SUPREME COURT OF YUKON

Citation: *R v Amos*, 2015 YKSC 20

Date: 20150506
S.C. No. 14-AP010
Registry: Whitehorse

Between:

REGINA

Respondent

And

ALAN DOUGLAS AMOS

Appellant

Before: Mr. Justice L.F. Gower

Appearances:

Ludovic Gouaillier — Counsel for the Respondent
J. Robert Dick — Counsel for the Appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal by Alan Douglas Amos from convictions by Deputy Territorial Court Judge Luther on September 23, 2014, for offences of criminal harassment and breach of recognizance. The offences were alleged to have occurred between January 21 and June 1, 2014. The complainant on the criminal harassment charge is Joanne Murphy. She is a close friend of Shannon Knowles, who was separated and hiding from Mr. Amos. The breach of recognizance is for failing to keep the peace and be of good behaviour as a result of committing the offence of criminal harassment.

Therefore, if Mr. Amos is successful on the appeal from the conviction on criminal harassment, then the conviction for the breach will also necessarily fall.

[2] The grounds of appeal put forward by Mr. Amos' counsel in his outline can be distilled down to two:

(a) the trial judge's verdict was unreasonable; and

(b) his reasons were insufficient to allow for meaningful appellate review.

LAW

[3] Criminal harassment is generally set out in s. 264(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Code*"):

> 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.

[4] Of the four types of harassing conduct referred to in ss. (2), Mr. Amos was specifically charged under s. 264.(2)(b) of the *Code*:

> (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;

[5] The Alberta Court of Appeal in *R. v. Sillipp*, 1997 ABCA 346, ("*Sillipp*") at para. 18, set out the five essential ingredients of the offence of criminal harassment which all must be proven beyond a reasonable doubt:

1) It must be established that the accused has 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.

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.

[6] Regarding the repeated communication referred to in s. 264(2)(b), the Ontario Court of Appeal in *R. v. Ohenhen* (2005), 77 O.R. (3d) 570 held that, depending upon the circumstances, the *actus reus* (guilty act) of the offence may be proved where the conduct occurs more than once. However, that is not to say that if there are only two instances, that the *actus reus* will be proven. It will depend upon the circumstances.

[7] Referring to other authorities from the Ontario Court of Appeal, the Court in *R. v Alvarez-Gongora*, 2014 ONCJ 712, ("*Alvarez-Gongora*") at para. 42 further clarified the nature of the offence as follows:

> 42 For the complainant to have been harassed or to have felt harassed, it is not enough for the complainant to have been "vexed, disquieted or annoyed". To have been harassed means to have been "tormented, troubled, worried continually or chronically, plagued, bedeviled and badgered". I note that these terms are not cumulative. It can be enough for harassment if any one of these terms is established.

[8] *Alvarez-Gongora*, at para. 44, also confirmed that a court must take a contextual approach in determining whether criminal harassment has been proven, including considering the background of the relationship and the history between the complainant and the accused:

> 44 When the Court is considering whether the elements of the offence have been made out, the approach is a

> contextual one. It is a question of fact for the Court to determine in each case. The Court must consider the conduct that is the subject of the criminal harassment charge against the background of the relationship and the history between the complainant and accused.

[9] With respect, the trial judge's reasons were very lean, consisting of only 12 paragraphs over fewer than two and one-half double-spaced pages. However, *R. v. Sheppard*, 2002 SCC 26, makes it clear that deficiencies in the reasons will not necessarily justify intervention by an appellate court, providing that court is not prevented from conducting a meaningful appellate review of the correctness of the decision (paras. 25, 26 and 28). At para. 55, the Supreme Court summarized the principles regarding adequate reasons as follows:

> 1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.
>
> 2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.
>
> 3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.
>
> 4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.

5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the *Criminal Code*, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.

6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key, issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.

8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact, the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.

10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso. (my emphasis)

[10] Finally, in assessing the reasonableness of the guilty verdict on the criminal harassment offence, my role as an appeal judge is not to retry the case or simply substitute my views for those of the trial judge. Rather, it is to determine whether there was evidence on the record to support the verdict: *R. v. G.W.* (1996), 93 O.A.C. 1, at paras. 18, 19 and 22.

[11] None of this law is controversial on this appeal.

