SUPREME COURT OF QUEENSLAND

CITATION:	*R v Morris* [2010] QCA 315
PARTIES:	**R** **v** **MORRIS, Gary Robert** (applicant)
FILE NO/S:	CA No 136 of 2010 DC No 1193 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	12 November 2010
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2010
JUDGE:	Holmes and Fraser JJA and McMeekin 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 is granted.** **2. Appeal allowed.** **3. The sentence imposed on 7 June 2010 is set aside.** **4. In lieu, the applicant is sentenced to three months imprisonment to be suspended forthwith with an operational period of 12 months.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to one count of unlawful stalking – where applicant posted flyers over a two and a half month period implying that the complainant was involved in a missing child's disappearance and possible murder – where applicant sentenced to 18 months imprisonment suspended after three months for an operational period of two years – where applicant granted bail after serving four days – where no circumstances of aggravation, threats or acts of violence – whether sentence manifestly excessive – whether sentencing Judge had sufficient regard to s 9(2)(a) of the *Penalties and Sentences Act* 1992 (Qld) *Penalties and Sentences Act* 1992 (Qld), s 9(2)(a)

R v Ali [2003] 2 Qd R 389; [2002] QCA 64, considered
R v Allie [1999] 1 Qd R 618; [1998] QCA 75, cited
R v Clark [2009] QCA 361, cited
R v Keong [2007] QCA 163, cited
R v King & Morgan (2002) 134 A Crim R 215; [2002] QCA 376, cited
R v Layfield [2003] QCA 3, cited
R v Walton [2006] QCA 522, considered

COUNSEL: R J Byrnes for the applicant
M B Lehane for the respondent

SOLICITORS: Burchill & Horsey for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of McMeekin J and with the orders he proposes.

[2] **FRASER JA:** I agree with the reasons for judgment of McMeekin J and the orders proposed by his Honour.

[3] **McMEEKIN J:** On 7 June 2010 the applicant pleaded guilty to one count of unlawful stalking[1] and was sentenced to 18 months imprisonment suspended after a period of three months for an operational period of two years. The applicant was granted bail by the Supreme Court on 10 June 2010 and so has served four days of his sentence.

[4] The applicant seeks leave to appeal against the severity of his sentence on the ground that the sentence imposed was manifestly excessive.

Circumstances of the Offence

[5] Over a two and a half month period between April and July of 2008, the applicant posted notices in the Samford area which were defamatory of the complainant. It is plain that there were many such notices posted, certainly many more than the ten that the complainant took down, but there is no evidence that precisely identifies a figure.[2] The notices were a reproduction of a "Crime Stoppers" flyer seeking information relating to the disappearance of Daniel Morcombe and bearing a photograph of the missing boy. The applicant had added the words "You will be brought to justice" followed by the complainant's name. The posters involved a scurrilous attack on the complainant, implying as they do an involvement in the boy's disappearance and perhaps his murder. They were positioned at locations frequented by the complainant and his family.

[6] No explanation for the applicant's conduct was advanced to the learned sentencing Judge or to this Court. All that is known is that some five years before the stalking offence there had been a verbal altercation between the applicant and the complainant.

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1 Section 359B of the *Criminal Code* (Qld).

2 There is no evidence establishing the figure of 100 to 200 that the complainant mentions in his victim impact statement.

[7] The applicant was apprehended when the complainant and his brother carried out surveillance at night time of a store in Stamford where the offending notices had been previously posted. They filmed the applicant putting up one of the posters and took their evidence to the police.

[8] When spoken to by the police, the applicant denied committing the offences.

[9] A committal with cross examination was conducted. The applicant eventually pleaded guilty on the morning of the second occasion on which the trial had been listed for hearing. Hence it was a late plea of guilty.

[10] Between the occasion on which he was spoken to by police on 17 July 2008 and the occasion of his sentencing on 7 June 2010 there had been no further like conduct by the applicant and no contact between the applicant and the complainant, such non-contact being a condition of his bail.

The Applicant's Personal Circumstances

[11] The applicant was 50 years of age at the time of the offence and 52 years of age at the time of sentencing, having been born on 13 March 1958. He is a truck driver by occupation. The learned sentencing Judge remarked that the applicant had worked hard as a truck driver and bricklayer through his life, had had a failed marriage and was under severe financial pressure at the time of the offending conduct.

[12] The applicant had no criminal history.

The Sentence

[13] At sentence the Crown contended for a suspended term of imprisonment as the appropriate penalty. Counsel referred to the "extremely offensive nature of the material that was published in his community" and the applicant's persistence in erecting the offensive material over a two and a half month period.

[14] The defence contended for a non-custodial penalty and the submissions ranged over a substantial fine, to community service, to a suspended sentence with a significant operational period.

The Application to this Court

[15] The grounds upon which counsel submitted the sentence was excessive were:

(a) There was no Court of Appeal authority which mandated actual custody as the only sentencing option;
(b) The only comparable decision that could be found, that of a single judge, supported a non-custodial sentence;
(c) The Crown did not seek actual custody;
(d) The applicant had no previous convictions;
(e) The offending conduct occurred over only a two and a half month period;
(f) There has been no continuation of the offending conduct after being spoken to by police;
(g) The applicant had remained out of trouble for almost two years;
(h) There were no circumstances of aggravation;
(i) There were no threats or acts of violence.

[16] The applicant's counsel reviewed a number of decisions involving charges of stalking but none are truly comparable. What might be said is that where the Court is dealing with a case of harassment that is "deliberate, serous and sustained" then a significant period of imprisonment may be justified: see *R v Ali*[3] where a sentence of three years imprisonment was not interfered with on appeal.

