

Citation: *R. v. Singh*, 2022 YKTC 37

Date: 20220923
Docket: 20-00600
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Killeen

REX

v.

PATRICK APURBA SINGH

Appearances:
Andreas Kuntz
Malcolm Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

Introduction

[1] The accused has been charged that he:

On or between the 18th day of September in the year 2020 and the 5th day of October in the year 2020 at the City of Whitehorse in the Yukon Territory, knowing that Georgette AISAICAN is harassed did without lawful authority repeatedly communicate directly or indirectly with Georgette AISAICAN, contrary to Section 264(2)(b) of the *Criminal Code*.

[2] The trial was heard on August 31, 2022. The Crown called two witnesses, a police officer and the complainant. There were admissions about the identity of the accused, the jurisdiction of the court and the dates of the events. The Crown filed a series of screen shots from the phone of the complainant showing ten missed calls from

the accused over the period of time in the information. The Crown also filed a series of text messages. The accused provided an oral statement at arrest and both the recording and a corrected transcript were filed in evidence.

The Evidence of Constable Karina Moore

[3] Constable Moore was working on August 28, 2020, when Ms. Aisaican, the complainant, and a victim service worker came to the Whitehorse detachment. The complainant explained to Constable Moore that she had been in a relationship with the accused. The relationship had ended. She did not want to hear from the accused. She was shaken, or on edge and not comfortable.

[4] What the complainant said to the police officer on August 28, 2020, was not in evidence. The evidence was that the complainant was upset and had been crying. She preferred to speak with the victim service worker involved. Constable Moore told her that she would go to see the accused.

[5] The first attempt was unsuccessful. Constable Moore did not find the accused at his home. She went back the next day and spoke to him. She told the accused that Ms. Aisaican did not want to speak to him. He told her that he knew that the relationship was over, but he still wanted to talk to her, or know that she was okay, or words along that line.

[6] Constable Moore warned him that continued communication would result in charges of criminal harassment. He should leave her alone. He should not go to see

her. She told him not to call Ms. Aisaican or her friends or her boss. He should not text her. If he did, there would be consequences.

[7] The accused was receptive. It was a smooth conversation. The officer followed up with the complainant by telling her what had happened.

[8] The next event was on October 5, 2020, when the victim service worker and complainant returned to the detachment. They turned over a series of screen shots of missed calls to her cell phone, which she identified as having come from the accused. They also turned over screen shots of text messages from the accused.

[9] As a result, Moore arrested the accused. He spoke with the officer after his arrest. No *voir dire* was required as the accused had clearly waived his right to counsel and the statement was given voluntarily. After the statement, the accused was released on an undertaking, which prevented contact.

[10] The statement was relatively brief. The accused was asked what was going on between himself and Ms. Aisaican. He replied:

Well we have had a long term relationship over twelve years, uh we have broken up many times um this is uh another breakup that we've had and I've respected Georgette's uh rights I have only tried uh contact her through telephone and texting however I just assume I was probably blocked so I haven't done anything untowards like driving by her house or trying to go to her house or trying to contact her through other means.

[11] He was asked:

But have you been sending her text messages?

[12] He responded:

Uh yes uh unfortunately sometimes I maybe perhaps would have a couple of drinks or something and then I would reach out to her but um I haven't done other than that. I would just assume it would have been very easy for her to block me from those messages given today's current technology.

[13] He was asked if anyone had told him to stop talking to her. He initially denied that that had happened, but then agreed that the officer had told him that.

[14] He was asked:

So why did you choose to message her after the RCMP asked you to stop and she asked you to stop?

[15] His response was:

Well I guess its just uh you know passion.

[16] He added later:

Well I have no malicious intent I have done nothing in the sense of trying to intimidate her or you know to do anything in the sense that would be considered stalking or untoward behaviour I have simply contacted her through messaging and texting and I think I did phone a couple times but as I said we have been through this many times and she has blocked me before and such so that's about it.

The Calls and Text Messages

[17] The record of missed calls is:

- September 19, 2020, 1:24 a.m.;
- September 26, 2020, 1:04 a.m., 1:06 a.m., 9:25 a.m., 3:40 p.m.;
- September 28, 2020, 9:52 p.m.;
- October 2, 2020, 1:21 a.m., 2:47 a.m., 1:41 p.m.; and

- October 4, 2020, 12:38 p.m.

