SUPREME COURT OF QUEENSLAND

CITATION:	*R v Oliver* [2018] QCA 348
PARTIES:	**R** **v** **OLIVER, Dean Matthew** **(applicant)**
FILE NO/S:	CA No 300 of 2018 DC No 1893 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 14 November 2018 (Porter QC DCJ)
DELIVERED ON:	Date of Orders: 30 November 2018 Date of Publication of Reasons: 14 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2018
JUDGES:	Sofronoff P and Fraser and Philippides JJA
ORDERS:	**Orders delivered 30 November 2018:** **1. Leave to appeal granted.** **2. Allow the appeal.** **3. Set aside sentence imposed on count 1.** **4. In lieu thereof the appellant is sentenced to a term of imprisonment for a period of 18 months, the term of imprisonment is suspended forthwith and the appellant must not commit another offence punishable by imprisonment within a period of three years if the appellant is to avoid being dealt with for the suspended term of imprisonment.**
CATCHWORDS	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant pleaded guilty to one count of unlawful stalking with a circumstance of aggravation, namely, that he intentionally threatened the use of violence against the complainant – where the applicant was sentenced to 18 months imprisonment, to be suspended after three months – where the learned sentencing judge applied s 9(3) of the *Penalties and Sentences Act* 1992 (Qld) and therefore did not apply s 9(2)(a) of the *Penalties and Sentences Act* 1992 (Qld) – where s 9(2A) of the *Penalties*

and Sentences Act 1992 (Qld) excludes the operation of s 9(2)(a) where an offence "involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person" or "resulted in physical harm to another person" – whether an intentional threat of violence does not fall within the categories of case stipulated under s 9(2A) of the *Penalties and Sentences Act* 1992 (Qld), such that it was erroneous for the learned sentencing judge to apply s 9(3) of the *Penalties and Sentences Act* 1992 (Qld) in sentencing the applicant

Penalties and Sentences Act 1992 (Qld), s 9(2)(a), s 9(2A), s 9(3)

R v Breeze (1999) 106 A Crim R 441; [1999] QCA 303, distinguished
R v Dullroy and Yates; Ex parte Attorney-General (Qld) [2005] QCA 219, distinguished
R v Tobin [2008] QCA 54, cited

COUNSEL: S C Holt QC for the applicant
C N Marco for the respondent

SOLICITORS: Potts Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** This application for leave to appeal against sentence raises a question about the meaning of s 9(2A) of the *Penalties and Sentences Act* 1992. In particular, it raises a question about the meaning of the expression "the use of … violence against another person".

[2] The applicant was charged with the following count:

> "that between the 9th day of August, 2016 and the 14th day of December, 2016 at Warner and elsewhere in the State of Queensland [he] unlawfully stalked [the complainant].
>
> And for 1 of the acts constituting the unlawful stalking [he] intentionally threatened to use violence against [the complainant]."

[3] The applicant was also charged with minor drug possession offences but they are not material to this application.

[4] In August 2016 the applicant was running a swimming pool construction company. He was then 44 years old. He had been married for over 10 years and had a son and daughter. His business had been successful but had hit some problems. At about that time the applicant's accountant brought information to his attention that the complainant had diverted into his own pocket monies paid by clients of the applicant's pool company. The applicant referred the matter to police for investigation but no action was taken by them.

[5] The complainant left the company's employ. The applicant was angry about what his accountant had told him and angry that the police had done nothing about it. He

began by sending the complainant argumentative text messages. Then, on 13 August 2016 he left a voice message on the complainant's telephone telling him that he would break his legs if he did not stop talking to the applicant's customers. At about 4 pm on that day he went to the complainant's home and, in the presence of the complainant's wife, child and mother-in-law, accused him of stealing. He made "various threats" before saying, "You are fucking dead, fucking dead." He then continued his verbal abuse and threatened to kill the complainant before leaving.

[6] On the following day the applicant sent the complainant's wife insulting text messages and also texted her saying that her husband would be going to jail.

