

SUPREME COURT OF QUEENSLAND

CITATION: *R v Seymour* [2004] QCA 348

PARTIES: **R**
v
SEYMOUR, Victor Clive
(applicant)

FILE NO/S: CA No 161 of 2004
DC No 160 of 2002

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Maroochydore

DELIVERED ON: 24 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 20 August 2004

JUDGES: McPherson and Jerrard JJA and Dutney J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDER: **1. Application for leave to appeal against sentence granted**
2. Appeal allowed
3. Vary the order made 17 May 2004 by ordering instead that the applicant serve five months of the period of suspended sentence imposed 22 August 2003

CATCHWORDS: CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN GRANTED - GENERALLY - where the applicant's former partner obtained a restraining order pursuant to the *Domestic and Family Violence Protection Act* 1989 (Qld) - where the applicant repeatedly breached the restraining order against his former partner and was given suspended sentences - where the applicant breached the restraining order and a probation order again and was sentenced in the District Court pursuant to s 147 *Penalties and Sentences Act* 1992 (Qld) in respect of two suspended sentences of imprisonment imposed on him - where the applicant was ordered to serve all of a 10 month suspended sentence and all of a two month suspended sentence to be served concurrently - where the applicant contends the

sentence is manifestly excessive - whether the circumstances are considered "special" pursuant to s 147(3)(c) *Penalties and Sentences Act 1992 (Qld)* to justify amending the order of the District Court

Penalties and Sentences Act 1992 (Qld), s 147

COUNSEL: Applicant appeared on his own behalf
M J Copley for respondent

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

- [1] **McPHERSON JA:** I agree with the reasons of Jerrard JA. The application and appeal should be allowed, and sentence varied by reducing from 10 to five months the term of imprisonment imposed on 22 August 2003.
- [2] **JERRARD JA:** On 17 May 2004 Victor Seymour appeared in the District Court and was dealt with pursuant to s 147 of the *Penalties and Sentences Act 1992 (Qld)* in respect of two suspended sentences of imprisonment previously imposed on him. The learned sentencing judge ordered that Mr Seymour serve all of the 10 months of a suspended sentence of imprisonment imposed on 22 August 2003 in that court, and all of the two months of a suspended sentence imposed in the Magistrates Court on 24 June 2002, those sentences be served concurrently. Mr Seymour has applied for leave to appeal against that order, arguing that it has resulted in a term of imprisonment which is manifestly excessive and which fails to take into account matters which made it unjust that he serve the whole of the suspended 10 month term.
- [3] Mr Seymour commenced a relationship with the complainant around the beginning of 2001 and on 6 August 2001 she obtained a restraining order pursuant to the provisions of the *Domestic and Family Violence Protection Act 1989*. Despite that order Mr Seymour committed the offence of unlawfully stalking her while using and threatening to use violence on her and in contravention of a restraining order. The conduct constituting that offence occurred on various dates between 5 August 2001 and 15 September 2001. Most of it consisted in his having continued to contact her after the order was made, including on the day it was made, but the most serious incident was on 14 September 2001.
- [4] On that date he entered her home through a garage, ran through a dining room and grabbed her by the throat, dragged her to a lounge, and held her down. He abused her, threatened to kill her, and told her that he could. She was 22 weeks pregnant at that time. He broke a glass, cut his own hand, and held the broken glass next to her stomach. Eventually he calmed down and she was released and allowed to leave to collect her children from school. She went to the police.
- [5] He was sentenced for the offence of stalking nearly one year later (on 24 July 2002) in the District Court, and sentenced to two months imprisonment, to be followed by three years probation. An order was made pursuant to s 359F of the *Criminal Code*, restricting his contact with the complainant to contact occurring only with her written consent.

