Wild v O'Neill [2012] NTSC 39

PARTIES:	WILD, Stephen Leslie
	v
	O'NEILL, Julie
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 14 of 2012 (21136885)
DELIVERED:	8 June 2012
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JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW — Justices Appeal – Stalking – elements of the offence – whether offence made out – s 189 *Criminal Code Act*

STATUTORY INTERPRETATION – s 189 *Criminal Code Act* – Stalking – "or otherwise contacting the victim" – whether *ejusdem generis*

WORDS AND PHRASES -- Stalking – "surveillance" – "repeated instances or a combination of" – "loitering" – "frequent" – "or otherwise contacting the victim" – s 189 *Criminal Code Act*

Criminal Code Act

Hansard, *Debates 289 November 2001*

Samuels v Stokes (1973) 130 CLR 490; followed

REPRESENTATION:

Counsel:

Appellant:	B. Taylor
Respondent:	C. Henderson

Solicitors:

Appellant:	De Silva Hebron
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Wild v O'Neill [2012] NTSC 39
No. JA 14 of 2012 (21136885)

BETWEEN:

STEPHEN LESLIE WILD
Appellant

AND:

JULIE O'NEILL
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 8 June 2012)

[1] The appellant was originally charged on information with five counts of stalking, contrary to section 189(2) of the *Criminal Code Act* (NT). The maximum penalty for the offence is imprisonment for two years. This is not an indictable offence and, therefore, not capable of being brought by way of information. The prosecutor applied to amend the charge sheet to a complaint. This was not objected to by counsel for the appellant, and the learned Magistrate treated the information as a complaint accordingly. The first two counts, being out of time, were withdrawn. The trial then proceeded on the remaining three counts.

[2] The learned Magistrate found the appellant guilty on Counts 3 and 4, but His Honour dismissed the charge in relation to Count 5. His Honour convicted the appellant on each count and imposed an aggregate fine of $700.00 and, in addition, placed the appellant on a good behaviour bond for 18 months, subject to conditions.

[3] The appellant has appealed against his findings of guilt only, on two grounds. The first ground complains that the learned Magistrate erred in his construction of section 189 of the *Criminal Code*. The second ground complains that the offences were not proved.

[4] Section 189(2) provides that a person who stalks another person is guilty of an offence. Section 189(1), which provides what is, in effect, a definition of what is meant by "stalk", is in the following terms:

> (1) A person (the offender) stalks another person (the victim) if the offender engages in conduct that includes repeated instances of or a combination of any of the following:
>
> (a) following the victim or any other person;
>
> (b) telephoning, sending electronic messages to, or otherwise contacting, the victim or another person;
>
> (c) entering or loitering outside or near the victim's or another person's place of residence or of business or any other place frequented by the victim or the other person;
>
> (d) interfering with property in the victim's or another person's possession (whether or not the offender has an interest in the property);
>
> (e) giving offensive material to the victim or another person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;

(f) keeping the victim or another 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 another 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 another person and the course of conduct engaged in actually did have that result.

[5] Section 189(1A) provides:

(1A) For the purposes of this section, an offender 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 another person if the offender knows, or in the particular circumstances a reasonable person would have been aware, that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear.

[6] The learned Magistrate construed section 189(1) to require evidence of repeated instances of an event referred to in the subsection or a combination of two or more of the events referred to in section 189(1) whether happening on the same occasion or not. Counsel for the appellant, Mr Taylor, submitted that either there must be repeated instances of one of the events referred to in section 189(1)(a) to (g), or separate instances of a combination of at least two or more of those events.

[7] The construction of Mr Taylor is supported by what the relevant Minister said during the debate on the amending Bill when he said:[1]

"... the existing *Act* requires that one of those various forms of stalking be repeated, be done two or more times. In this case, in the new *Act* as it will be when it is amended, just by simply following the victim or

[1] Hansard, *Debates 29 November 2001*, p 582.

another person and then *subsequently* telephoning them, you have *repeated* the offence ..."

[8] The question boils down to what is meant by the expression "repeated instances of or a combination of ...." For an "instance" to be repeated, there must be more than one occasion. To follow someone requires continuous behaviour. Whether there is more than one occasion depends on the facts. If the facts reveal that the behaviour was all part of the same occasion, there must be another occasion before the 'instance' is repeated. Whether there one or more occasion of 'following' would depend upon whether there was a sufficient lapse in time or a sufficient lapse or interruption in the act of following to constitute a separate occasion.

