SUPREME COURT OF VICTORIA

COURT OF APPEAL

No. 255 of 2004

THE QUEEN

v.

JOHN MURRAY ABBOTT

JUDGES:	BUCHANAN, VINCENT and NEAVE, JJ.A.
WHERE HELD:	MELBOURNE
DATE OF HEARING:	5 April 2006
DATE OF JUDGMENT:	4 May 2006
MEDIUM NEUTRAL CITATION:	[2006] VSCA 100

Criminal law – Stalking – Political demonstrations outside residence of victim – Jury not to be instructed to return a verdict of not guilty if the jury considers that law creating the offence unjust – Accused's conduct capable of constituting offence.

APPEARANCES:	Counsel	Solicitors
For the Crown	Mr J.D. McArdle, Q.C. The Crown relied on its written submissions	Mr S. Carisbrooke, Acting Solicitor for Public Prosecutions
For the Applicant	No Appearance The Applicant relied on his written submissions	

BUCHANAN, J.A.:

1 The applicant was arraigned in the County Court and pleaded not guilty to a presentment containing two counts of stalking, contrary to s.21A of the *Crimes Act* 1958. ("the Act"). He was unrepresented at the trial.

2 Section 21A provides, so far as is presently relevant:

> "(1) A person must not stalk another person.
>
> (2) A person (the offender) stalks another person (the victim) if the offender engages in a course of conduct which includes any of the following –
>
> (a) following the victim or any other person;
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> (b) telephoning, sending electronic messages to, or otherwise contacting, the victim or any other person;
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> (c) entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or any other person;
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> …
>
> (e) giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;
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> (f) keeping the victim or any other person under surveillance;
>
> (g) acting in any other way that could reasonably be expected to arouse apprehension or fear in the victim for his or her own safety or that of any other person –
>
> with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of any other person and the course of conduct engaged in actually did have that result.
>
> (3) For the purposes of this section an offender also has the intention to cause physical or mental harm to the victim or to arouse apprehension or fear in the victim for his or her own safety or that of any other person if that offender knows, or in all these particular circumstances that offender ought to have understood, that engaging in a course of conduct of that kind

> would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result."

3 At the conclusion of the trial the jury found the applicant guilty on one count of stalking and acquitted him on the other count. After a plea the applicant was sentenced to be imprisoned for a term of four months. The term was wholly suspended for a period of 18 months.

4 The applicant seeks leave to appeal against the conviction.

5 According to the evidence led on behalf of the Crown in respect of the count on which the applicant was found guilty, the applicant was a member of a group who called themselves the "Black Shirts". The group professed to be concerned about the effect upon children of the breakdown of their parents' marriages and were opposed to children of a marriage being exposed to a parent forming a relationship with another person.

6 One Emmanuel Goldberg was a member of the Black Shirts. He was married to Suzanne McKinnon. There was one child of the marriage, a son born in 1982. The couple separated and Suzanne McKinnon was given custody of the son by the Family Court. The court denied Goldberg access to his son.

7 On 11 June 2001 Suzanne McKinnon received a telephone call from a person who identified himself as John Abbott and who said that he was an advocate for contact between children and parents and was trying to arrange access by Emmanuel Goldberg to his son. On 1 September 2001 at about 10.30 a.m. a facsimile was sent to the Doncaster police station, which was addressed to the officer in charge of the station and was signed by the applicant. The facsimile stated that a small group of people would be participating in a demonstration that morning in the street in which Suzanne McKinnon lived. The facsimile was received by Sergeant Paul Dart, who went with other policemen to the address of Suzanne McKinnon.

8 On the same morning, at about 10.30 a.m., Suzanne McKinnon left her house in order to take her son to a soccer match. Her mother, Margaret McKinnon, who

had been visiting her daughter, remained in the house. Shortly after her daughter and grandson left the house, Margaret McKinnon heard a loud voice in the street. She looked out and observed a man on the road in the front of the house dressed in black pants, black shirt and black cap, with a bandanna hiding his face, holding a megaphone. There were two other men dressed in the same fashion walking up and down the nature strip. The man with the megaphone faced the house and Margaret McKinnon heard him say things such as "Suzanne and her family" and refer to the Family Court.