ANALYSIS

[12] In my view, despite the brevity of the reasons, there is evidence to support the trial judge's conclusion that the five ingredients of the offence of criminal harassment set out in *Sillipp* had been proven beyond a reasonable doubt. The only one of the five which gave me reason for pause is whether Ms. Murphy's fear was, in all the circumstances, reasonable. In a moment, I will go through each of the five ingredients and discuss the evidence in support, as well as the overall context. However, before I do that, and given that the trial judge's reasons were so short, it may be helpful to include the relevant paragraphs from his Reasons for Judgment (2014 YKTC 61):

> 2 A longstanding relationship between Joanne Murphy, Joseph Szulinszky, and the defendant broke down after 12 years or so because Joanne Murphy, a close friend of Shannon Knowles (who was separated and hiding from the defendant) would not disclose Shannon Knowles' location to the defendant.
>
> 3 The defendant was ordered several times to leave their home by Joanne Murphy, but this was largely thwarted by Joseph Szulinszky, who continued to have the defendant over for coffee.
>
> 4 As to communications, which is the central point of this charge, the defendant did say to Joanne Murphy, "I know you're still talking", which is obviously a reference to Shannon Knowles. Joanne Murphy stood by her friend,

> Shannon Knowles, and refused to disclose her location to the defendant. Frustrated, the defendant called Joanne Murphy at work, from her own house phone, and called her a "stunned cunt". The defendant went to her workplace, the Whitehorse Air Tanker Base, and told an acting supervisor, Walter Nehring, that she was providing drugs to co-workers. Walter Nehring described him as agitated, walking to the door with purpose, and not normal. The defendant repeatedly told Joseph Szulinszky that she was meeting men for coffee all the time, and having an affair with Kim.
>
> …
>
> 6 The defendant is a very large man, well over six feet tall, and well over 200 pounds. Joanne Murphy is an average size woman, perhaps five-foot-five. She feared for her safety, but in fairness, indicated, "this was all about Shannon, not about me".
>
> 7 The threefold discussions outlined above are sufficient to constitute an offence under s. 264(2)(b). The fivefold test in *R. v. Sillipp,* 1997 ABCA 346 is met.

[13] In his Reasons for Sentence, cited as 2014 YKTC 62, the trial judge further clarified what he meant by the “threefold discussions”, at paras. 4 through 7:

> 4 The three aspects of the case that led rise to the conviction under s. 264(2)(b) had to do with:
>
> 5 The defendant calling Joanne Murphy at work from her own house phone and referring to her in the most disgusting and degrading of terms;
>
> 6 Secondly, the defendant actually going to her workplace and speaking in an aggressive manner with the acting supervisor to tell him that she was selling drugs to her co-workers. The acting supervisor, Mr. Nehring, was an excellent witness and very balanced in his approach. He indicated how agitated and abnormal Mr. Amos was;
>
> 7 And thirdly, the defendant repeatedly telling Mr. Szulinszky, Joanne Murphy's partner, that Joanne Murphy was meeting men all the time and having an affair.

1. Was there evidence of repeated communication?

[14] The trial judge made a finding of fact that there were three different types of communication which constituted criminal harassment. The appellant does not seriously dispute that there is evidence to support this finding.

[15] The trial judge further found that Mr. Amos "repeatedly" told Mr. Szulinszky that she was meeting men all the time and having an affair. Here, the appellant's counsel points out that there is apparently conflicting evidence on the point. In direct examination, Ms. Murphy testified about what happened after the confrontation she had with Mr. Amos at her home on June 1, 2014[1], when Mr. Amos told Mr. Szulinszky about the affair, and Ms. Murphy told Mr. Amos to get out of her house:

> Q And after that time, where, you know, you had this exchange, you told him to leave, he wouldn't leave, took his time, did he come back?
> A Yes. Not the same -- I don't know if it was the same day, but, yeah, he just kept coming back anyway like -- like nothing, it didn't matter what I said. So, I had got Joe to say something to him.
> …
> Q No, but I'm talking -- sorry, I should have been more specific. How many times did he come and you were there?
> A At least another two, three times.

[16] In cross-examination, Ms. Murphy testified as follows:

> Q Okay. So, June 1st you had enough of him --
> A Mm-hmm.
> Q -- you told him to leave, he didn't leave right away. You told him to come back [as written]. And other than getting his stuff, he didn't come back?
> A Yeah. As far as I know, yeah.

[1] Ms. Murphy later testified that she was at home that day, which was a Friday and her day off. Therefore, she had to be mistaken about the date because Friday of that week was May 30, 2014. Ms. Murphy also testified that she worked on the following Saturday and Sunday and that Mr. Amos came to her workplace on Sunday, which would have been June 1, 2014.

[17] While there is admittedly some vagueness in this testimony, it was open to the trial judge to conclude that Ms. Murphy's answer in cross-examination was in reference to not coming back again on June 1st, rather than to not coming back on any other day following.

