New Guidance on the Meaning of Harassment

R v ZN [2016] EWCA Crim 92

In March of this year, the Court of Appeal gave decisive guidance on the meaning of harassment and could arguably be said to have raised the bar in terms of what behaviour should attract criminal sanction. The case also provides a useful summary of the line of authority in relation to harassment and tailors it neatly to deal particularly with harassment in breach of a non-molestation order.

In this case the term of the order which founded the count upon the indictment was as follows:

" The Respondent, ZN, is forbidden to ***intimidate, harass or pester*** the Appellant, PR, and must not instruct, encourage, assist or enable any other person to do so, or in any way suggest that any other person should do so."

In directing the jury, the trial Judge defined harassment as "causing alarm or distress". However, the Protection from Harassment Act 1997 provides that harassment ***included*** alarm or distress. This difference is nuanced but fundamental. The Judge at first instance equated harassment as causing alarm or distress, whereas in fact the correct approach is a more subtle one.

In reviewing the case law, perhaps Lord Nicholls in the case of Majrowski v Guy's and St. Thomas's NHS Trust [2006] UKHL 34; [2007] 1 AC 224 provided the clearest exposition of the rationale underpinning the law in this area when he said this:

" …..courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability"

A thorough review of the authorities lead the Court of Appeal, in the case of R v ZN at paragraph 39 of that judgment, to summarise the position as follows:

i) We respectfully agree with and adopt the opening lines of this passage from Blackstone as providing a concise, working understanding of "harassment"; thus, to repeat:

> *" The definition provided by s.7 is clearly inclusive and not exhaustive… 'Harassment' is generally understood to involve improper oppressive and unreasonable conduct that is targeted at an individual and calculated to produce the consequences described in s.7. By s.1(3) of the Act…*

reasonable and/or lawful courses of conduct may be excluded. The practice of stalking is arguably the prime example of harassment….but a wide range of other actions could, if persisted in, be so categorised. A course of conduct which is unattractive and unreasonable does not of itself necessarily constitute harassment; it must be unacceptable and oppressive conduct such that it should sustain criminal liability…… Harassment includes negative emotion by repeated molestation, annoyance or worry. The words 'alarm and distress' are to be taken disjunctively and not conjunctively, but there is a minimum level of alarm or distress which must be suffered in order to constitute harassment. "

ii) Harassment, within the meaning of the Order, cannot simply be equated with "causing alarm or distress".

iii) The danger of doing so is that not all conduct, even if unattractive, unreasonable and causing alarm or distress, will be of an order justifying the sanction of the criminal law.

iv) Here, the Judge's direction ought to have included a reference to the jury needing to be sure that the conduct was oppressive, not merely causing alarm or distress.

v) Some such further wording, [beyond the direction that the trial Judge gave] dealing with the element or ingredient of oppressive conduct, would have served to focus the jury's mind on the distinction between criminal conduct and conduct (however unpleasant) falling short of attracting criminal liability.

Obviously cases of domestic abuse, both emotional and physical, are taken incredibly seriously, as well they should be. However, in light of this authority, practitioners should be alive to the issue of that which is undoubtedly unpleasant behaviour, precipitating alarm or distress and that which constitutes conduct of sufficient gravity to attract criminal sanction.

The criminal law does not and should not criminalise all forms of unpleasant or offensive behaviour, even that which occurs in a domestic setting. Rather, it exists to police conduct so serious that the resources of the state are required to intervene, punish and prevent such behaviour. That line is now drawn quite plainly following this judgment.