[18] All calls were from the same number. The calls did not show as coming from the accused, but the evidence is that it was his number. The implication was that his information was not in her telephone contacts, but that she knew his number. The exhibit has the screen shots in a different order, but that is not material.

[19] The text messages also came from the same number, identified as his number. There is no dispute about him having sent the messages.

[20] They are as follows:

September 18, 10:04 p.m.

I love you

I'm getting 40k

I need you

Your wisdom

Call me

Or just tell me to fuck off

September 19, 1:25 a.m.

My mistake- didnt meant to call [sic] [this text immediately followed a missed call]

September 22, 8:03 p.m.

Here's a song for you...

Koop Island Blues by

Koop (a link was attached, but is not reproduced here)

September 26, 12:18 a.m.

Perhaps we could take

Talk

September 26, 1:34 a.m.

No mate- non trouble

Where did you go??

Goodnight!!!!

Call me

Phone smoke

No bullshit

September 26, 2:47 a.m.

I love you still

Forever

September 26, 3:55 a.m.

Tine is so short

Why should we waste

8t?

It?

September 26. 11:01 p.m.

1 phone smoke-call me please

Tuesday, 2:58 a.m. [the date is not noted, but must be
September 29]

I love you

Yesterday 1:25 a.m. [the date is not included, but must be
October 4]

I love you

I miss you
I don't give a fuck
Anynore [sic]
Yesterday 3:20 a.m.
I love you so much
Why don't you tell me to
Fuck.off again [sic]
Yesterday 12:21
Call me plesse [sic]
Yesterday 8:24 p.m.
Please call when you have a smoke

[21] The missed calls and the text messages form the total of communication from the accused. The evidence about “phone smoke” is that during their relationship, the accused and complainant would have telephone calls when each was having a smoke.

The Evidence of the Complainant

[22] The complainant testified by video from another location. The connection was strong and the video and audio were clear. The complainant has two adult children living with her. Her daughter has special needs and has always lived with her. Her son has lived away for work and university, but is back with her now.

[23] She was involved in a relationship with the accused for about eleven years. The accused had said twelve, but the difference is immaterial. She said that they had broken up many times over the last seven years or so. She agreed with a characterization that the relationship was a “dead end” relationship. When they would break up, the accused

would tell her that he loved her and that he would change. They would get back together. He would not change. They would break up.

[24] In July 2020, she decided that enough was enough and resolved to end the relationship forever. In mid to late July she told the accused that they were finished forever and she did not want him back. She said that she told him that she wanted no contact. She said it could be civil, or if there was any action from him, she would do whatever it takes to defend herself. She said that in past breakups, she had maintained communication with him. It had never worked out. By implication, she meant that communication lead to them getting back together.

[25] The former couple did not have a lot of shared responsibility for bills or finances. The one issue that did remain was a bill for internet. Although the details are not relevant, when there was a question of usage, the accused contacted the son of the complainant to resolve it.

[26] He did not have a lot of property to remove from her house. She remembered throwing away one sock and one book. Otherwise, he removed his property.

[27] The accused kept communicating with her. In late August, she checked on Google to see what resources were available. She found the information for victim services and contacted them.

[28] Her evidence was that she was trying to get out of her situation with the accused. She could not do it alone and needed help. She was fearful that she would be overwhelmed to the point where she would be back in the same situation. She felt she

needed separation for her emotional, mental and physical safety. There was no explanation or other evidence about what she meant by her physical safety. There were other comments about her emotional or mental safety, but no specifics were given.

[29] There was no evidence about what information she received from the victim service worker. There was no evidence about options considered, such as an application under the *Family Violence Prevention Act*, RSY 2002 c. 84. It appears that the only option considered was to go to the police.

[30] As a result, she and a victim services worker went to the RCMP in late August. Cst. Moore said she would speak to the accused after the meeting with the complainant. The complainant hoped that this action would get across that she wanted to be left alone. She said that at a different level, she was scared that this action would trigger him as he was unpredictable and she was scared.

[31] When asked about this, she said that she had been actively trying to get out of the situation for the last seven years. She had experienced a lot of being mentally and emotionally overpowered and manipulated back into the situation. There would be plans for the future and promises that were tossed aside when she accepted him back. It would not take long for the mental and emotional manipulations to start back up. She had a lot on her plate with her daughter and he would watch her energy levels. She found that the relationship caused a lot of stress and strain. He was very jealous.