[18] In any event, the harassing conduct by Mr. Amos occurred more than once, which meant that it was open to the trial judge to conclude that the *actus reus* had been proven: *Alvarez- Gongora*, at para. 41.

2. Was the complainant harassed?

[19] Again, Mr. Amos' counsel did not strongly contest the evidence that Ms. Murphy subjectively felt that she had been harassed. One of the best examples of this is in the testimony of Walter Nehring, Ms. Murphy's acting supervisor at her workplace on the day Mr. Amos came to visit. He testified that when Ms. Murphy noticed Mr. Amos at the workplace, she referred to him as the man who had been "harassing" her for the last two months:

> A Well, at about that point about that point Joanne Murphy showed up, walked through the gate, and started yelling that, "This is the man who's been harassing me for the last two months," and you better get out of here…"

[20] I also note here that it is sufficient for the evidence to indicate that Ms. Murphy felt "troubled" by the repeated communications in order to constitute harassment: *Alvarez-Gongora*, at para. 42.

3. Did Mr. Amos know Ms. Murphy was harassed, or was he reckless or willfully blind as to that fact?

[21] There is evidence to support any of these three states of knowledge in the testimony of Joseph Szulinszky. He said that Ms. Murphy had asked him to ask Mr. Amos

not to come over to their home anymore, because she was no longer comfortable with his presence. He then testified as follows:

> Q And did Ms. Murphy, Joanne, did she ever ask you to tell him not to come by anymore?
> A Yes, she did. She did ask me on two or three occasions to say something to him --
> Q Okay.
> A -- and I had at times said things to him about it.
> Q Okay. About not coming?
> A Yes. I told him that it would be wise if he didn't come over because she's pissed at him. And he would still come over at times just to piss her off…

[22] There was also some evidence from Mr. Amos himself which is capable of shedding light on his knowledge of how his conduct was being received by Ms. Murphy. It turned out that on the day of the trial, Mr. Amos had a brief confrontation with Ms. Murphy and Mr. Szulinszky outside of the courtroom, while the witnesses were waiting for the trial to begin. At that time, Mr. Amos was subject to both a recognizance and an undertaking not to have any direct or indirect communication with Ms. Murphy. Ms. Murphy testified that she and Mr. Szulinszky were sitting with a victim services worker when Mr. Amos came directly up to them, dropped a bag in front of them and mumbled something about a man named Kim and a "grow op". When asked about this in cross-examination, Mr. Amos testified:

> Q So, you did talk to them this morning?
> A I don't care about them.
> Q You did talk to them this morning?
> A I don't care anything about those people.
> Q Yeah.
> A They can go jump off a bridge as far as I care.

4. Did Mr. Amos' conduct cause Ms. Murphy to fear for her safety or the safety of anyone she knew?

[23] There are numerous examples in the evidence to support the trial judge's finding that Ms. Murphy was afraid of Mr. Amos as a result of his harassing conduct. Most of these come from Ms. Murphy herself. For instance, she testified that after Mr. Amos had been to her workplace, she called the RCMP to register her complaint:

> Q And did you -- did you speak to the RCMP?
> A Yes, I did.
> Q They took a statement from you?
> A Yes, she did.
> Q And did you express concerns at the time about your --
> A Yes, I did.
> Q -- safety and so on?
> A Yeah.

[24] And later:

> Q Okay. So you described many times, you described instances where he would come to your home and make these comments about -- about Ms. Knowles and so on and women. How did that make you feel? You said it --
> A Scared.
> Q -- but, again, I want you to -- perhaps just go over it specifically.
> A At the beginning I just kind of ignored it, but as the anger progressed it scared the hell out of me, to be honest with you because it's like I was -- I don't want to piss him off. Like, I'm scared. I'm -- I'm scared of him. I don't trust him. I don't know --
> Q I'm sorry?
> A I'm scared of him. I don't trust him. I don't know what's -- the way he's thinking anymore.

[25] In cross-examination, Mr. Szulinszky testified about the arguments Mr. Amos had with Ms. Murphy at their home:

> Q Okay. They just went into arguments?
> A Just…

Q Did she ever say to you, like, express that -- that she's afraid for her safety?
A Oh, yeah. Oh, yeah. Oh, yeah.
Q In what way?
A She was afraid of him.
Q In what way?
A Well, he's a large man and he has a temper.