[9] However, the problem becomes less clear when it is suggested that not only did the accused follow the victim, but also kept the victim under surveillance as all part of the same act or occasion. The word "surveillance" is not defined, and has its ordinary English meaning. The Macquarie Dictionary, 3rd Edition, defines it as "watch kept over a person, etc." The Shorter Oxford Dictionary defines is as "watch or guard kept over a person, especially over a suspected person, a prisoner or the like; often spying, supervision." In order to keep a person under surveillance, it may be necessary to follow them. Is this "engaging in conduct" of a combination of two circumstances, or is it all one circumstance? Similarly, if a person loiters outside a person's residence as part of keeping the person under surveillance, is this to be treated as a "combination" of two circumstances?

[10] Is the draftsman, when he uses the expression “repeated instances of or a combination of” intending to distinguish between repeated instances of the same conduct (for example, contacting the victim), and repeated instances of conduct which involves more than one type of conduct (for example, following the victim and later telephoning the victim); or is the draftsman intending to distinguish between repeated instances of the same conduct (for example, contacting the victim) on separate occasions, and instances of more than one type of conduct whether happening on the same occasion of not? I think that, if the draftsman intended that the separate acts referred to had to be on different occasions, he would have plainly said so.

[11] The word “surveillance” is wide enough to include other conduct, such as “following”, as the means by which the surveillance is carried out, but it is quite possible to conduct surveillance without following someone. I do not think that the draftsman intended that, if the only means by which the surveillance is carried out is by following, that these were two separate activities and could be treated as a ‘combination’. For there to be both ‘following’ and ‘surveillance’, there must be something more, some other means of keeping watch over someone other than by following, whether on the same occasion or not. I think that the words “keeping under surveillance”, because they are words of wide import, were meant as a catch-all. If the only means of keeping surveillance is to be found in some activity which the section specifically provides for, that is not in itself a separate activity which can be treated as a ‘combination’. On the other

hand, if the accused not only follows the victim, but also loiters in any of the circumstances referred to section 189(1)(c), those are two separate activities which can form a combination, whether they are part of the same occasion or not.

The Facts

Count 3

[12] As to Count 3, the facts were that on 6 October 2011, a child of 13 years, CJ, was standing at the front door of the 5 Star Supermarket on Progress Drive in Nightcliff waiting for her younger brother. The appellant was parked in a car park on the corner of Progress Drive and Oleander Street next to the Supermarket and in view of CJ, and with the window down. The appellant motioned to CJ by waving his hands for her to come over to him. CJ replied 'No' and stepped back towards the front door of the Supermarket and out of the appellant's view. The appellant then reversed his vehicle and drove around the shopping centre back past CJ, then parked again in the same car park near to the Supermarket. The appellant again motioned towards CJ in the same manner. CJ again said 'No' and again stepped backwards out of his view. The appellant then shifted his car to another place in the car park, and repeated the same conduct, with the same result. The appellant then drove around the shopping centre and parked in front of the Nightcliff Post Office in plain view of CJ, who then entered the 5 Star Supermarket. She obtained a pen and paper, exited the Supermarket, and

wrote down the appellant's registration number. The appellant then drove around the shopping centre, past CJ, and left the area. It was an admitted fact that CJ was concerned and fearful for her safety. The learned Magistrate, after hearing the appellant's evidence, found that the appellant was attempting to 'pick up' CJ "with a view to sex", and that a reasonable person in the circumstances would have been aware that engaging in this conduct was likely to cause apprehension and fear. No appeal has been lodged against that finding.

[13] The learned Magistrate found that the charge had been proved because, "by continuing to approach her on four separate occasions, effectively continuing to hound her, he was stalking her. He was loitering outside the Supermarket where he knew she was. He was coming back to the same place where he knew she was. He was thereby keeping her under surveillance and his manner would have been such as to cause reasonable apprehension or fear in any young female and it did so on that occasion." In effect, the learned Magistrate found a combination of section 189(1)(b) (repeated), section 189(1)(c): 'loitering' at another place frequented by the victim; section 189(1)(f): keeping the victim under surveillance; and section 189(1)(g): acting in any other way that could reasonably be expected to arouse apprehension or fear in the victim for her own safety.