9 Sergeant Paul Dart arrived at the house at 10.55 a.m. He observed a man dressed in black speaking through a megaphone outside Suzanne McKinnon's house and four other men walking around the area also dressed in black. Sergeant Dart spoke to the man using the megaphone, who identified himself as the applicant. The applicant said that he was there to conduct a demonstration and that he was a member of a male support group for fathers who had been harshly treated by the Family Court. At 11.05 a.m. the group, including the applicant, ceased the demonstration and departed. At about 12.15 p.m. Suzanne McKinnon arrived home to find her mother in an agitated state.

10 On 29 September 2001 Sergeant Dart received another facsimile at the Doncaster Police Station in similar terms to the facsimile he received on 1 September 2001, referring to a demonstration in Suzanne McKinnon's street. That morning the group of Black Shirts arrived outside Suzanne McKinnon's house. She observed four men in the street all dressed in black, one of them holding a megaphone. She heard the man with a megaphone stating that she had stolen her son's soul, that she was evil and that she was denying her son's right to see his father. When the demonstrators departed, they left behind on the front lawn of Suzanne McKinnon's house a pamphlet addressed to "Dear neighbour" and referring to "a little boy who has been denied knowing his father." It ended with:

"We will refer to the person as Sussie. Sussie lives in this very street."

11 At the conclusion of the Crown case the applicant submitted that there was no

case to answer. He contended that there was no evidence of a course of conduct answering the requirements of s.21A(2) of the Act and no evidence from which it could be concluded that the applicant had the necessary means rea.

12 The submission was rejected and the applicant gave evidence. He said that on 1 September 2001 he organised a demonstration in the street in which Suzanne McKinnon lived. The applicant recruited four persons to attend with him. The applicant said that the purpose of the demonstration was to appeal to the public at large, and was not directed to any particular person. It was a political issue. The applicant sent a facsimile to the police to inform them of the demonstration to be held that day in order to avoid any disorder. A handbill was distributed and a megaphone was used to draw people's attention. His aim was to effect a peaceful demonstration. The applicant said that he followed the same procedure in organising the demonstration which occurred on 29 September 2001. He had been participating in similar demonstrations since 1993. A tape recording and photographs of other demonstrations were tendered. The applicant called no other evidence.

13 The main thrust of the defence appears to have been that the applicant had no intention of causing harm to Suzanne McKinnon or any other person, but was seeking to attract the attention of the public to achieve political change.

14 The original ground of appeal was that the verdict was unsafe and unsatisfactory. Subsequently, the applicant, who remains unrepresented by a legal practitioner, filed a full statement of grounds pursuant to Rule 2.09 of the Supreme Court (Criminal Procedure) Rules 1998. There are 27 grounds, several with sub-grounds, occupying 18 closely typed pages. The applicant's written outline of argument consists of 107 pages.

15 The first ground was that the trial judge failed to properly instruct the jury as to a principle which the applicant called legal nullification. The principle was taken from a speech in 1898 by a Mr Wise, a New South Wales politician who, the

applicant said, stated, "that if a law was passed by the Federal Parliament which was counter to the popular feeling in a particular State and calculated to injure the interests of that State, it would become the duty of every citizen to exercise his practical power of nullification of that law by refusing to convict persons of proceedings after civil proceedings in the same subject matter." According to the applicant, the principle of nullification was unknown until "G.H. Schorel–Hlavka pointed it out in his book." The applicant contended that s.21A of the *Crimes Act* was nullified because an intervention order had been made before the applicant's trial on the charge of stalking.

16 The so-called principle invoked by the applicant has echoes of issue estoppel and autrefois convict. In fact there is no legal principle by which an intervention order made under the *Crimes (Family Violence) Act* 1987, as extended by s.21A(5) of the Act, in a civil suit[1] can operate to bar a conviction for stalking.

17 The applicant's concept of nullification is also said to entitle a jury to return a verdict of not guilty notwithstanding that they are satisfied that a breach of the law has been committed if the jury thinks the law unjust. The applicant contends that the trial judge in the present case was obliged to tell the jury that they could treat s.21A of the Act thus.

18 It is recognised that juries may deliver merciful verdicts. As King, C.J. said in *R. v. Kirkman*[2]:

> "Sometimes juries apply in favour of an accused what might be described as an innate sense of fairness and justice in place of the strict principles of law. Sometimes it appears to a jury that although a number of counts have been alleged against an accused person and have been technically proved, justice is sufficiently met by convicting him of less than the full number."

