SUPREME COURT OF QUEENSLAND

CITATION:	*R v Vaughan* [2011] QCA 224
PARTIES:	**R** **v** **VAUGHAN, Jason Ronald** (applicant/appellant)
FILE NOS:	CA No 13 of 2011 CA No 216 of 2011 DC No 3360 of 2009 DC No 1974 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence Application for Extension (Conviction) Application for Extension (Sentence & Conviction)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	9 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2011
JUDGES:	Muir JA, Margaret Wilson AJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In Appeal No 13 of 2011:** **1. The time within which the applicant may appeal against his convictions is extended to 4 February 2011.** **2. The application for leave to appeal against sentence is allowed.** **3. The appeals against conviction and sentence are dismissed.** **In Appeal No 216 of 2011:** **The application for an extension of time within which to appeal against conviction and sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – PLEAS – GENERAL PLEAS – PLEA OF GUILTY – WITHDRAWAL AND RESTORATION OF PLEA – GENERALLY – where the appellant was convicted on his own pleas of guilty of four counts of using a carriage service to have communications with three female complainants in a way that reasonable persons would regard as being menacing, harassing or offensive – where the appellant pleaded guilty following a pre-trial ruling that count 4 would not be severed from the

other counts on the indictment – where the appellant was represented by counsel when he entered his pleas – where the appellant sought to withdraw his guilty pleas on appeal – where the appellant argued that the prosecutor provided false and misleading information to the judge and that defence counsel made unauthorised admissions and concessions – where the appellant seeks an extension of time to appeal against his conviction – whether the application for an extension of time should be granted – whether the appellant should be granted leave to withdraw his pleas of guilty

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – GENERALLY – where the applicant was convicted after a trial of unlawfully stalking a female complainant – where the applicant sought an extension of time within which to appeal against his conviction and sentence – where the applicant had previously appealed to the Court of Appeal against his convictions – where the prior appeal had been dismissed on its merits – whether the Court has jurisdiction to hear a further appeal against those same convictions – whether it is in the interests of justice to grant an extension of time

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the appellant was sentenced to 12 months imprisonment for each of the Commonwealth offences of using a carriage service to menace, harass or cause offence – where the appellant complained that his counsel disregarded his instructions to contest the number of telephone calls made and raise other mitigating circumstances – where the appellant submitted that the sentencing judge erroneously took into account his earlier conviction and sentence for a Queensland stalking offence – whether later offences for which the appellant has been earlier sentenced may be taken into account in the exercise of a sentencing discretion – whether the appellant is entitled to have the sentences set aside

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to perform 240 hours community service and placed on two and a half years probation for the Queensland offence of unlawful stalking – whether the sentence was manifestly excessive

Crimes Act 1914 (Cth), s 4K
Criminal Code 1899 (Qld), s 590AA
Judiciary Act 1903 (Cth), s 68
Penalties and Sentences Act 1992 (Qld), s 12, s 152, s 155

Boag v R (1994) 73 A Crim R 35, cited
Grierson v The King (1938) 60 CLR 431; [1938] HCA 45, cited
Hicks v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 757, cited
Lawson v R [2011] NSWCCA 44, cited
Liberti v R (1991) 55 A Crim R 120, cited
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, considered
Putland v The Queen (2004) 218 CLR 174; [2004] HCA 8, cited
R v Basacar [2008] QCA 285, cited
R v Birks (1990) 19 NSWLR 677, considered
R v Gaudry [2005] QCA 395, cited
R v Hansen [2008] QCA 351, cited
R v Kirby; ex parte A-G (Qld) (2009) 193 A Crim R 357; [2009] QCA 35, cited
R v Leach [2004] QCA 189, distinguished
R v MAM [2005] QCA 323, cited
R v Mara (2009) 196 A Crim R 506; [2009] QCA 208, cited
R v Mundraby [2004] QCA 493, considered
R v Nudd [2007] QCA 40, cited
R v RAH [2011] QCA 35, cited
R v Vaughan [2010] QCA 268, cited
R v Walton [2006] QCA 522, distinguished
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, considered

COUNSEL: The applicant/appellant in Appeal No 13 of 2011 and Appeal No 216 of 2011 appeared on his own behalf
S M Ryan for the respondent in Appeal No 13 of 2011
V A Loury for the respondent in Appeal No 216 of 2011

SOLICITORS: The applicant/appellant in Appeal No 13 of 2011 and Appeal No 216 of 2011 appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent in Appeal No 13 of 2011
Director of Public Prosecutions (Queensland) for the respondent in Appeal No 216 of 2011

[1] **MUIR JA**:

CA No 13 of 2011

Introduction

The appellant pleaded guilty on 10 September 2010 to 4 of the 5 counts on an indictment of using a carriage service to have communications with a person in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. Count 1 concerned the use of the Internet. Count 2, in which the complainant was the same as in count 1, concerned the use of the telephone network between 1 March 2005 and 1 September 2005. Counts 4 and 5 concern telephone communications with different female complainants between

5 February 2007 and 21 May 2008, in the case of count 4, and on 22 July 2007 in the case of count 5. A nolle prosequi was entered by the Crown in respect of count 3, which involved telephone communications to another female complainant.

