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R. v. George, 2001 YKSC 2

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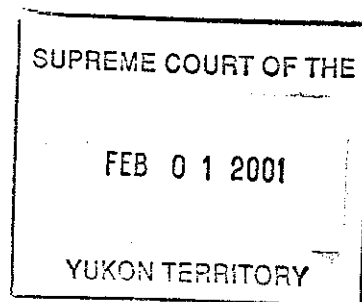
IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

ROY GEORGE



DAVID MCWHINNIE

For the Crown

SCOTT NIBLOCK

For the Defence

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

INTRODUCTION

[1] VEALE J. (Oral): Roy George is charged with criminal harassment of M.O. pursuant to s. 264(2)(d) of the *Criminal Code*.

[2] He is also charged with committing an assault and failing to comply with his recognizance. I acquit Mr. George of these charges, as no evidence was

presented. Certain hearsay from Constable Letendre was not confirmed by the complainant.

[3] The issue before the Court is whether it has been proved beyond a reasonable doubt that the conduct of Roy George on October 24, 2000 was contrary to s. 264(2)(d). The section is set out below:

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.

(2) The conduct mentioned in subsection (1) consists of

...

(d) engaging in threatening conduct directed at the other person or any member of their family.

[4] It should be noted that the main purpose of these sections, often referred to as the "stalking law," is to enable the police to take timely action to save women from becoming victims of violence before it is too late. (See *R. v. Ryback* (1996), 105 C.C.C. (3d) 240.(B.C.C.A.))

[5] The elements of the offence of criminal harassment have been set out in *R. v. Sillipp* (1997), 120 C.C.C. (3d) 384 (Alta. C.A.). The following questions must be considered:

1. Did Roy George engage in threatening conduct to M.O. as set out in s. 264(2)(d)?
2. Was M.O. harassed?
3. Did Roy George know that M.O. was harassed or was he reckless or wilfully blind as to whether M.O. was harassed?
4. Did the conduct of Roy George cause M.O. to fear for her safety?
5. Was M.O.'s fear, in all of the circumstances, reasonable?

THE FACTS

[6] M.O. is a pleasant, friendly young woman. Although she was 24 years old at the time of the incident, she appears to be more like a young teenager. This is because she has limits to her intellectual ability, which her mother described as a learning disability. Her mother advised that no diagnosis has been given. M.O. has a distinct but mild speech impediment. She attends the Challenge Program, which I understand to be a program that trains, provides work, and finds jobs for people with a variety of challenges. No evidence was presented on the Challenge Program, but the location of the program in Whitehorse was referred to often in the evidence.

[7] I say all of this because I must take M.O.'s ability into consideration regarding her evidence. On the one hand, there may be some danger in accepting some of her evidence. On the other hand, her handicap or challenge should not be a disadvantage to her. Nor should it be an infringement of the

rights of Mr. George to be presumed innocent until proven guilty beyond a reasonable doubt.

[8] M.O. gave her evidence in a forthright manner. She was clearly nervous and anxious to get it over with. She described the events of October 24, 2000.

[9] Her mother met her on the previous day. Her mother is not happy with M.O. living with her boyfriend and tries to convince her to come home. M.O. was keeping an eye out for her parents.

[10] She said that she and her boyfriend walked downtown from their apartment in Riverdale, a suburb of Whitehorse. Her boyfriend was going to a government office for a meeting and she was going to the Challenge building to start work at 1:00 p.m. They parted near Riverside Grocery and she continued down Second Avenue, which is a major downtown street in Whitehorse. She was proceeding in a northerly direction.

[11] When she reached the H & R Block office at Hanson Street, she noticed that she was being followed by "a guy" on the other side of the street. She identified him as Roy George. She wanted to walk along First Avenue to get to the Challenge building.

[12] Roy George stopped M.O. somewhere in the area between Closeleigh Manor, a senior's residence with some offices, and the Yukon Electric office at First Avenue and Elliott Street. Emma Sam, an interpreter, whose office is in the Closeleigh Manor building, saw Roy George outside her office window at that time.

[13] M.O. testified that Roy George said he would pay her money to go for a walk with him. She stated that he walked beside her and wanted to pay her \$20. A \$20 bill was later found in the possession of Roy George. She said she was scared and didn't know why he wanted to give her money.