[7] The complainant began working for a business that was in competition with the applicant. About two weeks later he was sacked from that employment. In September 2016 the complainant began work with another pool company that competed with the applicant. The applicant contacted that company and told an employee that another pool builder had already sacked the complainant. He told them that "[h]e'd give us a week to get rid of Taylor and then start coming after us". A couple of days later the applicant contacted the same company again. He said he was giving that company "a last chance before I start coming at you". He said that the complainant was the "biggest compulsive liar I've ever met". He said that he was going to "come after you on every job". He made other abusive threats.

[8] On 5 October 2016 the applicant sent a text message to the complainant saying, "Mark and Brandon coming down for a week to catch up. He owes me and he can't wait to catch up with you real soon." He sent another text message saying, "Also got a few others wanting to catch up with the snitch."

[9] The implication from these messages was said to be that "Mark and Brandon" and the "others" would do violence to the complainant.

[10] On 13 December 2016 the applicant sent a text message to the complainant saying, "You are the lowest cunt I have ever met in my life. We have a couple of quotes at my office. You are using my quote template and my fixed price. You are one low cunt. After you are charged I have a Christmas present coming for you."

[11] The applicant then used a phone application to cause the complainant's phone number to be called repetitively 400 times. Investigations later showed that the number from which those calls had been made was that of a phone registered to the applicant's wife. Between 13 December and 16 December 2016 the applicant caused over 1,000 calls to be made from that phone number to the complainant's phone.

[12] Between midnight and 1.00 am on 15 December 2016 the applicant made 30 further calls to the complainant threatening serious injury to him by "Mark and Brandon".

[13] The complainant contacted police and a search warrant was executed at the applicant's place of work and at his home. There, with the assistance of the applicant himself, the police found some small quantities of drugs that became the subject of three counts. The applicant was arrested and taken to the watch house where he was interviewed. He admitted to all of the offences. He explained to police that he had made a complaint to police of fraud against the complainant and became angry by the failure to act against the complainant. He was using drugs and they affected his behaviour.

[14] Not only did the applicant cooperate with police but he also pleaded guilty at committal and was committed for sentence. Police had released him on bail after he had been charged on 22 December 2016 and he remained on bail until he surrendered himself for sentence on 14 November 2018.

[15] During that period of almost two years the applicant addressed his offending behaviour. He attended counselling over the course of 2017 and 2018. The purpose of his attendance at counselling was to manage his emotions and his anger. A report tendered at sentence stated:

> "Over the past year he has indicated considerable improvement in his capacity to manage his anger and his stress. He certainly understands the relationship between stress and anger as well as the neuroscience behind anger responses. I believe that this applied knowledge has helped his management of anger resulting in positive development in this area.
>
> He has also said his substance abuse has stopped and he manages his work-stress by redirecting his energy into the gym."

[16] Pathology reports were tendered at sentence. They showed the results of urine tests taken on 26 February 2018, 31 August 2018, 3 October 2018 and 2 November 2018. All the tests showed that he was clean of drugs.

[17] Several character references were tendered at sentence. Every one of these spoke highly of the applicant's character. They referred to his devotion to his family and to his work. He has earned the loyalty of his employees and the contractors with whom he engages to construct swimming pools. He engages in community affairs and has been generous with time and money. Indeed, one referee explained that on three occasions the applicant had donated swimming pools to deserving people. A number of the referees have perceived that the applicant's uncharacteristic offending was due to an inappropriate reaction on his part to the pressure and stress of business including his perception of having been the victim of fraud by an employee.

[18] It was not challenged that over the course of the preceding two years the applicant has turned his life around and has, despite offending, retained the confidence of his work colleagues, his friends and his family.

[19] It was in these circumstances that he appeared for sentence.

[20] Section 9 of the *Penalties and Sentences Act* provides that the "only purposes for which sentences may be imposed" are five in number. They are:

(a) to punish the offender to an extent or in a way that is just in all the circumstances; or

(b) to provide the conditions in the Court's order that the Court considers will help the offender to be rehabilitated; or

(c) to deter the offender or other persons from committing the same or a similar offence; or

(d) to make it clear that the community, acting through the Court, denounces the sort of conduct in which the offender was involved; or

(e) to protect the Queensland community from the offender.

