4/8

(3)

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
MASTERTON REGISTRY

M. 9/86 & 12/86

996

BETWEEN: DAVID SEVEN EIAO
LANCE KIMIORA SETEPHANO

Appellants

A N D: THE POLICE

Respondent

Hearing: 2 July 1986

Counsel: K. Johnston for Appellants
J.H.C. Larsen for Respondent

Judgment: 30 July 1986

JUDGMENT OF JEFFRIES J.

This is an appeal against conviction by two appellants, David Seven Eiao and Lance Kimiora Setephano, of the charge laid under s.21(d) of the Summary Offences Act 1981 which states as follows:

> "Every person is liable ... who, with intent to frighten ... any other person, -
>
> (d) Watches or besets the house or other place where that other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; ...."

The charge was laid in the following terms:

"With intent to frighten beset the house at Road."

The factual situation is as follows. A background fact is that some members of a group, identified as the Mongrel Mob, had been in physical occupation of a house at Road, Masterton, but through efforts which will be described had been forced out of the premises about a week before the early hours of 17 January 1986. The said house at Road was originally owned by Mrs , but she had allowed it to be occupied by her daughter, and her children. It was whilst so occupied that apparently some members of the said gang occupied the premises. Mrs in her evidence stated she was aware that her grandchildren were being frightened because of the presence of these persons there. Mrs decided to return to the house herself and achieved the removal of these people which took place probably around a week prior to 17 January. She said in her evidence in the intervening week they had not been particularly troubled but obviously, one gathered from her evidence, she was fearful of a return of members of this group. Across the road from Mrs lived a Mrs Bevk, and there was some family relationship between these two women. Mrs Bevk's evidence will be referred to shortly, but she was obviously aware of the necessity to support Mrs over the events I have just described.

I think it important, as did the trial judge in the lower court, that the events that led up to the incident about to be described cannot be isolated from the pattern of behaviour that had existed around this house for some time prior to 17 January in relation to this group. As I will

mention later, the argument of Mr K. Johnston for the appellants was to have the court concentrate in a very narrow and confined way on some events of 17 January but, particularly, the actual approach to the house and the commencement of the verbal exchange that took place between one of the protagonists, David Seven Eiao, and Mrs Bevk. On the whole I reject such an approach, and think it necessary to examine the entire circumstances in the relevant period to decide whether the main offence of besetting the house was committed.

During the evening of 16 January Mrs Bevk had been to the house of Mrs on two occasions. It seems from reading the evidence a possible inference is that trouble was expected that night by the two women. Mrs Bevk gave evidence that she was aware that a car without its lights on had been travelling up and done the street earlier than the incident to be described. Just after 1.00 a.m. on 17 January a car pulled up outside the premises of Road, Masterton. Mrs Bevk said that when it approached the dwelling it did not have its lights on, and I accept that as a proven fact. There is no question from the evidence of Mrs but that this event caused great fear and consternation within her household. She immediately rang the police whilst Mrs Bevk confronted two of the members who came up to stand outside the french doors on the property. One of them, Eiao, approached the house and spoke to Mrs Bevk who stated he said, "Can I see ". She replied he never could and then Mrs Bevk said he asked for Gloria whom Mrs Bevk did not know. That exchange is the one on which Mr Johnston expects the court to concentrate and alone it may be regarded as fairly civilised if it were not for the background previously mentioned, and the furtive approach by this group at the particular hour of the morning. At all events, almost immediately after the request to see those two persons, Mrs Bevk and Eiao engaged in firey verbal quarrelling

in which obscenities and vulgarities were exchanged on both sides. Certainly serious threats of violence were addressed by Eiao to Mrs Bevk. One cannot be too critical of Mrs Bevk's verbal reaction, and it must be said in her favour that it was Eiao and his group who plainly were the aggressors. To describe the situation as a "perfectly lawful approach to the property which for one reason or another turns sour" is to trifle with the court's commonsense.

The police arrived within a very short time as a result of the request of Mrs , and the group guiltily dispersed running in several different directions. Originally four were charged with the offence of besetting as outlined above, and also with the offence of being without reasonable excuse in an enclosed yard being an offence against s.29(1)(b) of the Summary Offences Act. At the conclusion of the police case Robert Steven James Kurupo, who was represented by counsel, made application to change his plea on the lesser charge pursuant to s.29(1)(b) to that of guilty, and it was accepted by the trial judge and he was not convicted of the charge of besetting. Of the other three, two were represented by Mr J.K.W. Blathwayt, and Barclay was unrepresented. Mr Blathwayt made submissions on the law which were rejected by the trial judge, and Eiao, Barclay and Setephano were convicted on both charges. Ultimately all were sentenced to two months' imprisonment. There is no appeal against sentence or against the lesser of the two charges, namely being in an enclosed yard. Barclay has not appealed.

It is plain from the wording of the section that the offence is one of specific intent and unless that specific intent is proved by the prosecution the offence is not committed. The group were charged that they did beset the dwelling. At first that word might seem slightly inappropriate and perhaps a little old-fashioned, but on further reflection

it can be seen as very appropriate in the context of the section designed to deal with intimidation and obstruction. To beset here means to surround, besiege resulting in annoyance and fear of consequences. Against the background of ejection from the premises some days earlier of some members of the group, and then for a large group to patrol the street in an unlit motor vehicle late at night finally physically approaching the house, given that the actual words used in the first request might have been literally polite and acceptable, that, in this court's view, without doubt, amounts to besetting. If irony is the contradiction between the words used and intended meaning, the situation could be truly described as ironic in all the circumstances.

Notwithstanding the foregoing, has the prosecution proved that the besetting was with the specific intent to frighten? There are two types of evidence from which a court may properly find an accused guilty of an offence. One is direct evidence such as testimony of an eye witness. The other is circumstantial evidence in the proof of a chain or web of circumstances pointing to the commission of an offence. As a general rule the law makes no distinction between direct and circumstantial evidence but simply requires that, before convicting an accused, the court be satisfied of the accused's guilt beyond reasonable doubt from all the evidence in the case.

The specific intent with which an act is done may be shown by the circumstances surrounding the commission of the act. The proved circumstances must be not only consistent with the theory that the accused had the required specific intent, but cannot be reconciled with any other rational conclusion.

Surveying the evidence I do not believe there could exist any reasonable doubt about the intentions of the accused. They must have been fully aware that the course they

followed up to the first verbal request was designed to frighten, if not petrify, the occupants of the dwelling. After the initial request for Jackie was rejected the irony of polite language was immediately abandoned and replaced with serious threats of violence. That, I am satisfied, displayed the true purpose of the visit. On arrival of police there was a hurried dispersal demonstrating a consciousness of guilt.

In my view, the learned trial Judge B.J.McK. Kerr came to the correct decision and the appeal is dismissed.

Solicitors for Respondent: Crown Solicitor, Wellington