[17] The applicant contended that the appropriate sentence that should have been imposed was 120 hours of community service with a conviction recorded or at worst three months imprisonment wholly suspended for an operational period of 12 months.

[18] The applicant's counsel submitted that the sentencing Judge had overlooked the principle in s 9(2)(a) of the *Penalties and Sentences Act* 1992 (Qld) that a sentence of imprisonment should only be imposed as a last resort, relying on the failure to refer to the provisions of that Act and the view expressed by the learned sentencing Judge that he had "no alternative" but to impose a term of imprisonment. Whilst his Honour made no express reference to the provisions of the Act, that alone provides no basis for thinking that so experienced a Judge would overlook that principle. Rather his Honour plainly thought such a sentence justified because of his view of the seriousness of the offending conduct.

[19] There is no doubting the seriousness of the offence. As the learned sentencing Judge remarked, the offending conduct "was extremely offensive to the complainant" given that the Morcombe case is notorious with the resultant inevitability of the inferences likely to be drawn, and given that notices had been posted throughout the community in which the complainant lived and so came to the knowledge of his children, other members of his family, friends, and acquaintances. As well, the conduct was persisted in over a significant period.

[20] Nor was there any substantial ground for thinking that there was any great remorse for the conduct. The offending conduct stopped only when the applicant was spoken to by the police. He knew at that stage that he had been caught on film placing a poster. The plea of guilty was very late. And there was no explanation at all offered for the offensive conduct. In the absence of an explanation I cannot see that any inference can be drawn but that the applicant's conduct was malicious.

[21] To my mind these factors justified the imposition of a sentence of imprisonment. I note that the legislature has seen fit to set a maximum punishment of five years imprisonment. That "ultimate delimitation" should not be overlooked.[4] Here, punishment, general deterrence and denunciation of the applicant's conduct all justify the learned sentencing Judge's determination that a sentence of imprisonment was appropriate.

[22] However whilst I agree with the sentencing Judge to that point, I cannot agree that a sentence so long as 18 months and one requiring three months of actual imprisonment to be served was in all the circumstances appropriate. The absence of any act or threat of violence is a significant matter.

[23] Generally speaking sentences of 18 months imprisonment or longer have been imposed where the conduct complained of involved a circumstance of aggravation,

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3 [2003] 2 Qd R 389; [2002] QCA 64.

4 *R v King & Morgan* (2002) 134 A Crim R 215; [2002] QCA 376 per Chief Justice with Davies JA and Jones J concurring.

usually threats of violence. Examples include *R v Keong*,[5] *R v Allie*,[6] *R v Layfield*[7] and *R v AN*.[8] In the former two cases, this Court reduced the sentences imposed to 18 months imprisonment.

[24] It might be said that *R v Ali*[9] is against that general statement, as in that case a sentence of three years imprisonment for stalking simpliciter was not disturbed on appeal. However, there the conduct was quite outrageous, perceived reasonably enough by the complainant to be threatening, persisted in for some 15 months, continued after the complainant had been driven from her home, the applicant demonstrating no remorse at all but rather conducting the trial on a basis that the trial judge clearly thought was false, and the harm suffered by the complainant was quite marked, she suffering financial detriment as well as significant emotional harm for which she sought medical treatment.

[25] To return to the present case, the personal circumstances of the applicant, particularly the long period of good behaviour following him being spoken to by the police, his lack of criminal history and his eventual, albeit late, plea of guilty, the utilitarian value of which cannot be overlooked,[10] are significant factors in mitigation and which would justify, to my mind, a significantly more lenient approach than that taken by the learned sentencing Judge.

[26] Thus in my view, the applicant has made out his case that the sentence was manifestly excessive. It follows that the application for leave to appeal against sentence must be granted, the appeal allowed and the sentence imposed set aside.

[27] This Court must now re-sentence the applicant. I bear in mind that he has already served a few days in actual custody. He is a man of mature years with a good work history. There is no reason to think that he needs the supervision of a probation order.

[28] The decision that has given me some guidance is *R v Walton*[11] where the applicant was sentenced to six months imprisonment wholly suspended. This Court declined to interfere with the sentence. There the applicant entered a timely plea of guilty to three counts of stalking. The stalking involved the making of hundreds of phone calls to the complainant that were abusive and obscene, the calls occurring at sporadic intervals from March 2004 to August 2005 and the result of which was to cause the complainant to feel threatened and to move from Queensland to Adelaide in an unsuccessful bid to escape the harassment. The applicant had no previous convictions. Despite the early plea, a factor not present here, I consider *Walton* to be a more serious case than the present one given the persistence in the conduct over so long a period.

[29] I do not overlook the significant distress caused to the complainant and his description of the hurt and humiliation he has suffered as detailed in the victim impact statement. I observe that this criminal proceeding against the applicant hopefully will be seen by the complainant as a significant vindication of his character.

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5 [2007] QCA 163.

6 [1999] 1 Qd R 618; [1998] QCA 75. Note that the legislature saw fit to increase the maximum penalty for the offence from three years to five years after this case was decided.

7 [2003] QCA 3.

8 [2003] QCA 349.

9 [2002] QCA 64.

10 *R v Clark* [2009] QCA 361 at [25] per Keane JA.

11 [2006] QCA 522.

[30] I would sentence the applicant to three months imprisonment wholly suspended for an operational period of 12 months.

[31] I would make the following orders:

(a) The application for leave to appeal against sentence is granted;

(b) The appeal is allowed and the sentence of 18 months imprisonment to be suspended after serving a period of three months with an operational period of two years is set aside;

(c) Sentence of three months imprisonment is imposed to be suspended forthwith and the applicant is not to commit another offence punishable by imprisonment within a period of 12 months if he is to avoid being dealt with for the suspended term of imprisonment.