[21] In aid of these purposes, in imposing a sentence a Court "must have regard to" certain principles. The first of these is stated in the following way in s 9(2)(a):

> "(i) A sentence of imprisonment should only be imposed as a last resort; and
>
> (ii) A sentence that allows the offender to stay in the community is preferable."

[22] Section 9(2) goes on to prescribe further principles that apply to which a Court must have regard when sentencing an offender. The prescription that a sentence of imprisonment should only be imposed as a last resort and that a sentence that allows the offender to stay in the community is preferable is a reflection of community standards. In most cases it will be immediately clear whether or not a sentence of imprisonment is called for. It is in the cases in which the answer is not so obvious that it is necessary to bear in mind the stricture in s 9(2)(a) of the Act. The present was such a case.

[23] However, that principle is inapplicable in a certain category of case. Section 9(2A) provides as follows:

> "However, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence –
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> (a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or
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> (b) that resulted in physical harm to another person."

[24] In such cases a different set of principles is applicable and they are set out in s 9(3) of the Act. I set them out:

> "In sentencing an offender to whom subsection (2A) applies, the court must have regard primarily to the following—
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> (a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;
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> (b) the need to protect any members of the community from that risk;
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> (c) the personal circumstances of any victim of the offence;
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> (d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;
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> (e) the nature or extent of the violence used, or intended to be used, in the commission of the offence;
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> (f) any disregard by the offender for the interests of public safety;
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> (g) the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;
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> (h) the antecedents, age and character of the offender;
>
> (i) any remorse or lack of remorse of the offender;

(j) any medical, psychiatric, prison or other relevant report in relation to the offender;

(k) anything else about the safety of members of the community that the sentencing court considers relevant."

[25] The principles stated in s 9(2A)(d), (g), (h), (i) and (j) have their analogues in s 9(2). However, the principles contained in s 9(3)(a), (b), (e), (f) and (k) are unique to subsection (3). Of course, any of these might be "any other relevant circumstance" within the meaning of s 9(2)(r). However, their express articulation in s 9(3) and the absence in s 9(3) of any requirement that imprisonment be considered a sentence of last resort makes s 9(3) an entirely different sentencing regime.

[26] At the forefront of a sentencing judge's consideration of an offender who falls within s 9(2A) must be the risk to the community on the one hand and the interests of the victim of the offender on the other hand. No longer is the sentence to be seen, in the first instance, from the perspective of the offender who should not, except as a last resort, be sentenced to an actual term of imprisonment. Instead, a judge must place at the forefront of the sentencing process the question whether the risk to the public and to the victim, as well as the circumstances of the victim, point to the need for prison.

[27] This is a large difference from s 9(2). It is justified by the community's abhorrence of the use of violence and the community's expectation that the courts will protect the community when necessary from the risk of further violence by incarcerating the offender. That will deter the particular offender, will deter others from offending and will satisfy a justified need for a sense of retribution.

[28] These considerations are not at the forefront of sentencing non-violent offenders.

[29] Because of this large difference, it is important to be clear about the class of offenders to which this different regime will apply. That class is defined by s 9(2A) of the Act. The subsection distinguishes between two categories of offence. The first category consists of offences that involve "the use of violence". The second category of offences consists of offences in which violence might not actually have been used but in which it was the plain intention of the offender that it should be used. This follows from the offender's counselling or procuring another to use violence, or conspiring with others to use violence or, finally, an offender attempting to use violence. In cases of procuring, counselling or conspiring, violence might or might not actually have been used and that should be reflected in the sentence that is imposed. But in each of these categories, the offender has shown a positive intention and commitment to use violence.

[30] The common factor between the defined offences informs the principles that then follow in s 9(3). It is the demonstrated willingness of the offender to use violence, shown by its actual use or by the offender's endeavours to see that it was inflicted, that invokes the need for a sentencing judge to consider, for example, the risk of physical harm to any members of the community if a custodial sentence were not imposed. Similarly, it is the actual use or the impending use of actual violence that explains the requirement for a sentencing judge to consider "the nature or the extent of the violence used or *intended to be used* in the commission of the offence".

