IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R.* v. *Cesar Marius Zorogole*, 2004 NSPC 16

Date: 20040227
Case No.(s): 1357390, 1357391, 1357392, 1361282, 1361283, 1361284
Registry: Halifax

Between:

R.

v.

Cesar Marius Zorogole

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision rendered orally on February 27, 2004 in Halifax Nova Scotia
Counsel:	Jean M. Whalen, for the Crown Roger A. Burrill, for the Defence

BY THE COURT

Introduction

[1] The police have charged the accused with two counts of criminal harassment relating to three different complainants but referring to the same premises. It is alleged that he without lawful authority and knowing that another person is harassed or reckless as to whether the other person is harassed beset or watched a dwelling house that was either their place of work or their home. In addition, they have charged him with the violation of his Recognizance in that he failed to keep the peace and be of good behaviour. Both counts concerned incidents of alleged criminal harassment occurring within the period of September 10, 2003 and September 23, 2003, at a residential address in the Halifax Regional Municipality.

Summary of Relevant Evidence

[2] The first questionable conduct complained of happened on September 11, 2003. Two nannies who were outdoors and looking after some children at the subject premises, observed the accused standing across the road and staring in the direction of the dwelling. The children were playing. Generally, they were not aware of his presence. After awhile, he walked away but stood in the middle of the street looked backwards and stared in the direction of the premises. At no time did he speak to the nannies and they never spoke to him but they felt that his behaviour was off and it made them feel nervous and uneasy.

[3] The second questionable conduct occurred on September 13, 2003. First, earlier in the day the accused attended a yard sale at the subject dwelling house and purchased a book. With some discomfort, the complainant observed that the accused was watching the children who were playing. Later, in the day, the complainant saw the accused in front of his dwelling house and he approached and spoke briefly with him. During this conversation and upon enquiry, the accused told the complainant his name. He also informed that he was from a foreign country and that he was just walking around making friends. The complainant felt that this was odd but did not feel threatened and the accused left. At about 2130 hours, the accused returned to the dwelling house and rang the doorbell. When the complainant responded to the door, the accused informed him that he, the accused, was there to meet a friend. Advising the accused that he had no friends at the dwelling the complainant directed him to leave. Without further incident, the accused left and never returned to the dwelling house nor contacted any of its residents.

[4] Because of these incidents, the accused stands charged as indicated. This case therefore raises the issue of whether the seemingly odd conduct of the accused rises to the standard

of criminal behaviour.

Applicable Legislation

[5] The ***Criminal Code*** s.264 states:

> 264. (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engaged in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.
>
> (2) The conduct mentioned in subsection (1) consists of
>
> (a) repeatedly following from place to place the other person or anyone known to them;
>
> (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
>
> (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
>
> (d) engaging in threatening conduct directed at the other person or any member of their family.
>
> (3) Every person who contravenes this section is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
>
> (b) an offence punishable on summary conviction.

Theory of the Crown

[6] Put succinctly, the Crown submitted that the accused, a total stranger to the complainants, went to the dwelling-house. On the first occasion, when he stood and watched the nannies

and the children, although he never spoke a word his presence and odd behaviour made the nanny complainant nervous and concerned. Because this episode of watching was continuous and for a period of about fifteen minutes it alarmed the nannies who had children in their care and the accused should have known that his conduct was not only unusual and unsettling but also disturbing to them. Consequently, this conduct attracted criminal sanctions.

[7] As persons observed the accused in the neighbourhood, where he would have no reason to be, and he had returned to the dwelling-house on another day, cumulatively his presence in this particular neighbourhood was persistent and repetitive. He demonstrated this repetitiveness and persistency when he attended the yard sale and watched the children playing. Further, when he returned later in the day and in the evening the accumulative effect on the owner complainant was fear and anxiety. As a total stranger to the residents of the neighbourhood in general and those of the dwelling-house in particular, the accused conduct by any discernible standard, given its cause and effect, demonstrated that he did engage in conduct, which at the minimum was reckless, or wilfully blind.

Theory of the Defence

[8] On the other hand, the defence counsel submitted that the nannies and the homeowner exhibited idiosyncratic and subjective sensitivities in what they perceived to be an odd and atypical set of circumstances. He suggested that there existed a sub-text reaction in that the accused, a black man with a dreadlocks hairstyle, was an unusual and rare sight in this neighbourhood. As a result, his standing and watching the children and his proximity to the dwelling-house while doing so may have caused the nannies to be concerned. However, the accused never spoke to anyone nor did any overt acts that demonstrated any hostility or threats. Thus, in the circumstances, the nannies' reactions were highly subjective and the accused conduct was not sufficiently blameworthy to meet the test for criminality.

