SUPREME COURT OF QUEENSLAND

CITATION:	*R v Walton* [2006] QCA 522
PARTIES:	**R** **v** **WALTON, Helena** **(applicant)**
FILE NO/S:	CA No 288 of 2006 DC No 521 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2006
JUDGES:	Williams and Keane JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
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 REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – GENERALLY – where applicant pleaded guilty to three counts of stalking – where applicant was sentenced to six months imprisonment wholly suspended for an operational period of two years – where offending behaviour occurred over a period of 17 months – where the volume of telephone calls made to the complainant by the applicant evidenced determined and persistent conduct – where the applicant involved the complainant's teenage son as a recipient of some of the abusive calls – whether sentence imposed was manifestly excessive in all the circumstances *R v Kyriakou* (1994) 75 A Crim R 1, cited *R v Layfield* [2003] QCA 3; CA No 271 of 2002, 29 January 2003, cited *R v Maniadis* [1997] 1 Qd R 593; [1996] QCA 242, cited *R v Millar* [2002] QCA 382; CA No 198 of 2002, 25 September 2002, cited

R v Reid; ex parte A-G (Qld) [2001] QCA 301; CA No 85 of 2001, 26 July 2001, cited

COUNSEL: P J Davis SC for the applicant
D R McKenzie for the respondent

SOLICITORS: Ryan and Bosscher for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA**: The relevant facts are fully set out in the reasons for judgment of Philippides J with which I agree.

[2] I would add that, in my view, deterrence must always be the major factor in sentencing for the offence of stalking. The penalty must be designed to ensure that the conduct in question does not continue. In a case such as this it is not to the point to say that no specific threat to the complainant was made. Conduct such as that of the applicant is designed to put as much stress as possible on the complainant and constitutes at least a direct threat to the complainant's mental wellbeing. Ordinary people subjected to such stress may feel compelled to react inappropriately or may well develop psychiatric conditions. In either case there could be far-reaching complications; in an extreme case the target of the stalking could well react by committing a criminal offence.

[3] For all of those reasons a deterrent sentence is called for in cases of this type, and in my view it has not been demonstrated that the sentencing judge erred in imposing the sentence which he did.

[4] I agree with order proposed by Philippides J.

[5] **KEANE JA**: I agree with the reasons of Philippides J.

[6] It is important to recognise the gravity of the applicant's offending even though it did not involve threats of violence or surveillance of the complainant by the applicant. Offending of this kind is inherently likely to escalate; and it is significant in this regard that the misconduct charge in count 3 ceased only when the complainant had involved the police. Equally important is the risk that a victim of this kind of harassment will strike back. Personal violence may occur and may engulf persons other than the immediate complainant and antagonist. Finally, one should not seek to trivialise the profound misery which this sort of misconduct can cause to the victim.

[7] None of the foregoing considerations are reduced in their significance for the purposes of fixing upon an appropriate sentence by the sympathy which one may feel for the applicant because of her unfortunate matrimonial situation or her previous good character.

[8] I agree with Philippides J that the application for leave to appeal should be refused.

[9] **PHILIPPIDES J:** The applicant was convicted on her plea to three counts of stalking and was sentenced to six months imprisonment wholly suspended for an operational period of two years. A restraining order was also made for a period of

five years. The applicant seeks leave to appeal against sentence on the ground that the sentence imposed was manifestly excessive.

[10] The applicant is 56 years of age. In 1971 she married Selwyn Walton. They had three children and together they established a family transport business. In October 2002, after a long marriage, they separated. Upon separation from the applicant, Mr Walton rekindled a relationship with the complainant, who came to reside at his property at Kirklea, Queensland.

[11] Count 1 concerns conduct over a period from 19 March to 26 April 2004 during which the defendant made over 330 calls to the complainant, with up to 50 calls being made on a single day starting from 6.50 a.m. to 10.48 p.m. The phone calls were often abusive and obscene. They ceased only because, in order to get away from the applicant's harassment, the complainant moved back to Adelaide.

[12] Count 2 concerned the period from 1 January 2005 to 12 April 2005 when the complainant had returned to the Kirklea property. Some 33 calls were made by the applicant from 2 to 4 January 2005. In addition, from 7 January 2005, the complainant started to receive calls on her mobile phone. On 8 January 2005, when the complainant attended a wedding with Mr Walton, she received 41 calls on her mobile phone and eventually was forced to switch it off. When the complainant turned on her mobile phone the following day, she found 21 messages had been left by the applicant, one of which indicated that she had also contacted the complainant's 15 year old son at the complainant's Adelaide number. Phone records indicate that the applicant made 11 phone calls to that number. From 11 January 2005, the complainant was able to put a block on the applicant calling her on her landline in Adelaide and was thus able to protect her son from the calls. However, the applicant continued to contact the complainant on her mobile phone.