[14] Cecile Gail Terris works at the Yukon Electric office. She returned to her office after lunch at 1:00 p.m. As she was entering the back door of the Yukon Electric building, Ms. Terris saw a man and a woman quite close together near a parking meter on the sidewalk. She overheard the woman say two times and in a loud voice, "I have to go now." It took about five minutes for Ms. Terris to reach her office. When she looked out the window she saw the woman heading back to First Avenue. She cannot identify the man or the woman, but she said the woman had a lisp or speech impediment.

[15] Ms. Terris said the woman did not seem frightened, but there was something wrong. She said it was odd that the woman spoke in such a loud

voice. She said the incident didn't cause her concern and the woman didn't appear to be in need of assistance. Ms. Terris did not see Olga Anderson.

[16] Olga Anderson works at the First Nations Health Program at the Whitehorse General Hospital. She had driven downtown at lunch hour with an acquaintance. Ms. Anderson takes a Tlingit language class at the Aboriginal Language office in Closeleigh Manor during the noon hour, from 12:00 noon to 1:00 p.m. She parked on the corner of First Avenue and Elliott Street and went to her class. She had agreed to meet her acquaintance at Tim Horton's on Second Avenue and then return to her car and drive back to the Whitehorse General Hospital.

[17] As she went from Second Avenue to First Avenue, on the north side, she saw and heard M.O. She appeared to be talking to a man on the same side of the street, near the Yukon Electric building. M.O. was hollering at the man. He was walking away from M.O., towards Tim Horton's. Ms. Anderson heard M.O. say, "Quit following me and leave me alone."

[18] Ms. Anderson says that they were 20 feet from M.O. when the man passed them. Ms. Anderson had seen M.O. before, but she did not know the man.

[19] Ms. Anderson testified that M.O. was very frightened and nervous. M.O. was standing behind some cars parked on the street. Ms. Anderson spoke to

M.O. to calm her down and see what help she needed. M.O. said she would be all right, and walked briskly back to First Avenue and went north.

[20] Ms. Anderson went to her car. M.O. suddenly appeared again. This time she was running south on First Avenue, back to Elliott Street. She then crossed Elliott Street to the south side and ran towards Second Avenue. M.O. dropped a red mitt and Ms. Anderson's acquaintance pointed it out to M.O. M.O. said she would get it later.

[21] As M.O. ran up Elliott Street to Second Avenue, Ms. Anderson returned to her car on First Avenue, in front of Closeleigh Manor. Ms. Anderson wondered what was wrong. M.O. had been frightened of the man, but he was no longer in view. She decided to return to the hospital.

[22] Ms. Anderson does not like to make left turns onto Second Avenue, as it is a busy street. She drove to Lambert Street and went around the block completely, back to First Avenue. She then turned left onto First Avenue and left onto Main Street. She decided to go back to the hospital via Fourth Avenue. The sequence of events described are best understood by reference to Exhibit 1, which is a scale drawing of the streets in question.

[23] As she was driving along Fourth Avenue, she noticed the same man again, going southerly along Fourth Avenue (the same direction that Ms. Anderson was

travelling). As the man went into the Sport Yukon building, M.O. was across the street, running towards an apartment block (4050 Fourth Avenue) with a fenced yard. M.O. said that she thought she was being followed by the man again and she was scared.

[24] Ms. Anderson was very concerned at this point and pulled over to see if M.O. was all right. She described M.O. as anxious, upset and frightened. However, M.O. said she could wait at the apartment building until her boyfriend was finished his work. Ms. Anderson informed M.O. that the man, later identified as Roy George, was following her.

[25] Ms. Anderson was about to carry on to the hospital when she saw the same man again. She was looking in her rear-view mirror, and saw him cross Fourth Avenue and go up Rogers Street, which is on the north side of the city block containing the apartments at 4050 Fourth Avenue.

