

SUPREME COURT OF QUEENSLAND

CITATION: *R v Leach* [2004] QCA 189

PARTIES: **R**
v
LEACH, Jeffrey Francis
(applicant/appellant)

FILE NO/S: CA No 50 of 2004
DC No 484 of 2003

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Cairns

DELIVERED EX TEMPORE ON: 2 June 2004

DELIVERED AT: Townsville

HEARING DATE: 2 June 2004

JUDGES: McMurdo P, Cullinane and Jones JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Application for leave to appeal against sentence granted**
2. Appeal allowed
3. Set aside the sentences in relation to counts 1 and 2 and substitute therefor, an order that the applicant in each of those counts, be sentenced to nine months' imprisonment and be released on probation for a period of three years, conditioned upon his undertaking such psychiatric, psychological and counselling services as may be directed by the community services officer, together with the standard conditions applicable to probation orders
4. The declaration as to presentence custody made by the learned sentencing Judge continues to apply

CATCHWORDS: CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – APPEAL AGAINST SENTENCE – PARTICULAR OFFENCES – STALKING – where applicant sentenced to concurrent imprisonment terms of twelve, eighteen and six months imprisonment respectively for the charges of stalking, stalking with a circumstance of

aggravation and wilful damage – whether trial judge was in error in placing emphasis on the commission of offences during the currency of an earlier probation order – whether trial judge failed to take into account the benefits to the community of controlled treatment undertaken within a community based order rather than in a correctional institute – whether sentences were manifestly excessive

COUNSEL: The appellant appeared on his own behalf
J Gregory for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

JONES J: The applicant seeks leave to appeal against sentences of imprisonment imposed by the District Court at Cairns for one offence of stalking; one offence of stalking with aggravation and one offence of wilful damage. The applicant pleaded guilty to each offence on the 27th of November 2003 and sentences were imposed on the 22nd of January 2004 after the learned sentencing Judge had received a presentence report prepared by the Department of Corrective Services dated the 14th of January 2004 and an addendum report dated the 21st of June 2004.

The first offence of stalking relates to conduct between the 31st of October 2001 and 3 May 2003. The complainant was a 20 year old woman, international student studying in Cairns. She commenced her studies there in August of 2001. The applicant was a member of the same class. He obtained the complainant's phone number and commenced to phone her once or twice a week to discuss course work. He then asked her out socially a few times before the end of the term.

When studies recommenced after the summer vacation, the applicant started calling her again with the calls becoming more frequent. She asked him to stop, but to no effect. He often turned up at the complainant's accommodation. He professed his love for her and despite the complainant telling him the feelings were not mutual, he persisted.

She threatened to complain to the police and to the student association. This brought about a temporary cessation in the calls. But they resumed a short time later and when they did, it was followed by unwelcome behaviour of increasing intensity. The applicant commenced following the complainant making remarks to her, laughing at her requests that he leave. After lectures, she had to ensure that she remained in the company of other students. The applicant followed her to her workplace and watched her from outside the premises. This caused her to change her employment on occasions, but he quickly found out the new location and continued this type of behaviour.

The applicant made various threats, including one that he would have her deported. Ultimately, this harassment was having an effect on the complainant's studies and she reported the matter to the police on the 2nd of May 2003. The applicant was charged and came before the Magistrates Court, where he was granted bail. A condition of the bail was that he not approach the complainant directly or indirectly. The applicant however, breached this condition almost at once and

continued to do so on five occasions. He was further charged in connection with this.

On 26th August 2003, his enrolment at the institution was terminated because of his continuing harassment of the complainant and his failure to comply with earlier administration directives that he should cease the behaviour. His response to this was two days later for himself to lodge a complaint of discrimination against the complainant.

On the 20th of September 2003, a further incident occurred at the complainant's workplace. She contacted the police who then arrested the applicant and he has remained in custody since that time. Whilst no actual physical violence was offered to the complainant, she was concerned, and justifiably so, that it might.

Count 1 on the indictment relates to the applicant's offending behaviour prior to the imposition of the bail conditions. In count 2, his offending behaviour thereafter was aggravated by being in breach of those conditions. The learned sentencing Judge made the comment that the stalking occurred within a few months of the probation order made in respect of an earlier offence of stalking. The acts which would constitute the stalking however, probably did not commence until after that period of probation had, in fact, ceased. For those offences that I have just outlined, penalties were imposed of 12 months' imprisonment and 18 months' imprisonment respectively.

Count 3 relates to the wilful damage of a motor vehicle owned by a fellow student at the institution. The student had made a statement to the police detailing the applicant's conduct relevant to the first charge of stalking. On the 10th of September 2003, the applicant poured a type of fluid over the fellow student's car causing damage which cost approximately \$5,000 to repair. The applicant was then arrested on the 21st of September 2003. The applicant was sentenced to six months' imprisonment on that count.