[32] She had an underlying autoimmune disorder and the stress caused a lot of inflammation. She had not disclosed this to the police, or prior to trial. After the death of

the family member, she felt that there was purposeful cruelty surrounding her grief. This was not explained. She knew that she could not continue in the relationship.

[33] The communication did stop for three weeks, but started up again. The communication consisted entirely of the text messages and missed calls already noted. The complainant never saw the accused. There was no suggestion that he came to see her, or sent her anything. He did not contact any other person to try to communicate with her.

[34] There was no evidence about removing his contact information from her phone. As well, there was no evidence about why she did not block his calls and texts. It seems odd, but there is nothing from which to draw any inference about that.

[35] The complainant gave evidence about the relationship with him. The evidence was somewhat limited. For example, she said that he lived with her family until the end of July, but did not say when that had started. It was unclear how often they had broken up and reunited. It was unclear what he meant when he said he would change. The nature of their difficulties was not stated and was not necessarily significant.

[36] There was no evidence of violence or threats of violence in the relationship. The complainant had suffered some cruelty over the death of a close relative, but it was not clear what she meant by that. It was reasonable to assume that she was speaking of the accused in that context, but little else is known. The cruelty seemed to imply that he wanted her to focus on him, instead of her loss, but that is not clear from the evidence provided at trial.

[37] The complainant told the court that she had developed a safety plan. She now keeps objects at the doors of her home that can be used as weapons. That includes a snow pick and a broken shovel handle. She sleeps with a fob that would let her set off the panic alarm on her vehicle. Those measures indicate a substantial degree of apprehension or fear. Interestingly, there was no evidence to explain the cause of that level of apprehension or fear. She did not describe events or words that would have caused her to fear that someone would come to her home and need to be deterred by a weapon.

[38] Her concerns with the accused largely dealt with his efforts to manipulate her. He knew her. He knew her actions, her thoughts and her needs. He would use those things to get what he wanted. She did not expand on any of this. In the context, the manipulation seemed to be his promises to change and his focus on her needs to get her back into the relationship.

The Cross-Examination

[39] The cross-examination included excerpts from her statement to police on October 6, 2020. After she had turned over the text messages, the following exchange had taken place.

Q. Okay and how do you feel now?

A. I feel that, it's when I get a text message from him, it instantly drains my energy. And I feel like he is just reminding me that he is still there. That he's still around. And he knows my schedule. He knows what I like to do in the evening after I've put... like ending my day. I go out in my special spot in the back yard and look up at the stars and have a cigarette. He knows that I like to do those kind of things and so he tries...

He's been messaging me around that time and trying to get me to talk to him or calling me around that time. And, I'm not...

It just interrupts my time to do that.

My days are long because my daughter is so special needs. She needs assistance with every aspect of daily life. And, so that's kind of my down time, and I feel like he takes that away from me because he...

I'm sitting there and I get a text or a call either way...

My yard is...

I'm right next (inaudible) to Porter Creek where the kids walk through the woods to get to high school and that and so I'm always looking over my shoulder into the wooded areas and if I hear anything and people walk their dogs and stuff like that and I feel paranoid and I don't feel secure.

[40] Later, she was asked by the officer:

Q. Do you feel that you are in danger or you're going to be in trouble of physical harm?

A. I feel like in certain circumstances if he was like drinking alcohol he can be very unreasonable. He's not a big drinker and he doesn't have a problem drinking, but when he does, that when he will either be emotional or angry or just a mix of the emotions.

Q. Okay,

A. Makes me feel nervous because he can be unpredictable.

Q. And you, would you fear for your safety or your family's safety?

A. I would, I would feel very uncomfortable.

Q. Okay and also, so we talk about your physical safety, but we also, like your mental safety, so your mental health...

A. My mental health is what I am most concerned about, because I have my daughter to take care of and I need to be strong for her and he has always depleted that energy for himself and I can't, I just can't fight him. And physically, I just feel drained really, but mentally, that's the main thing because it has gone on so long.

[41] The complainant's evidence was not contradicted on any point. In her cross-examination, she largely confirmed things that she had said at other times.

The Law

[42] Criminal harassment is an offence under s. 264 of the *Criminal Code*. Part of the section reads:

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, engage 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.

[Prohibited conduct]

(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.

[43] Both counsel filed cases to assist the Court.