[26] Ms. Anderson decided it was time to find out what was going on. She drove around the block once, back to Fourth Avenue. She didn't find the man, as he cut across the property from Rogers Street to Lowe Street. Ms. Anderson drove up Lowe Street. The man appeared walking on Lowe Street towards the 4050 Fourth Avenue apartments. Ms. Anderson got out of her car and walked after him. She said, "Excuse me," and the man extended his hand and said, "I'm Roy George." She confronted him about the young girl. Roy George said he

didn't know what she was talking about. Roy George said he was lost and was looking for a friend on Taylor Street to return videos. He started to unzip a horizontal zipper to show her the videos. However, Ms. Anderson was unnerved at this point and decided to get back into her car and return to the hospital, where she phoned the R.C.M.P. She identified Roy George in court. She did not know who it was until he identified himself. I accept the evidence of Ms. Anderson. She estimated that the duration of the entire incident, from when she first saw M.O. to her arrival back at the hospital, was about 15 to 20 minutes. The hospital is across the Yukon River from Closeleigh Manor.

[27] Bruce Webber rents the apartment where M.O. sought refuge. He described M.O. as scared and "shooked up." She wanted to call the police and stay with him until they arrived. After the R.C.M.P. arrived, Constable Letendre observed M.O. to be very scared, anxious and talking quickly. M.O. identified Roy George across Fourth Avenue, coming out of the High Country Inn parking lot.

[28] Although M.O. said she didn't know Roy George, she acknowledged there had been three previous contacts between them.

[29] The first contact was at the Kwanlin Dun village, which is located in Whitehorse. The date is unknown, but it appears to be before she met her present boyfriend, which was approximately one year ago.

[30] On that occasion, M.O. said that Roy George had "tried to bother me in a certain way." He invited her into his basement as she walked by. She said she didn't want to go, but I find that she did go to his basement, although she was able to "leave and get away." She acknowledged that Roy George loaned her music tapes on that occasion.

[31] The second contact was in Riverdale, when she was having problems with her bike. Roy George apparently helped her fix it. This incident was after she first met her boyfriend. M.O. agreed that Roy George was nice to her on this occasion.

[32] The third contact was at the Salvation Army soup kitchen, sometime before the October 24, 2000 incident. Her boyfriend was present. Roy George approached her and asked how she was doing and she said she was okay.

[33] It is also important to note that the presence of Roy George in Whitehorse has had some extensive publicity. Constable Hrankowski testified that on May 26, 1999, the R.C.M.P. issued a press release advising the public that Roy George was in the community. Again, on May 25, 2000, a similar press release was issued. On each occasion a photo was released.

[34] M.O. was told by her boyfriend and his mother that Roy George was dangerous and she should stay away from him for her own safety.

[35] There are two apparent discrepancies in the evidence of M.O. The first relates to the explanation that M.O. gave for returning back along First Avenue and running up Elliott Street towards Second Avenue. On the day in question, her mother stated she was not looking for her. Defence counsel suggested to her that when she came running back along First Avenue and up Elliott Street, she was running because she saw her parents. M.O. did say at one point that she was running away from her parents and that guy. However, she subsequently clarified this by saying that she was running away from the guy and not her parents. She agreed she did not want her parents to see her. I am satisfied that she was running from the man she feared and not because she saw her parents.

[36] The second discrepancy relates to the route that she took to get to Fourth Avenue. Ms. Anderson last saw her heading west on Elliott Street towards Second Avenue. In cross-examination, it was suggested that she went to Fourth Avenue past a gas station and a Mexican restaurant and through a park. This would bring her out onto Fourth Avenue by the Sport Yukon building. The discrepancy alleged by counsel for Mr. George is that he could not have been following M.O. since he was seen by Olga Anderson near the Video Update store at Fourth and Elliott. I find no discrepancy at all, as Ms. Anderson said Roy George was behind M.O. but on the opposite side of the street.

[37] I have concluded that I accept the evidence of M.O. despite its brevity regarding the events she describes. Although her evidence is childlike, it is forthright and credible.

[38] I find the following facts:

1. Roy George followed M.O. from the corner of Second Avenue and Hanson Street (H & R Block) until he left her outside the Yukon Electric building on Elliott Street.
2. At the Yukon Electric building, Roy George offered M.O. \$20 to go for a walk with him.
3. M.O. was fearful for her safety as a result of the incident with Roy George. She continued north on First Avenue but suddenly retraced her steps and began running up Elliott Street towards Second Avenue and a place of refuge.
4. Roy George continued to follow M.O. as she ran along Fourth Avenue. M.O. thought she was being followed by Roy George.
5. When M.O. reached her place of refuge at 4050 Fourth Avenue, she continued to be fearful of Roy George and was "shooked up." She was very scared, anxious and talking quickly.
6. M.O. was aware of Roy George as a dangerous person from the publicity given in the R.C.M.P. press releases. She was also told by her boyfriend and his mother that Roy George was dangerous.