- [6] One month before that appearance in the District Court he had engaged in conduct constituting a further breach of the domestic violence restraining order, on 22 June 2002. On that date he entered the complainant's residence through the garage door again, ran into her bedroom and argued with her; that conduct breached both the existing restraining order and his bail undertaking on the stalking charge. When she went downstairs to call the police he took their then five month old daughter, who had been born on 25 January 2002, from her room, and refused to return the child to her mother. He fled when police attended. He was dealt with on 24 June 2002 for breaching the restraining order, entering a dwelling without the consent of the owner, and on three charges of having assaulted a police officer. Fines were imposed on each count.
- [7] On 6 March 2003 consent orders were made with respect to the child's residence with her mother and for contact between Mr Seymour and his daughter. This was to include at least six hours from 9.00 am each Saturday, plus some other ordered contact. Disputes about provision of the child by the mother for contact with Mr Seymour very soon occurred, resulting in his breaching the restraining order on various days in late March 2003 and in early April 2003. That conduct essentially consisted in his repeatedly telephoning the complainant's residence and leaving messages on her answering machine. Some involved abusive or obscene language, and on 12 April 2003 he attended at that residence when drunk. On 20 May 2003 he again went there, entered it, and after an argument again took possession of the child. The police were called.
- [8] On 17 July 2003 he was dealt with in the Magistrates Court for that behaviour which had been in breach of the restraining order, and on a charge of entering a dwelling without the consent of the owner. He was sentenced to two months imprisonment, to be suspended for two years. One month later, on 22 August 2003, he appeared in the District Court and was dealt with for the breach of the probation order imposed on 24 July 2003, the breach being constituted by that conduct engaged in March, April and May 2003. The learned judge who then re-sentenced him for the stalking offence for which he had been placed on probation imposed a 10 month sentence of imprisonment, suspended for two years, and warned Mr Seymour that if he committed any offence at all for which he could be punished by imprisonment in those two years, he would be brought back and re-sentenced to the suspended term. Mr Seymour is recorded as confirming that he understood that consequence would follow.
- [9] Despite that clear warning and the further opportunity to avoid imprisonment, Mr Seymour did re-offend. On 16 August 2003 he committed an offence constituted by causing a solicitor to receive two abusive and threatening phone messages; and on 28 September 2003 arrived at the complainant's residence and bashed on a glass sliding door with his fist. He left when she told him she would call the police, and he subsequently made three abusive telephone calls to her residence. On 8 October 2003 he made another five telephone calls of a threatening nature to that residence.
- [10] Mr Seymour was arrested on 27 October 2003 and released on bail. He was arrested on further charges on 2 November 2003 and has remained in custody ever since. He was sentenced on 1 April 2004 to 200 days detention for seven offences, constituted by the making of the described telephone calls in August, September and October 2003 and his visit to her premises on 28 September 2003.

- [11] Mr Seymour's application to this Court was accompanied by extensive written material, much of it handwritten, and the respondent did not particularly object to this Court considering its content. It includes copies of his correspondence to his then solicitors in October and November 2003, and copies of their correspondence with the relevant police prosecution corps, which correspondence or copies does support Mr Seymour's submission in argument on this application that he had indicated a clear readiness at that time to plead guilty to the charges related to the telephone calls, of which he was ultimately convicted. The correspondence shows he did not make an early, or any, offer to plead guilty to any offence constituted by his going to her premises on 28 September, and he still says that was at her invitation, despite his plea. His complaint on this application is that the time taken for the prosecution to agree to withdraw a further 10 charges, and proceed only on the seven to which he ultimately pleaded guilty, has resulted in his suffering a particular disadvantage.
- [12] This disadvantage lies in the fact that on 17 May 2004 the District Court by order activated both the 10 month suspended sentence and the two month suspended sentence, and ordered that both be served in full, albeit concurrently. That order activating those suspended sentences was made because of his conduct constituting the offences for which Mr Seymour was sentenced to 200 days imprisonment on 1 April 2004; and because the 151 days he had already been in custody by 1 April 2004 were regarded as time served in respect of those seven charges, Mr Seymour was due for release soon after 17 May. He argues that requiring that he serve now the entire 10 months on the sentence imposed on 22 August 2003 will result in his serving a total of 17 months in custody. He says that will happen because the policy of the correctional institution in which he is held is that prisoners subject to restraining orders are not granted the benefit of the discretionary conditional release provided for in s 76 of the *Corrective Services Act 2000*.
- [13] That particular assertion of fact was not challenged by the respondent, and whether it is accurate or not, the orders which have been made for Mr Seymour's imprisonment on 1 April 2004 and 17 May 2004 certainly result in a total potential term of 17 months. I respectfully consider that while the learned sentencing judge was entirely correct in remarking that Mr Seymour's situation had been brought about entirely by his own conduct, if Mr Seymour had been dealt with earlier by both the Magistrates and District Courts, it is unlikely that the entirety of the suspended sentence of 10 months would have been ordered to be served cumulatively on a 200 day sentence. Yet that is very nearly what has happened, and Mr Seymour has demonstrated that he made early and timely offers to plead to six of the seven charges of which he was convicted, which would have avoided that cumulative effect had those matters been brought on earlier.
- [14] This is not said by way of criticism of either of the two courts which have sentenced Mr Seymour to imprisonment, after each had attempted to avoid that necessity. It is simply an observation that the actual result has operated harshly on him in the circumstances, which I consider could be regarded as "special" ones pursuant to s 147(3)(c) of the *Penalties and Sentences Act 1992*, making it just to amend the order of the District Court to require instead that Mr Seymour serve five months of that suspended sentence. I note that the learned sentencing judge was not told of Mr Seymour's endeavours to be dealt with at an early date.

- [15] I would allow the application, allow the appeal, and vary the order of the District Court made 17 May 2004 by ordering instead that Mr Seymour serve five months of the period of suspended imprisonment imposed on 22 August 2003.
- [16] **DUTNEY J:** I agree with the reasons of Jerrard JA and the orders he proposes.