[44] *R. v. Ryback* (1996), 71 B.C.A.C. 175, considered (along with other issues) the relevance of pre-charge conduct. The Court of Appeal stated:

32 In my view, a similar test can be applied to a charge of harassment under s. 264. The appellant's conduct which is the subject of the charge is to be looked at objectively and in the context of all that preceded

it. Viewed in that way, the question is whether the complainant would reasonably fear for her safety by reason of the appellant's conduct between 1 December 1993 and 15 February 1994, given her knowledge of the appellant's prior conduct. It is therefore clear to me that the evidence of the appellant's pre-charge conduct was relevant to the issues of whether the complainant had fear for her safety and whether it was reasonable that the complainant should be fearful "in all the circumstances".

33 I am also of the view, however, that the pre-charge conduct is relevant to the appellant's intent, that is to say as to whether he knew or was reckless as to whether his conduct harassed the complainant. The appellant was warned by the police in the summer of 1992 to desist from the conduct of the previous six months. The complainant had consistently ignored or rebuffed the appellant's approaches. Any reasonable person would have understood at that time, and thereafter, that his approaches were unwelcome and a nuisance.

34 The appellant's state of mind would, of necessity, depend in large part on his past association with, and conduct towards, the complainant. His knowledge that the complainant was harassed, or his recklessness as to whether she was harassed, could be realistically decided only by looking back to what had gone before. Similarly, pre-charge conduct which tended to show an innocent state of mind on the appellant's part would also be admissible. If the pre-charge evidence tended to show that there had previously been a friendly relationship between the two, or that the complainant had encouraged the appellant in his advances so that the appellant believed his attentions were welcomed, it would be difficult to conceive a sound reason for excluding the evidence. It would clearly be relevant to showing an innocent state of mind and the absence of *mens rea*. If evidence of pre-charge events might be led to exculpate the appellant, then equally it would be admissible to inculpate him.

[45] *R. v. Noddle*, 2018 BCSC 1780, dealt with harassment in the case of two people who had met in grade school. After meeting again later in life, a disturbing course of conduct began.

[46] The Court repeated the elements of the offence as set out in *R. v. Scuby*, 2004 BCCA 28:

8 ...Those elements are summarized by the Alberta Court of Appeal in R. v. Sillipp 120 C.C.C. (3d) 384, leave to appeal to S.C.C. dismissed [1998] S.C.C.A. No. 3 as follows (at para. 18):

- 1) It must be established that the accused has [without lawful authority] engaged in the conduct set out in s. 264(2)(a), (b), (c), or (d) of the Criminal Code.
- 2) It must be established that the complainant was harassed [by the conduct].
- 3) It must be established that the accused who engaged in such conduct knew that the complainant was harassed or was reckless or wilfully blind as to whether the complainant was harassed;
- 4) It must be established that the conduct caused the complainant to fear for her safety or the safety of anyone known to her; and
- 5) It must be established that the complainant's fear was, in all of the circumstances, reasonable.

[47] The Court also noted that safety includes physical or psychological well being.

[48] The third and fifth components of the test were considered by the Manitoba Court of Appeal in R. v. Hyra, 2007 MBCA 69, where the Court stated:

20 From the above, the evidence shows that the accused initiated at least 27 unwelcome contacts (13 of which were made after having been warned by police to desist) that were relentless and recurrent over a three and a half year period. Though the number of contacts diminished after each police warning, it does not take away from the fact that the accused, knowing that his communications were unwanted and knowing that they caused her to fear him, continued to harass the complainant.

21 It is trite to say that not all harassment is criminal harassment. ...

...

23 What readily demonstrates that the accused's conduct in this case reached the level of criminal harassment under s. 264(2)(d) is his threatening conduct towards the complainant during Period III, when he threatens to "ruin her life." This threatening conduct is to be examined in

the context of all that preceded it. Indeed, the indictment specifies that the offence occurred between December 1, 2000 and August 2, 2004.

24 In this case, the evidence shows that, notwithstanding the short-lived nature of their relationship (if one accepts that one even existed), despite being warned on two different occasions by the police to leave her alone and even though he was charged and cautioned with criminal harassment after the second complaint (though no information was laid at that time), the accused continued to initiate, prior to the threat, 26 unwanted communications toward the complainant, 12 of which occurred after the warning.

25 The accused's conduct over a long period manifested unpredictability and an unwillingness or inability to exercise restraint or self-control, as shown by his disregard for police cautions and the charge. In all the circumstances, the fear the complainant felt was reasonable.