[26] Mr. Amos' counsel emphasized a passage from Ms. Murphy's cross-examination which he suggests contradicts the above testimony:

Q Okay. Now, when you had the dealings with Mr. Amos, it was really annoying to listen to what he had to say, would you say?
A No, it was more insulting than anything else.
Q Or insulting?
A Insulting and -- and scary in a way because of the anger.
Q Okay. But was his anger directed at you or Joanne [sic]?
A No, it wasn't directed at me. I -- I don't -- it was just directed -- it was anger. Like, I -- I don't think he was angry at me; there was no reason for it.

[27] Although the offence of criminal harassment under s. 264(1) allows the Crown to prove either that the complainant had "fear for their safety or the safety of anyone known to them", in this particular case, the information specified that the repeated communication caused Ms. Murphy to "fear for her safety". Therefore, arguably, it was not open to the trial judge to rely on evidence that Ms. Murphy feared for the safety of her friend Ms. Knowles. It may be that he meant to do just that when he concluded, at para. 6 of his reasons, that: "[Ms. Murphy] feared for her safety, but in fairness, indicated, "this was all about Shannon, not about me."" Nevertheless, looking at the evidence as a whole, I am satisfied that there was evidence capable of allowing the trial judge to make the explicit finding that Ms. Murphy "feared for her safety".

5. Was Ms. Murphy's fear reasonable, in all of the circumstances?

[28] Mr. Amos' counsel argued that the three forms of communication relied upon by the trial judge in order to convict his client neither individually, nor taken together, provide objective justification for Ms. Murphy's fear. He asked me to remember that Mr. Amos was going through a conjugal separation, was understandably upset about that, and was also understandably not on his best behaviour as a result. However, counsel stressed that Mr. Amos' bad behaviour did not cross the threshold into criminal conduct.

[29] Crown counsel argued that I must consider this aspect of the *Sillipp* test in the context of the entirety of the evidence at the trial, including the evidence that Mr. Amos made further unlawful contact with Ms. Murphy on June 16, 2014, at the Whitehorse courthouse, as well as on the trial date of September 22, 2014. Mr. Amos was separately charged for breach of recognizance and breach of undertaking for the June 16th contact and was convicted by the trial judge of those offences. Neither are the subject of this appeal.

[30] With respect to the contact on June 16, 2014, there was evidence that Mr. Amos himself went to the RCMP detachment immediately afterwards to try and register a complaint that Ms. Murphy was stalking him. He was unsuccessful in this regard, however his conduct indicates the level of animosity he harboured towards Ms. Murphy.

[31] As for the contact on September 22, 2014, there was evidence from both Ms. Murphy and Mr. Szulinszky of a further incident which occurred as they were driving into Whitehorse for the trial from their home in the rural subdivision of Mendenhall, where Mr. Amos also resides. According to Ms. Murphy and Mr. Szulinszky, Mr. Amos passed by them very quickly in his vehicle, stuck his hand through the sunroof and gave them the

finger. Then, when Mr. Amos confronted Ms. Murphy and Mr. Szulinszky at the courthouse, he apparently was making some reference to Ms. Murphy continuing to be involved in illegal drug activity with the man named Kim, the same man Mr. Amos believed she was having an affair with. This is further evidence of his animosity towards Ms. Murphy, which the trial judge could properly have taken into consideration.

[32] The fact that there were two further incidents of repeated communication after those relied upon by the trial judge to make out the offence is nevertheless part of the overall context which the trial judge could properly have had in mind in assessing the reasonableness of Ms. Murphy's fear of Mr. Amos during the time period set out in the information, which was on or between January 21 and June 1, 2014.

[33] Overall, the context of the evidence was that Mr. Amos was upset generally with women following his separation from Ms. Knowles. He was further sufficiently upset with Ms. Murphy to make allegations to her partner that she was being unfaithful, to telephone her at her workplace and call her a "stunned cunt", and to physically attend at her workplace to make unsubstantiated allegations that she was selling drugs to co-workers. Mr. Amos also either intentionally ignored the court orders (recognizance and undertaking) preventing him from having any contact with Ms. Murphy on June 16 to September 22, 2014, or was so obsessed or angry towards her that he could not stop himself from making contact on those occasions. Finally, Mr. Amos was known by Ms. Murphy to be a big man with a temper whom she did not trust. Even Mr. Amos himself testified:

> I'm just a 6 foot 2 blonde-haired guy that weighs 262 pounds that's got a really bad attitude at times with people like that.

[34] I am satisfied that in the context of the evidence as a whole at the trial, it was open to the trial judge to conclude beyond a reasonable doubt that Ms. Murphy's fear of Mr. Amos was objectively reasonable.

CONCLUSION

[35] The appeal is dismissed.

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GOWER J.