All sentences were to be served concurrently. The learned sentencing Judge made a restraining order with a duration of 10 years. She also dealt with the five breaches of the bail conditions, but imposed no further penalty.

The applicant's offending has to be seen against a background of the prior similar offence of stalking committed between 1 February 1999 and 5 August 2000. In that case, the complainant was a young woman with whom the applicant had become infatuated. His conduct towards her intensified over time and included following her to social events, sending her flowers at her workplace, sending cards, letters and facsimiles. Telephone calls were made as frequently as 31 calls in a day. He even followed this young lady to Darwin when she visited there for a short period. And finally, he made some verbal threats against her.

He appeared before the District Court in respect of this matter as a person with no criminal record. A probation order was made.

According to the report before the learned sentencing Judge on this occasion, the applicant completed that course satisfactorily, though with one blemish towards the end of the period relating to a drink driving offence. That order did not result in lasting benefit in the sense of discouraging him from engaging in behaviour of stalking.

The detailed presentence report, including a report from forensic psychiatrist, Mr Ritchie, provides an insight as to why this is so. The report identifies some personality deficiencies, such as, "a general inability to empathise with others, obsessive compulsive ideation, poor future planning and psychopathy affective traits, narcissistic personality disorder and an unrealistically inflated view of his own self-controllabilities."

The testing profile undertaken by the psychologist reveals that the applicant is at a moderate risk of re-offending and a moderate risk of particularly further stalking behaviour. The final part of the presentence report states that "behavioural therapy is to be of prime importance in the applicant's rehabilitation."

The concern is whether the applicant would be able to pay for non-Government therapy of this kind or that he would

voluntarily attend such a treatment outside some correctional arrangements.

The learned sentencing Judge in coming to the view that a term of imprisonment was warranted, made the following comment - (at page 34 of the Record).

"The Community Corrections officer does recommend a community based order. However, in my view, it would not be appropriate for this Court to order that he be released on a community based order because of the difficulties with respect to counselling, as I have said, and the reservations that both the Community Corrections officer and the psychiatrist have regarding your commitment to addressing the issues. And because the commission of count 1 is, in fact, a breach of community based order, you were on probation at the time for part of your behaviour relating to that offence. Also, the assessment that you are of moderate risk of re-offending, means that the protection of the community is of particular importance with respect to any sentence that I do impose."

I must observe that there was an error in the remark about the breach of the previous probation order. Although the term of the offending behaviour set out in the indictment is from the 31st of October 2001 to August 2003, the probation order which had run its course in March 2002, did not really overlap the significant part of the offending behaviour, which I have noted, really started after the resumption of university studies in 2002.

I should note also, that in choosing to impose imprisonment against the recommendation of the Community Corrections officer, the learned sentencing Judge did not particularly distinguish between treatment that may have been available as

suggested by the community supervision management plan, which appears at page 72 of the record, and the treatment which would be available within the institution.

We have been referred to comparative sentences by the learned Crown Prosecutor. Comparative sentences are difficult to apply in an offence of this kind because of the infinite variety in circumstances and in the characteristics of the offender. The cases referred to in the sentence form and the Crown Prosecutor's outline do, however, suggest a range as was identified by the learned sentencing Judge as being appropriate.

Where however, in my view, her Honour has fallen into error is in placing emphasis on the commission of these offences during the currency of the earlier probation order and in failing to discriminate between the benefits to the community of controlled treatment pursuant to a community based order, rather than in an institution.

In the course of his submissions, the applicant was asked whether he would be prepared to agree to a probation order being made if he were to be released from prison in the near future. The order was proposed for a period of three years, to which would be attached a significant condition that he undertake counselling as directed by the probation officers. The applicant agreed that he would accept such a condition and the ordering of his release on probation.

In those circumstances, it seems to me that the community interest is best served by a combination of imprisonment coupled with a probation order on release. I repeat what was set out in the addendum of the presentence report of the Community Corrections officer saying,

"I consider behavioural therapy to be prime importance in Mr Leach's rehabilitation, whether undertaken in a correctional institution or within the community."

The course, to which the applicant has agreed, provides a more likelihood of success of that treatment if it is over a longer period of time and undertaken within the community.

I would therefore, set aside the sentences in relation to counts 1 and 2 and substitute therefor, an order that the applicant in each of those counts, be sentenced to nine months' imprisonment and be released on probation for a period of three years, conditioned upon his undertaking such psychiatric, psychological and counselling services as may be directed by the Community Services officer, together with the standard conditions applicable to probation orders. The declaration as to presentence custody made by the learned sentencing Judge continues to apply.

I note in making that recommendation, that the sentence imposed for count 3 for wilful damage has now been served.

THE PRESIDENT: I agree with what Justice Jones has said and with the orders he proposes.

CULLINANE J: I also agree.

THE PRESIDENT: Those are the orders of the Court.