[31] It might be thought a bare threat to use violence unaccompanied by any actions to suggest an imminent use of violence does not easily give rise to "the risk of physical

harm" or a "need to protect" or a consideration of "the nature or extent of violence intended to be used". That is because many threats are empty threats. Making a threat to use violence may not connote any intention at all actually to do violence. In some circumstances, a threat may be accompanied by actions so that the threat and the actions together may be regarded as violence although no touching has occurred.

[32] *R v Breeze*[1] was such a case. The applicant had pleaded guilty to an offence of robbery in company whilst armed. A question arose as to whether s 9(3) applied. The applicant's co-offender had used a long metal bar with a sharp end that he pointed at the victim's chest area as a threat to make her hand over money. In a joint judgment, Pincus and Davies JJA and Demack J said that the term "violence" had acquired a broad meaning that was capable of describing any act, whether violent in the ordinary sense or not, to which the user of the word strongly objected.[2] Their Honours said that s 9(3) should be construed without adopting such a broad construction because the provision was one that would potentially affect the level of punishment.[3]

[33] The ratio of the decision, on my reading of the case, lies in the following sentence:

> "… at least in the context of commission of a robbery, a threat of violence to induce compliance is itself regarded as violence."[4]

[34] The case must be read in its factual context. That context was one in which the offender had threatened to use violence against his victim and had the weapon at hand immediately to inflict that violence if necessary.

[35] *R v Breeze* was followed in *R v Dullroy & Yates*; *Ex parte Attorney-General of Queensland*.[5] This was another robbery case. One of the applicants pointed a gun at his victim's head. It was in that context that White JA held that the principle described in *Breeze* applied.[6] McMurdo J agreed. De Jersey CJ, who dissented on the facts, did not refer to the issue.

[36] *R v Tobin*[7] was a different kind of case. The applicant had made two telephone calls to the Police Emergency Operator saying that there was a bomb at the local surf and rescue club. After referring to *R v Breeze* and certain other cases, Fraser JA said:

> "It was accepted that there was no apprehension of the potential for any explosion or harm of any kind. It is therefore clear, in my opinion, that this offence did not involve the use of "violence" within the meaning of s 9(3) of the *Penalties and Sentences Act* 1992 (Qld)."[8]

[37] That dictum must also be read in context. His Honour was concerned with a case in which a threat to use violence had been made but in circumstances in which the hearers of the threat did not believe it and, consequently, felt no apprehension. Consequently, the case does not assist the resolution of the present problem.

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1 (1999) 106 A Crim R 441.
2 *Supra* at [17].
3 *Supra* at [18].
4 *Supra* at [19].
5 [2005] QCA 219.
6 *Supra* at [31].
7 [2008] QCA 54.
8 *Supra* at [22].

[38] The agreed facts revealed that the applicant had made the following threats:

1. A threat to the complainant in the presence of his wife, his child and his mother-in-law that "you are fucking dead, fucking dead";
2. A threat on the same occasion to kill the complainant made just before the applicant left the scene;
3. A text message stating, "Mark and Brandon coming down for a week to catch up. He owes me and he can't wait to catch up you real soon";
4. A further text message stating, "Also got a few others wanting to catch up with the snitch";
5. A text message stating, among other things, "After you are charged I have a Christmas present coming for you";
6. Some 30 calls to the complainant that were expressed generally as "threatening serious injury to the complainant by Mark and Brandon".

[39] All of these constitute threats to do violence to the complainant. None of them were made under circumstances in which it appeared that the threatened violence would be, or could be, inflicted suddenly.

[40] It is material to consider the terms of the sections of the *Criminal Code* under which the charge was laid. Stalking is defined in ss 359B, 359C and 359D. The details of those provisions are presently immaterial. Section 359E creates the offence and prescribes the punishment. Subsection 359E provides that the maximum penalty for the offence is increased from five years imprisonment to seven years imprisonment if the offender "uses or intentionally threatens to use violence against anyone". That circumstance of aggravation was alleged against the applicant.