[9] Further, in the context presented, one could not reasonably characterize the accused conduct as persistent, reckless or wilfully blind. He attended the yard sale as an invitee and bought a book. However, as the owner of the dwelling-house knew about the accused earlier odd behaviour he considered the accused presence with suspicion and some anxiety particularly when he saw him watching the children playing. When he was outside the dwelling- house in the afternoon the accused, when asked, gave his name to the homeowner and indicated that, as a foreigner, he was walking around making friends. Although the homeowner thought that it was unusual and odd this conduct neither alarmed nor disturbed him. When the accused returned at 2130 hours and rang the doorbell indicating that he was looking for some friends and learning that he had no friends at the dwelling house he left and never returned.

[10] Thus, regardless of his odd and perhaps troublesome behaviour, subjectively, there might

have been the sub-text factor of race subtly operating and manifesting in the negative reactions of the complainants. In our free and democratic society, the accused was free to walk about in any neighbourhood without any irrational restrictions placed upon him. Therefore, viewed objectively, the accused conduct was not reasonably capable of causing the complainants to fear for their safety.

Analysis

[11] In the case at bar, I think that the Crown must prove each of the following elements beyond a reasonable doubt:

1. That the accused beset or watched the dwelling-house at 3197 Hemlock Street, Halifax Regional Municipality.

2. That Sharon Delaney, Jamie Ferguson and Melissa Trenbirth were harassed.

3. That the accused knew that on the occasions when he beset and watched the dwelling-house that Sharon Delaney, Jamie Ferguson and Melissa Trenbirth were harassed or was reckless or wilfully blind as to whether they were harassed.

4. That the conduct of the accused, beset and watching, caused Sharon Delaney, Jamie Ferguson and Melissa Trenbirth individually to fear for their safety or the safety of someone known to them.

5. That the fears of Sharon Delaney, Jamie Ferguson and Melissa Trenbirth were, in all the circumstances, reasonable. See ***R.*** *v.* ***Sillip*** (1997), 120 C.C.C. (3d) 384 (Alta.C.A.), at para. 18; leave to appeal refused [1998], S.C.C.A. No. 3.

[12] Here, defence counsel urges caution and submitted that, not every idiosyncratic, odd or unusual conduct will give rise to the imposition of criminal sanctions. I am inclined to agree with this observation particularly when I consider the following quote made in ***R.*** v. ***Hau***, [1994] B.C.J. No. 677 at para. 4:

> As part of its brief, the Crown tendered a statement made May 6, 1993 in the House of Commons by Hon. Pierre Blais, then the Minister of Justice, when he led off debate on Bill C-126, an Act to amend the Criminal Code and Young Offenders Act. In part Mr. Blais stated:
>
> > Bill C-126 will introduce a new criminal harassment section to the Criminal Code. The new section is called criminal harassment because we believe this best describes the nature of the crime

> although the acts are more commonly known as stalking.
>
> More and more cases are being reported of women being stalked by men they used to be involved with and from whom they may be trying to escape.
>
> There have been several cases in Canada recently in which women have been stalked and seriously injured or killed. These cases made it clear that a new provision in the Criminal Code was urgently needed to explicitly criminalize these types of acts.
>
> A recent public opinion survey shows that more than eight in ten Canadians would support a law that would prohibit the persistent harassment and intimidation of another person.
>
> What is commonly called stalking includes such things as repeatedly following someone; spending extended periods of time watching someone's home or place of work; making repeated telephone calls to someone or her friends, making contact with someone's neighbours or co-workers; and contacting and possibly threatening someone's new companion, spouse or children. Any or all of these actions results in the causing of fear for safety.
>
> To a certain extent several sections in the Criminal Code already cover the behaviour involved in these cases. These current provisions have been criticized by victims and various groups for several reasons, such as difficulty of proof and inadequacy of coverage. The offence proposed in the bill addresses these concerns.
>
> I believe we have created a new offence that will capture the sort of behaviour that we, as a society, want to prevent without interfering unjustifiably with anyone's rights or freedoms as guaranteed under the Charter.
>
> Undoubtedly, people have the right to move about freely and to communicate freely. But no one has the right to deliberately harass another person in a way that causes the other person to fear for their safety. The bill makes a clear statement that this is a crime.

[13] It therefore seems to me that section 264 (2)(c) is directed at a person who knowingly or recklessly keeps going to and looking and waiting at or keeping vigil or surveillance of another person's dwelling-house or place of work. This persistent conduct, which need not be violent, must cause the other person to feel at risk of being in danger and, it must also result in the other person having a reasonable apprehension of violence.

[14] In the case at bar, concerning the complainant Sharon Delaney, I accept and find that the accused appeared only once and that September 11, 2003 was the first and only time that she saw him. Further, subjectively, his presence in the neighbourhood was unusual and his behaviour, standing and staring in her direction and more directly, as she thought, at the playing children, was odd. Likewise, his presence made her feel uneasy but at no time were the children in her care disturbed. Additionally, the accused was apparently watching the children at play and he did so quite openly. I find that even though he crossed the street and stood by the fence he neither spoke to anyone nor made any threatening gestures at anyone. He merely looked silently for a total period of fifteen minutes and then left.

