by electronic and print media in the immediate area, across the province and across the country. The community at large was so upset by it that within a week they staged a public march in support of the family in the home. February is Black History Month in Nova Scotia and there had been well publicised events to commemorate it.
5. Further, it is agreed that Justin Rehberg had been informed prior to this event that Michele Lyon had said that the Rehbergs had herpes.

[3] On the last day when counsel were making their submissions it was clear that there was agreement on most of the essential elements under section 319(1)(a) of the *Criminal Code*. In fact, the only issue that was left in dispute was whether the Crown had proven beyond a reasonable doubt that Mr. Rehberg's act of cross-burning incited hatred.

[4] The position put forward by Mr. Manning on behalf his client was that the community, being so upset by the cross burning, held a public march to show support for the family of Shane Howe and Michele Lyon. Given this, Mr. Manning argues that there was no incitement of hatred either in fact or in law.

[5] Mr. Manning argued that there was no intention on the part of Mr. Rehberg to incite hatred and that mere communication does not constitute 'inciting'. In support of this, he referred to a decision of the Ontario Court of Appeal, *R. v. Ford* 145 C.C.C. (3d) 336, where 'incite' was defined as follows:

The word "counselling" includes procuring, soliciting or inciting. I will explain what each of these words means. To "counsel" means to advise or recommend. To "procure" means to instigate, encourage or persuade. A person can encourage or persuade without having instigated the offence. A person "solicits" another when he or she entreats or urges another to do something. To "incite" has a similar meaning. It means to urge or stir up or stimulate.

[6] The position of the Crown is that the act of cross-burning, in and of itself, when considered in the historical context-its connection and association with the Ku Klux Klan- the act itself is one of intimidation and one that incites hatred.

[7] Reference was made on the last day to a decision of the United States Supreme Court, *Virginia v. Black* 538 U.S. 343 (2003). Justice O'Connor stated:

Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan which following its formation in 1866 imposed a range of terror throughout the South.

The Klan had often used cross burnings as a tool of intimidation and a threat of impending violence although such burnings have also remained coated symbols of shared group identity and ideology.

... the burning of a cross is a symbol of hate.

[8] By way of background, the Virginia statute at issue in that case made it "unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place." The statute also provided that "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." The Court held that although a State could ban cross-burning carried out with the intent to intimidate, the provision treating any cross-burning as *prima facie* evidence of intent to intimidate was a violation of freedom of speech.

[9] In *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, [2005] 2 S.C.R. 100 (S.C.C.) the Supreme Court of Canada considered the law with respect to section 319 of the Criminal Code.

102 The offence does not require proof that the communication caused actual hatred. In *Keegstra*, this Court recognized that proving a causal link between the communicated message and hatred of an identifiable group is difficult. The intention of Parliament was to prevent the risk of serious harm and not merely to target actual harm caused. The risk of hatred caused by hate propaganda is very real. This is the harm that justifies prosecuting individuals under this section of the *Criminal Code* (p. 776). In the *Media Case*, the ICTR said that "[t]he denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm" (para. 1072).

105 In *Keegstra*, at p. 778, this Court found that "[t]o determine if the promotion of hatred was intended, the trier will usually make an inference as to the necessary *mens rea* based upon the statements made". In many instances, evidence of the mental element will flow from the establishment of the elements of the criminal act of the offence. The speech will be such that the requisite guilty mind can be inferred.

106 As is the case with the crime of incitement to genocide, the crime of incitement to hatred requires the trier of fact to consider the speech objectively but with regard for the circumstances in which the speech was given, the manner and tone used, and the persons to whom the message was addressed.

[10] With respect to the argument that no incitement of hatred occurred in this case, paragraph 102 of the *Mugesera* decision makes it clear that the Crown does not have to prove that the communication or the act caused any actual hatred. The decision also makes it clear that the court must consider all of the circumstances surrounding the making of the statement.

[11] Bearing that in mind, first, what was the statement here? Well, the statement here was the act of burning a five foot cross-a-cross that is symbolic of intimidation. Where did this happen? It happened in a public place in that it could be seen by passersby. This cross-burning took place in the front yard of a home-a home that was shared by a couple and their five children. Further, the couple who lived in the home at the time were a bi-racial couple. This was known to Mr. Rehberg. He knew that Mr. Howe was of African-Canadian descent and that Michelle Lyon, his Caucasian spouse, lived there with their children. When did this happen? It happened after midnight, at 12:30 a.m. on February 21st. That is the context in which this happened. As mentioned above, Mr. Rehberg had been informed prior to the event that Michelle Lyons had said that the Rehbergs had herpes.. Perhaps that played a role in the decision Mr. Rehberg made. I don't know. That may have been part of Mr. Rehberg's motive for what he did, or maybe it was not. From a legal point of view it makes no difference. It does not matter.

[12] The facts here are clear. Having considered the law and the context as referred to earlier, the circumstances under which this act of cross-burning took place, I am satisfied that the Crown has proven all of the essential elements of the

offence beyond a reasonable doubt. I find Mr. Rehberg guilty of the first count on the Information.

Claudine MacDonald, JPC