IN THE HIGH COURT OF NEW ZEALAND 3/10
WELLINGTON REGISTRY

1480

A.P. 148/94

BETWEEN JOY

Appellant

AND POLICE

Respondent



Hearing: 31 August 1994

Counsel: R. Stevens for appellant
C.L. Mander for respondent

Judgment: 13 September 1994

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**JUDGMENT OF BARKER J**

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Solicitors: Crown Solicitor, Wellington, for respondent
Fanselows, Wellington, for appellant

The appellant appeals against his convictions in the District Court at Wellington on 13 April 1994 on two charges - (1) of using a telephone for the purpose of disturbing contrary to S.8(2) of the Telecommunications Act 1987; and (2) of breaching a non-molestation order by making persistent telephone calls contrary to Ss.16(b) and 18 of the Domestic Protection Act 1982. The appellant represented himself in the District Court.

The facts are that the complainant, who had been in a relationship with the appellant was telephoned by the appellant on 2 July 1993. On this occasion, the complainant's secretary recorded a message from the appellant in these words "You've got a week to get his stuff back to him, otherwise someone will be sent to get it while you are at work and burn it to the ground. I am sick of this shit". After delivery of this message the appellant then hung up. The appellant claimed that he was merely trying to get the return of his goods; he denied threatening to have the complainant's house burnt down. The District Court Judge found that the secretary had accurately transcribed what the appellant had said. This message was the subject of the charge under the Telecommunications Act.

In respect of the charge under the Domestic Protection Act, the Judge accepted the evidence of the complainant that the appellant had telephoned the complainant twice on 3 August 1993. In one of these calls, the appellant

said to the complainant that "she had a nice dog" which indicated to her that he must have visited the premises in order to be aware that she had a dog; she did not own a dog when they commenced living apart.

It is not necessary to consider in detail the calls of 3 August because it was conceded by counsel for the respondent that there was no evidence before the District Court Judge as at that date that the appellant knew that an operative non-molestation order was in force. There had been a non-molestation order made on 23 June 1993 which had ceased to have effect. A new one had been obtained some date before 3 August 1993 but there was no evidence that the appellant had been informed.

The indication is that on 3 August the appellant did not know of the fresh non-molestation order because on 5 August 1993, he made a call recorded by the complainant's secretary to the effect "I hope the molestation order is costing you a fortune because there will be more". As a result of this call a complaint was made to the Police.

The appellant spoke to a Police officer on 11 August 1993. He asked the appellant whether he was aware of a non-molestation order made on 28 July 1993. The appellant acknowledged there had been two non-molestation orders and that he had broken the first one (presumably the 23 June 1993); he presumed she must have taken out a second one.

Dealing with the first charge. S.8(2) of the Telecommunication Act provides as follows -

> "Every person commits an offence against this Act who -
>
> (a) Uses, or causes, or suffers to be used, any telephone station for the purpose of disturbing, annoying, or irritating any person, whether by calling up without speech or by wantonly or maliciously transmitting communications or sounds, with the intention of offending the recipient..."

In **Spooner v Police** (1992) 8 CRNZ 672, Fisher J held that on a charge under this subsection the prosecution must prove: (i) that the defendant used the telephone to speak to a "recipient"; (ii) that the defendant's dominant purpose in doing so was to disturb, annoy, or irritate the recipient; and (iii) that the defendant intended that the level of disturbance, annoyance, or irritation would be serious in the sense that it would go beyond the sort of call to which all subscribers impliedly agree.

The learned District Court Judge applied these criteria despite a submission made to him that the appellant's dominant purpose was to have the complainant return his property. The dominant purpose was to enforce the return of the property by means of a threat which clearly came within the category of disturbing, annoying or irritating the recipient. The Judge was quite right to regard the contents of the message as being covered by the subsection.

However, that is not the end of the matter. Spooner's case goes on to hold that the disturbance, annoyance or irritation must be heard by the "recipient" of the phone call; to pass on an annoying etc message to a recipient via a third party did not come within the subsection.

Fisher J said at p.671 -

> "The only reason I can think of for revisiting the mental aspect of the offence must lie in the word "recipient". The elements to which I have referred so far would on a literal basis permit persons other than the person receiving the telephone call to be the intended target of the disturbance, annoyance, or irritation. Probably the reason for the final words in this provision was to limit the target to the person actually listening at the other end of the telephone line. This would exclude from the section use of a telephone to pass on a message to a third party ..."

The District Court Judge held that the charge under the section was similar to the charge of threatening to kill which meant that the threat could be made to a third person other than the intended victim. Having cited the first part of Fisher J's judgment he did not refer to Fisher J's later finding that the offending telephone call must be actually received by the recipient.

Counsel for the Crown invited me to disagree with the latter part of Fisher J's judgment. He submitted that if the provision is designed to prevent the use of telephone services to make offensive or abusive communications, an individual's culpability should not turn on whether the person intended to be the recipient

of the communication personally received the call; it is the illegitimate use of the telephone which the Act seeks to prohibit and the culpability of the person making such a wrongful use should not turn on who happens to pick up the telephone at the other end of the call.

With respect I accept these submissions and disagree with Fisher J. The term "recipient" is defined in the Concise Oxford dictionary as "a person who receives something". It is clear that the call was received by the complainant through the intermediary. The purpose of the provision is clearly to stop scurrilous use of a telephone. In my view, the term "recipient" should be given a wide meaning, not only to include the person who actually takes the call but also the person for whom a message is left with another. The intent of the statute is clearly to regulate the use of the telephone service. This was clearly a scurrilous call. I consider that the District Court Judge was right, although he did not follow this aspect of Fisher J's judgment which was binding on him.

Accordingly the appeal in respect of the charge under the Telecommunications Act is dismissed.

In respect of the appeal against conviction for breach of non-molestation order, counsel for the Crown conceded there was no evidence that when the appellant made the two phone calls on 3 August 1993, he was aware that there

was a current non-molestation order in existence. In fact the evidence suggests that he did not because of his reference to the non-molestation order in the one call on 5 August. One call cannot be a "persistent" phone call. See **de Montalk v Police**, (1994) NZFLR 149.

The District Court Judge did not avert to this lack of evidence in his judgment. He said the appellant was aware that there was a non-molestation order. However, the 23 June 1993 order had expired. There is no proof that the appellant knew of the later one.

Accordingly, this appeal against conviction must be allowed.

Therefore the result of the appeal is that the appeal against conviction under the Telecommunications Act is dismissed. The appeal against conviction under the Domestic Protection Act is allowed. That conviction is quashed and the penalty vacated.

R.D. Barker J.