It is another matter altogether for a jury to determine which of the laws of the land are to be enforced. The trial judge was under no duty to instruct the jury that they

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1 Suzanne McKinnon and other persons brought proceedings in a Magistrates' Court and obtained an intervention order against the applicant.

2 (1987) 44 S.A.S.R. 591 at 593.

could return a verdict of not guilty if they thought s.21A of the Act or its application in this case was unjust. Indeed, he would have erred had he done so.

19 Under cover of the same ground, the applicant contended that he could not be guilty of stalking because the police were present on 1 September 2001 and took no action. The applicant relied upon the fact that the police had the benefit of observing the applicant's conduct while the jury did not. In my view, the attitude of the police was incapable of determining the question of the applicant's guilt or innocence. That was a matter for the jury.

20 Ground 2 was that the trial judge denied the applicant a fair trial by refusing to allow him to give evidence of his motives and the provocation he suffered, which caused him to take the actions he did. He also ruled against the defendant calling evidence as to his political activities. In my view, the trial judge did not err. The question was not whether the applicant was provoked or was justified or acted reasonably, but whether his conduct constituted a breach of the provisions of s.21A of the Act.

21 I think I do no injustice to the remaining grounds in describing them as variations on two themes. The first was the so-called principle of nullification, which was reiterated in many of the grounds. The second was that no reasonable jury could have found the applicant had engaged in the course of conduct proscribed by s.21A with the intention of causing harm to Suzanne McKinnon or arousing apprehension or fear in her or that the applicant knew or ought to have understood that his conduct was likely to cause harm to her or arouse apprehension or fear in her. The applicant's argument, shortly stated, was that he organised a political demonstration, and a political demonstration could not be caught by s.21A of the Act.

22 The Crown case was based upon paragraphs (b), (c), (e) and (g) of s.21A(2). In my view it was open to the jury to find that the applicant's conduct answered the requirements of one or more of those paragraphs. The applicant telephoned the

victim, he attended and remained near the victim's residence, and could be said to have done so for the purpose of arousing apprehensional fear in her for her safety, and he left a pamphlet which could be regarded as offensive to her.[3] Those acts were arranged by the applicant and were performed by him and others dressed in a sinister fashion and acting menacingly. The fact that the applicant had wider political objectives in my view did not preclude the conclusion that his conduct offended against s.21A of the Act.

23 Perhaps the principal issue was the applicant's intention. He said in his evidence that his actions were not intended to have any effect upon Suzanne McKinnon. She was no more than an example he was using to make a political point. Again, I do not think that a reasonable jury was bound to accept the applicant's version as a reasonable hypothesis. The jury could reasonably have inferred beyond a reasonable doubt that the applicant had the intention necessary to constitute the offence. In any event the Crown was not required to prove that the applicant intended to harm or arouse apprehension, but only that the applicant appreciated that his conduct was likely to have that effect.

24 Apart from the two major themes to which I have referred, the applicant made a number of particular complaints, interlarded with attacks upon the credit of Suzanne McKinnon, largely based upon material that was not before the County Court. He contended that the trial judge failed to ensure that the parties were addressing the correct version of s.21A of the Act, that the Attorney-General should have been called to give evidence to enable the applicant to prove that the charge was laid against him as a result of a conspiracy, that a presentment alleging an offence was committed "between 1 September 2001 and 29 September 2001" did not permit evidence to be led of events on 1 and 29 September, and the trial judge erred in failing to tell a jury that the applicant and his fellow demonstrators covered their faces with bandannas to further the anonymity required by the provisions of the *Family Law Act* 1975 (Cth). In my opinion there is no substance in any of these

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3 Cf. *Nadarajamoorthy v. Moreton* [2003] VSC 203; *Berlyn v. Brouskos* [2002] VSC 377.

contentions.

25 I would refuse the application for leave to appeal against conviction.

VINCENT, J.A.:

26 I agree that the application for leave to appeal against conviction should be refused and I do so for the reasons advanced by Buchanan, J.A. in his judgment.

NEAVE, J.A.:

27 For the reasons given by Buchanan J.A, I would also refuse the application for leave to appeal against conviction.