[15] True, his physical appearance and his odd behaviour may have caused the complainant some legitimate concerns. He was a total stranger, with a camera over his shoulder looking at playing children who were in her charge. Under those set of circumstances I think that it was natural for the complainant to feel uneasy. However, the issue is whether the accused conduct, strange and suspicious as it might have been, was criminal.

[16] The charge is that the accused beset and watched the house. However, the evidence points to the fact, which I accept and find, that he was actually watching the children at play and not the house. This was the conduct that caused the complainant some concerns. Therefore, viewed objectively, the conduct complained of, watching the children, was not reasonably capable of causing Sharon Delaney to fear for her own safety. I find that staring at the children, by itself was disconcerting. However, there was no verbal or other threats or pestering of any kind and there had been no imposition or other indication of an intent or desire to harm. There was no evidence of repeated and persistent watching of the dwelling-house. Thus, only staring at the children and nothing more, in my view, did not give rise to a reasonable apprehension of harm or violence. It also could not have harassed, within the meaning of section 264, Sharon Delaney.

[17] I therefore find and conclude that the accused did not knowingly or recklessly beset or watch the place of work of Sharon Delaney. She may have been concerned by his presence as he was watching the children playing but that is distinct to him harassing her and by his conduct reasonably causing her to fear for her safety. In the result, I am not satisfied that the Crown has established or proved beyond a reasonable doubt its case against the accused concerning Sharon Delaney. I find him not guilty as charged and will enter an acquittal on the record.

[18] On the charge relating to the complainants Jamie Ferguson and Melissa Trenbirth they alleged that he beset and watched the same dwelling-house. I accept and find that the accused was present at the dwelling-house on September 13, 2003 when Jamie Ferguson and Melissa Trenbirth, the homeowners, held a yard sale. He, however, was an invitee and was therefore permitted to be on the premises. Then, he purchased a book and Ferguson observed him watching the children who were playing. Given the information of the earlier similar conduct Ferguson felt somewhat perturbed but said nothing about this to the accused.

Nonetheless, without any incident the accused left the yard sale. As a result, I conclude and find that then the accused did not beset or watch the dwelling-house.

[19] I accept and find that later in the afternoon, they saw the accused in front of their dwelling-house. It is not clear from the evidence what precisely he was doing and I do not accept, without doubt, that he, at that point in time, beset and watched the house. Nonetheless, Ferguson approached him and enquired of him his name and the nature of his business in front of the house. I accept and find that the accused responded by giving his name and stated that he was from the Ivory Coast and was walking around making friends. Ferguson thought that this was odd but did not feel threatened by this conversation or the accused conduct.

[20] When the accused rang the doorbell later in the evening, again it cannot be said that this was an act in which he beset or watched the house. He came as he said to meet friends. When Ferguson informed him that he had no friends at the house the accused appeared to become upset but left, without incident, when Ferguson told to go.

[21] In my opinion, the evidence does not support the contention that the accused beset and watched the dwelling-house as alleged. True, he was at the dwelling-house, first as an invitee conducting lawful business. Second, he was outside the dwelling-house stating that he was looking to make friends but he did not persist or impose himself upon anyone and his conduct was not threatening. Third, when he rang the doorbell he stated that he was looking for a friend. However, when Ferguson told him that he had a mistaken belief that he had friends at the dwelling-house he departed without incidence and never returned.

[22] I would readily agree that the accused conduct appeared to be unusual and an aberrance. Undeniably, it caused Ferguson and Trenbirth concerns perhaps because of their children. The evidence that others saw him in the neighbourhood, in my view, adds nothing to the mix as there is also evidence that he lives in an adjacent neighbourhood. This, reasonably could support his contention that, as a foreigner, he was walking around making friends.

Conclusion

[23] Consequently, as I find that the accused did not beset and watch the dwelling-house it is reasonable to conclude and I do conclude, that any reaction, emotional or otherwise, manifested in or by Ferguson and Trenbirth was not as a result of this specified but unproven conduct of the accused.

[24] As a first step in finding any criminal fault, in the case at bar, the Crown must establish that the accused did, within the meaning of section 264, beset and watch the dwelling-house. On the evidence that I accept, the analysis that I have made and on the authorities referred to, I am not satisfied that it has done so beyond a reasonable doubt. Because each element of

the offence must be proved beyond a reasonable doubt I conclude and find on the total evidence that the Crown, has not beyond a reasonable doubt, proved its case against the accused with respect to the allegations concerning Jamie Ferguson and Melissa Trenbirth charged on the Information tried before me.

[25] The charge concerning the accused failing to comply with the condition to keep the peace and be of good behaviour, in light of my other findings, cannot stand on its own and must fail. Accordingly, I find him not guilty as charged and will enter an acquittal on the record.

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