[14] Section 189 is not an offence to which the provisions of Part IIAA of the *Criminal Code* apply: see Section 1 and Schedule 1 of the *Code*. The provisions of section 189(1)(c) relating to loitering do not require

knowledge on the part of the accused that the place was one "frequented" by the victim. I consider that the word 'frequent' means to visit constantly, habitually, or regularly: see Macquarie Dictionary, 3rd Edition. There was no finding that CJ 'frequented' the Supermarket, and no evidence that she did so. As to 'loiter', this has no fixed technical meaning. In its ordinary sense, it means 'to linger idly about a place' and 'to hang about in an idle manner'. It may suggest indolence or inactivity, but it does not connote necessarily an unlawful purpose.[2] I think the evidence supported a conclusion that the appellant loitered, but not outside or near a place 'frequented' by CJ.

[15] As to the expression in section 189(1)(b), "telephoning, sending electronic messages to, or otherwise contacting the victim", it might be thought that there is a genus created by the words 'telephoning, sending electronic messages to,' as both kinds of contact use a machine which requires electricity, and telephonic means of communications through the internet, whether via telephone lines, mobile phones or satellite; and that 'or otherwise contacting' must take its meaning *ejusdem generis* with the words which precede it. However, I do not see any reason to so confine the words 'or otherwise contacting', because it is difficult to see what work would be left to do by that expression if it was confined to contacting by other means using telephonic or electronic apparatus. I think that the learned Magistrate was correct to find that the appellant 'contacted the victim' and did so more

[2] *Samuels v Stokes* (1973) 130 CLR 490.

than once. I would reject the appellant's submission that there was no finding to this effect and that all that happened on the evidence was a single episode of surveillance. On the facts, the learned Magistrate was correct to find that the appellant's conduct amounted to stalking because of a combination of both contacting the victim and surveillance.

[16] As to the finding that the appellant's manner was such as to fall within section 189(1)(g), the learned Magistrate appears to have had in mind the frequent changes of position of the car to keep CJ in his sight, the waving of the appellant and his persistence after she has indicated 'No'. Section 189(1)(g) specifically requires conduct which is "in any other way", i.e. in a way which does not fall within section 189(1)(a) to (f) inclusive. I do not think there was any other such conduct in this case. What he did was all part of keeping CJ under surveillance and contacting her. However, the ultimate conclusion reached by the learned Magistrate was correct, and I would therefore dismiss the appeal in so far as it relates to Count 3.

Count 4

[17] As to the facts in relation to Count 4, the appellant was driving his motor vehicle along Dick Ward Drive in Coconut Grove when he noticed LB, a 17-year-old female. He drove past her, turned into a side street, pulled back onto Dick Ward Drive, and parked beside her as she walked along the footpath. LB continued to walk along Dick Ward Drive. After she had passed the appellant, the appellant drove onto Orchard Road, did a U-turn,

and then parked on Orchard Road across from LB, who was still on Dick Ward Drive. The appellant wound down his window and continued to look at LB, but did not speak to her or attempt to communicate with her. LB became alarmed. She crossed Dick Ward Drive and walked to a bus stop where she met up with her younger brother and they both sat down at the bus stop. The appellant drove down Dick Ward Drive towards the clock tower, did a U-turn, and drove past LB and her brother again. He did not return again.

[18] In this case, the learned Magistrate found that the appellant had, by his behaviour, "gone from perving or enjoying the sight of an attractive young female to stalking. Three times was, in my view, pushing it. Four times was very over the top and five times was extreme. There was no reasonable excuse for the defendant's behaviour. It was clearly something what a reasonable person would have been aware that it was likely to cause harm or arouse apprehension or fear in a young person such as Ms LB." There was no finding that the appellant had done any of the acts in section 189(1), other than that his behaviour met the requirements of section 189(1)(g). In the absence of a finding that he had done something else, the conviction cannot stand, unless I am satisfied that the facts, which were not in contention, supported a finding of guilt beyond reasonable doubt: see *Justices Act*, s 177(2)(f).

[19] The learned Magistrate ought to have found that the appellant had kept LB under surveillance. Counsel for the appellant submitted that the facts

proved only one instance of surveillance. I accept that there was only one instance of surveillance, but in addition to that, there was the behaviour of the appellant in repeatedly driving past the appellant in the circumstances above described, which amounted to more than one mere surveillance, because it might be inferred that he was not only keeping LB under watch, but also wanting to be seen by LB. His manner of driving past her, turning around, stopping, moving off again, returning past her again on four more times was behaviour which the learned Magistrate found fell within the definition of conduct covered by section 189(1)(g). I therefore consider that the appellant was rightly convicted, that there has been no substantial miscarriage of justice, and therefore the appeal against conviction on this count should also be dismissed.

Order

[20] The appeal is dismissed.

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