[41] It can be noticed immediately that the provision distinguishes between the use of violence and the threat to use violence and this distinction cannot be ignored. The provision expressly ensures that not only will the use of violence as an incident of stalking aggravate the offence, but that a mere threat will do so as well.

[42] I am not prepared to construe s 9(2A) so that an offender who commits an offence while making threats to use violence, in some unstated way and at some unstated time, is to be regarded as committing an offence that "involved the use of violence against another person". The ordinary and natural meaning of the words does not, in any sense, bear such a connotation. Moreover, many empty threats are made with no intention on the part of the offender ever to carry them out. Section 359E ensures that, as a circumstance of aggravation of the offence of stalking, that does not matter. However, in s 9(2A) the express expansion of the operation of the section beyond those offences in which violence is "used" to those offences in which violence may not have been used but in which the offender has been shown to be demonstrably committed to its use because he or she had actually attempted to use it, has actively sought by counselling or procuring another to use it or has conspired with others to use it, shows that a bare threat to use violence such as occurred in this case, is not included in the category of offences to which the more severe regime applies. For that reason, the applicant fell to be sentenced in accordance with the principles stated in s 9(2).

[43] Unfortunately, at the sentence hearing it was common ground between the parties, and the learned sentencing judge naturally accepted, the contrary position. As a result, his Honour sentenced the applicant according to the principles of sentencing stated in s 9(3) rather than s 9(2). For that reason, the sentencing discretion miscarried and so leave to appeal should be granted.

[44] The sentence must be set aside and this Court must sentence the applicant afresh.

[45] This offence of stalking was a serious one and the effect upon the complainant and his family must have been extremely distressing. As the prosecutor submitted to the sentencing judge, one serious aspect of the offence involved the applicant's presence at the complainant's home in the presence of his family. As she submitted, everyone has a right to feel safe in his or her own home.

[46] In terms of the purposes of sentencing prescribed by the Act, there is no need to send the applicant to prison for rehabilitation or to protect the community from him. The prospect of his reoffending is remote. The purposes of general deterrence and denunciation can be served by the head sentence.

[47] It was common ground between the parties below that a head sentence in the order of 18 months imprisonment was appropriate. Neither party adopted a different position on this application. Further, at the sentence hearing the prosecution accepted that a wholly suspended sentence was within the appropriate range of sentencing options. In my respectful opinion, for the following reasons, that concession was rightly made.

[48] On the unchallenged evidence, the applicant's behaviour was totally out of character for him. It was behaviour in which the applicant engaged as a result of his submission to the stressors of life that then were upon him and his weakness in resorting to drugs to alleviate his feelings. Apart from those circumstances, the unchallenged evidence is that he is a decent family man who is regarded by those who know him in various contexts as a man with strong work ethic, proper social values and charitable instincts, all of which he manifests in his actions.

[49] In the many months since this offence was committed the applicant has made successful efforts to restore balance to his life. The evidence is that he has ceased drug taking and has undertaken counselling which has been successful because of his capacity for insight. He has shown genuine remorse. He has the ongoing support of his family and friends and work associates, all of whom are fully informed.

[50] His history since the commission of the offence is consistent with the applicant's attitude when he was arrested. He immediately cooperated with police and aided them insofar as it was possible for him to do so. He pleaded guilty at the earliest possible stage. He has demonstrated real remorse, consistently with the assessment of his good character to which I have referred.

[51] I can see no purpose whatsoever in requiring a person like this to serve any period of imprisonment. Indeed, that is why the prosecutor below correctly submitted that a suspended sentence was within the appropriate sentencing range. Personal deterrence is simply not a factor in this case.

[52] For these reasons, after hearing the application and appeal, the Court set aside the sentence that was imposed upon the applicant and substituted a sentence of imprisonment for 18 months that was wholly suspended, conditioned that the applicant be of good behaviour for three years.

[53] **FRASER JA:** I agree with the reasons for judgment of Sofronoff P.

[54] **PHILIPPIDES JA:** I agree with the reasons given by Sofronoff P.