7. M.O. had three previous contacts with Roy George. The first contact was in Roy George's basement. It was not harmless, although I can make no finding as to what precisely transpired. The bike repair and soup kitchen contacts were in more public places. They were harmless.

REASONS

[39] The position of the defence is that the conduct of Roy George does not amount to the harassment required for a conviction under s. 264(2)(d). Defence counsel suggests that I should not put too much weight on M.O.'s evidence, and the following evidence, or gaps in evidence, should result in an acquittal:

1. M.O. didn't say that Roy George followed her from H & R Block on Second Avenue.
2. Ms. Terris did not feel the incident warranted intervention.
3. When M.O. was yelling at Roy George, he was already leaving the scene.
4. Roy George was not following M.O. on Fourth Avenue.
5. The conversation between M.O. and Roy George at the Yukon Electric building did not amount to harassment.
6. Roy George did not know that M.O. was on Fourth Avenue and M.O. did not know Roy George was on Fourth Avenue until she was informed by Olga Anderson.

7. Roy George said he did not know any young girl or what Olga Anderson was talking about. He said he was returning videos to a friend but was lost.
8. The past contacts were harmless, including the basement incident where M.O. was given tapes.
9. M.O. was running because she saw her parents, not because of Roy George's contact outside the Yukon Electric building.

[40] Most of the issues raised by the defence arise from a meticulous dissection of the evidence of M.O. As I have said, her evidence was childlike, and she is suffering from some limits to her intellectual ability. However, there was no suggestion that she was improperly coached and there were no improper leading questions by Crown counsel.

[41] There has been a change in the attitude of the law toward the evidence of children, and, in my view, I can approach the evidence of M.O. on a "common sense" basis, taking into account her mental development, understanding and ability to communicate. (See *R. v. R.W.*, [1992] 2 S.C.R. 122 at 134.)

[42] I have no difficulty accepting the evidence of M.O., particularly as it was corroborated in considerable detail by Olga Anderson. The gaps and apparent inconsistencies in the evidence of M.O. are understandable given the limits of her intellectual ability.

1. *Did Roy George engage in threatening conduct to M.O. as set out in s. 264(2)(d)?*

[43] Section 264(2)(a) and (b) use the word "repeatedly." This word obviously connotes more than one incident or event.

[44] Section 264(2)(d) uses the words "engaging in threatening conduct." It has been suggested that this subsection also requires more than one incident.

[45] However, in *R. v. Kosikar* (1999), 138 C.C.C. (3d) 217 (Ont. C.A.), Goudge J.A. had this to say on s. 264(2)(d) at para. 20 and 22:

20 As a matter of statutory interpretation I do not think that s. 264(2)(d) is limited to repeated threatening conduct to the exclusion of a single threatening act. Parliament expressly required repeated conduct in defining the prohibited acts in s. 264(2)(a) and (b). The absence of such a qualification in s. 264(2)(d) strongly suggests to me a legislative intention not to confine that prohibition to repeated threatening conduct, but to encompass a single threatening act as well.

22 Nor can it be said that the threatening conduct must itself be harassment and therefore repetitious. Section 264 simply requires that the threatening conduct cause the complainant to be harassed. The threatening conduct can be constituted by a single act provided it carries as a consequence that the complainant is in a state of being harassed.

[46] It is my view that the conduct of Roy George towards M.O. was "threatening conduct." He was following her, and whether it was immediately beside her, behind her, or from a distance is not significant.

[47] Roy George then tried to involve her in taking a walk with him for \$20. Although it was not direct physical contact, it was an attempt to entice her away with him that would frighten any young woman being followed by an older man. Although the age of Roy George was not given in evidence, I can state that he is obviously not in his teens or 20s.

[48] Threatening conduct does not have to be physical contact or assault. In my view, it can be verbal communication that threatens the psychological safety of the complainant. In this case, the psychologically threatening words were accompanied by the act of following that added to the threatening words.