[13] There was an abatement in the applicant's conduct from April 2005 to late August 2005. During the week the subject of Count 3, the applicant phoned the complainant up to 23 times on one particular day and 39 times on another. The applicant's behaviour only ceased when the police became involved.

[14] The applicant has no prior criminal history. She co-operated with the authorities and entered an early plea.

[15] Before the learned sentencing judge it was contended on behalf of the prosecution that a sentence of 12 to 18 months imprisonment, wholly or partially suspended, was within the appropriate sentencing range and reference was made to *R v Layfield* [2003] QCA 3 and *R v Millar* [2002] QCA 382, where longer custodial sentences (two years imprisonment) were imposed in cases where the stalking had involved threats of violence. The prosecution acknowledged in placing these authorities before the sentencing judge that they concerned more serious offending and stressed that, although the complainant had made mention of "threats" by the applicant in her victim impact statement, no threats of violence had been made by the applicant and the complainant was to be understood as meaning that she, not surprisingly, felt threatened by the applicant's conduct. Counsel for the applicant argued for the imposition of a community service order or probation order and referred to a number of cases where non-custodial sentences had been imposed.

[16] In imposing sentence the learned sentencing judge took into account the various matters of mitigation in the applicant's favour; her lack of criminal history, co-

operation, early plea, good work history, the references tendered on her behalf and evidence as to her medical conditions. He also had regard to the fact that the offending conduct represented abnormal behaviour by the applicant which had taken place against a background of a marital breakdown and consequent financial anxiety and stress, complicated by the fact that Mr Walton continued to have some contact with the applicant and was said to have an "on again off again" relationship with her.

[17] The learned sentencing judge distinguished the decisions of *Layfield* and *Millar* as involving more serious behaviour than the conduct involved in the present case. However, his Honour identified two features of particular concern in respect of the applicant's conduct. The first related to the sheer volume of the telephone calls involved, evidencing determined and persistent conduct by the applicant. The second was the applicant's conduct in involving the 15 year old son of the complainant as a recipient of some of the abusive phone calls. The sentencing judge observed that the applicant's conduct reflected a significant level of harassment, which had caused great distress as borne out by the victim impact statement.

[18] Before this Court it was contended on behalf of the applicant that the learned sentencing judge erred in the exercise of his sentencing discretion in imposing a term of imprisonment, albeit a wholly suspended one. In support of that submission the applicant relied on *R v Kyriakou* (1994) 75 A Crim R 1, *R v Maniadis* [1997] 1 Qd R 593 and *R v Reid* [2001] QCA 301, as comparable cases where probation orders were imposed. However, an analysis of those cases reveals that the offender's conduct did not involve the degree of persistence exhibited by the applicant and was in part explained by the mental condition suffered by the offender. In *Kyriakou* the offender suffered from unusual personality traits. In *Maniadis* the offender suffered from a major depression with psychotic symptoms. In *Reid*, the offender's disinhibited behaviour occurred in the context of severe cerebral ischaemic disease and a cerebrovascular stroke.

[19] It was submitted that the sentencing judge erred in the manner in which he approached the issue of whether a probation order or community service order was appropriate. In particular, it was said that his Honour appeared to have decided that probation was excluded because of the applicant's age and the unlikelihood that she would re-offend. Similarly, it was said that the sentencing judge improperly discounted the imposition of a community service order by having regard to complications that might arise from the applicant's medical condition (coronary artery disease and diabetes).

[20] I do not read the sentencing remarks as indicating an erroneous approach by the sentencing judge in respect of those sentencing options. His Honour approached the question of sentence, by observing correctly in my view, that no useful purpose could be achieved in the present case by a penalty designed to impose a level of ongoing supervision. But more importantly, his Honour considered that a term of imprisonment was required to adequately reflect the seriousness of the offending, bearing in mind the volume, nature and tenor of the telephone calls. That view was entirely open to him. The applicant's conduct demonstrated an extraordinary level of persistence in her harassment of the complainant. Considerations of general deterrence and community denunciation weigh heavily in the present case. In my view, no error was demonstrated in the approach taken by the sentencing judge, nor

was the wholly suspended term of imprisonment imposed manifestly excessive. I would refuse the application for leave to appeal against sentence.