[49] The Crown also relies on *R. v. Sidhu*, 2021 ABCA 56. The Court stated that when addressing the reasonableness of the complainant's fear, all the circumstances must be considered. The particular vulnerabilities of the complainant are not excluded. Mental, emotional or psychological trauma may be included in reasonable fear. The nature and extent of the conduct, as well as the measures used to discourage the conduct are to be considered.

[50] The accused relies on comments in *R. v. Amos*, 2015 YKSC 20, and *R. v. George*, 2002 YKCA 2. Both consider the reasonableness of any fear. Both have a factual basis that is very different from this case.

[51] In the present case, counsel have focussed on some aspects of the requirements. The evidence has established that the communication was from the accused, to the complainant. The communication was repeated. The complainant says that she was subjectively harassed. His communications caused her to suffer stress and aggravated an autoimmune issue.

[52] The issues that remain include whether the Crown has proven that the accused knew that communication was harassment and whether, objectively viewed, the communication reasonably caused fear in the complainant.

The Warning

[53] A warning by police that if a person continues to communicate with another person, they will be charged with criminal harassment would normally be evidence that the warned person should know that the recipient of the communication feels harassed. That is relevant to the intention of an accused under the third requirement as set out in the case law.

[54] The evidence of the officer was that she told the accused that the complainant did not want to speak to him. The accused told her that he cared about the complainant and wanted to know if she was all right. In response, he was told that further communication would result in a charge of criminal harassment.

[55] There was no evidence that the accused was told anything more about the impact that his communication was having on the complainant. Perhaps that would be appropriate, if telling the accused would only cause the potential for harm. In many cases, a complainant might want to keep private from the accused the knowledge of the impact of his actions. Here, there is no evidence that the officer even knew of the impact. She did not tell him that his communication was causing the complainant fear.

[56] Not all communication is criminal harassment. The accused would have been entitled to ask for return of his book. He was entitled to ask to have the internet usage

reduced to avoid extra charges. He did not pursue the first item. He contacted the complainant's son over the second item.

[57] It is not clear from the warning that the accused was aware that further communication would be harassment. He just knew that she did not want to talk to him. In the context of their decade plus relationship, that was something that had happened before. She would block his calls.

The Objective Test

[58] The test requires that the Crown establish that the complainant's fear was reasonable, in all of the circumstances. That includes the number of communications, the nature of the communications, the background of the relationship between the parties and the frailties of the complainant.

[59] There were ten missed telephone calls on five days, over a period of about three weeks. Obviously, there was no content to the calls. The timing of the calls, late at night, in the case of five of them, would itself be irritating or worse, but for the fact that it seems to have been a normal time for the two of them to speak. Objectively speaking, I do not conclude that ten missed calls alone on five days over three weeks would lead to fear.

[60] There were twelve text messages on six days over the same three weeks. The content was included earlier in this decision. None of the content is objectively likely to cause fear. The texts sent late at night were sent at a time that apparently was a time at which the parties had communicated in the past. The texts are consistent with the

accused trying to let the complainant know that he still loved her, or wanted her advice, or just wanted to talk.

[61] Although the content of the texts is not objectively likely to cause fear, the analysis must also include consideration of all of the circumstances. An innocuous message might have a chilling meaning when other factors are considered.

[62] The complainant described her frailties, in so far as the accused was concerned. He knew her routines. He knew when she would be doing things. He knew her needs. She described him as being manipulative. She had decided that she needed to break off communication, in order to end the relationship. After earlier breakups, they had continued to communicate and she had always ended up going back to him.

[63] Nothing was said about fear of him. There was no evidence suggesting abuse or threats. Her evidence about manipulation was in the context of him getting her to come back into the relationship.

[64] The relationship was described as being a dead end relationship. Whatever that meant to the complainant, it does not suggest that she was fearful of him. Rather, she knew that the only way to keep from getting back together with him was to cut all communication. That may be insightful and appears to have been successful. It does not mean that his actions, in totality were likely to cause her to be fearful.

[65] The history was that they had broken up several times over the last seven years. On every other occasion, they re-united. He thought that she had blocked his calls or messages, since she had done that on other occasions. He did not go to her home. He

did not go to any other location where she might have been. He did not send her things. He did not contact others to communicate with her. There was no evidence that he had done anything to cause her fear. Her fear was apparently that she might be manipulated into taking him back. Objectively, that cannot be the type of conduct that rises to criminal harassment.

[66] In the result, Mr. Singh is not guilty.

KILLEEN T.C.J.