[49] I find that Roy George has engaged in threatening conduct prohibited by s. 264(2)(d).

2. Was M.O. harassed?

[50] In *Kosikar*, Goudge J.A. said at para. 25:

Hence, I think this element of the offence requires the Crown to prove that as a consequence of the prohibited act the complainant was in a state of being harassed or felt harassed in the sense of feeling "tormented,

troubled, worried continually or chronically, plagued, bedeviled and badgered". The statute says nothing that would preclude a single threatening act from producing this consequence. In other words, while being in a harassed state involves a sense of being subject to ongoing torment, a single incident in the right context can surely cause this feeling.

[51] The point is that conduct which causes a complainant to be "vexed, disquieted or annoyed" is not sufficient. The complainant must be "tormented, troubled, worried continually or chronically, plagued, bedeviled and badgered."

[52] It is clear from the evidence of M.O., Olga Anderson and Bruce Webber that M.O. was harassed. She was fearful and in a state of agitation that caused her to run for several blocks to find a safe haven. Constable Letendre, who attended at the 4050 Fourth Avenue apartment, described M.O. as very scared, anxious and talking quickly. In short, she was not annoyed, but rather, she was tormented, troubled and badgered.

[53] I conclude that M.O. was harassed.

3. Did Roy George know that M.O. was harassed or was he reckless or wilfully blind as to whether M.O. was harassed?

[54] It is my view that Roy George knew that M.O. was harassed, or, at the very least, was reckless or wilfully blind as to whether M.O. was harassed. A

man who offers a young woman a \$20 bill to take a walk with him knows that she will be harassed. It is not an everyday expression used by a friend or an acquaintance. It is calculated to be a financial enticement. In the context of unwanted following, its impact on a woman is clear to any reasonable person.

[55] Pre-charge conduct is relevant when considering the intent of Roy George (See *R. v. Ryback, supra.*) However, I have found that the contact in Roy George's basement was not harmless. Therefore, the pre-charge conduct, taken altogether, can be used to suggest that Roy George would have known the impact his words and actions would have on M.O.

4. *Did the conduct of Roy George cause M.O. to fear for her safety?*

[56] I have found that M.O.'s fear and subsequent running to a safe place were the result of Roy George's conduct. The fear she expressed was confirmed by Olga Anderson, Bruce Webber and Constable Letendre. The fact that it was not confirmed by Cecile Terris is explained by the fact that she did not see the state of M.O. when Olga Anderson came upon the scene.

[57] However, it must also be acknowledged that a certain amount of fear may exist from the knowledge of M.O. that Roy George was a dangerous person, as a result of the R.C.M.P. press releases. She was further warned by her boyfriend and his mother about associating with Roy George. But, in acknowledging that

this was a factor in play, I am of the view that M.O.'s principal or main fear for her safety arose out of Roy George's conduct on October 24, 2000.

5. *Was M.O.'s fear, in all of the circumstances, reasonable?*

[58] I have said that M.O. has limited intellectual ability and appears childlike in the way she talks and relates to adults. I have found that she had fear for her safety. The question is whether, from an objective viewpoint, her fear was reasonable.

[59] Based upon her previous experience of being "bothered" by Roy George in private circumstances in his basement, it was reasonable for her to have fear when he offered her money to go with him for a walk. In my view, it would be reasonable for any woman to experience fear for her safety when receiving an unsolicited or uninvited proposal from a man following her in these circumstances.

[60] The fact that there were two harmless contacts with Roy George previously in more public places does not detract from the very legitimate fear caused by Roy George on October 24, 2000.

[61] I find M.O.'s fear to be reasonable in all the circumstances.

DECISION

[62] The law requires that I consider the evidence as a whole in determining whether I have a reasonable doubt in this matter. It is not necessary that I believe the exculpatory statements, attributed to Roy George by Olga Anderson, in order to acquit him. There is no burden on the accused to establish his innocence. However, considering all the evidence, I do not have a reasonable doubt.

[63] In conclusion, I am satisfied that the Crown has proven beyond a reasonable doubt that Roy George has committed the offence of criminal harassment as set out in s. 264(2)(d) of the *Criminal Code*.



VEALE J.