[2] The appellant was sentenced to imprisonment for 12 months for each offence and ordered to be released immediately upon giving security by recognizance in the sum of $2,000 conditioned that he be of good behaviour for two years. He appeals against his convictions on a number of grounds. The primary ground was that the judge, who decided an application under s 590AA of the *Criminal Code* on 14 May 2010 to have count 4 severed from the other counts on the indictment, erred in the exercise of his discretion.

[3] Another ground is that the decision pursuant to s 590AA was procured by false and misleading information provided by the prosecution and in circumstances in which unauthorised admissions and concessions were made by defence counsel. The grounds of appeal are not without their curious aspects. The following paragraphs are included in the five paragraphs under the heading "Grounds for Appeal of Conviction":

> "It has been the consistent objective of the appellant from the beginning to plea (sic) to counts 1 and 5, it was counts 2,3 and 4 that I believe I am innocent. In the interests in avoiding emotional trauma of the complainant in count 4, in taking the matter to trial and subjecting her to cross-examination, I submit a plea in this respect *albeit* with significant contesting of the facts. Since count 3 was discontinued by the prosecution, my only basis for appeal of conviction squarely relates to count 2 for which I believe I am innocent in this respect.
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> My submission of a plea for this charge (count2) was made since I was repeatedly advised by a number of legal advisors that I couldn't possibly get a fair trial with the charges maintained in jointer (sic) and that I would be convicted of it innocent or not."

The consequences of the appellant's pleas of guilty

[4] In order for the appellant to succeed on his appeal against conviction, he must first persuade the Court to go behind his plea of guilty. In *Meissner v The Queen*,[1] Brennan, Toohey and McHugh JJ discussed the principles relevant to the circumstances in which a court may go behind a plea of guilty:

> "A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence. The principle is stated by Lawton LJ in *R v Inns*:
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> > 'The whole basis of a plea on arraignment is that in open court an accused freely says what he is going to do; and the

[1] (1995) 184 CLR 132 at 141, 142.

> law attaches so much importance to a plea of guilty in open court that no further proof is required of the accused's guilt. When the accused is making a plea of guilty under pressure and threats, he does not make a free plea and the trial starts without there being a proper plea at all. All that follows thereafter is, in our judgment, a nullity.'
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> It may not be strictly accurate to describe what follows as a nullity, but it is certainly liable to be set aside and a new trial ordered. If a plea of guilty is entered by the person charged in purported exercise of a free choice to serve that person's own interests, but the plea is in fact procured by pressure and threats, there is a miscarriage of justice. In such a case, the court is falsely led to dispense with a trial on the faith of a defective plea. The course of justice is thus perverted." (citations omitted.)

[5] Before a court will go behind a guilty plea and entertain an appeal against conviction it must be satisfied that a miscarriage of justice has occurred.[2] A miscarriage of justice may be established where, in pleading guilty, the accused did not appreciate the nature of the charges or did not intend to admit guilt or where, on the admitted facts, the accused would not, in law, have been liable to conviction of the subject offences.[3] A miscarriage of justice may be established also by showing that the plea was "not really attributable to a genuine consciousness of guilt."[4] In *R v Mundraby*, Jerrard JA observed in the course of his reasons:[5]

> "This court was referred to the observations of Kirby P (as His Honour then was) in *Liberti* (1991) 55 A Crim R 120 at 121–122, cited by McPherson JA herein. Kirby P also added that:
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> > 'For good reasons, courts approach attempts at trial or on appeal in effect to change a plea of guilty or to assert a want of understanding of what was involved in such a plea with caution bordering on circumspection. This attitude rests on the high public interest in the finality of legal proceedings and upon the principle that a plea of guilty by a person in possession of all relevant facts is normally taken to be an admission by that person of the necessary legal ingredients of the offence.'
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> Those remarks are relevant to Mr Mundraby's application to set aside his plea. To cite from what Hunt CJ at CL wrote in *Boag v R* (1994) 73 A Crim R 35 at 39, all that has happened is that a different lawyer has given Mr Mundraby more favourable advice as to a jury's likely reaction to (the evidence) than Mr Mundraby was given by his solicitor before he made his plea of guilty. He knew before he attended court that day that he would be asked how he pleaded. Again to cite from Hunt CJ at CL in *Boag*, it is clear that Mr Mundraby made a deliberate and informed choice to plead guilty at that time."

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2 *R v Gaudry* [2005] QCA 395 at 3.

3 *Lawson v R* [2011] NSWCCA 44 at para [32].

4 *Boag v R* (1994) 73 A Crim R 35 at 37; *R v Gaudry* (supra) at 7 and *R v Mundraby* [2004] QCA 493 at para [11].

5 *R v Mundraby* [2004] QCA 493 at para [21].

[6] The appellant swore that he was advised by his solicitor that he could appeal against the refusal to order separate trials only after "finalisation of the matter through sentencing…despite communicating [his] strenuous desire to file an appeal of the 590AA Pre-trial decision." He swore that his guilty pleas were made:

> "…solely on the belief that a trial heard whilst counts remained in joinder would be inherently unfair due to the tendency and propensity submissions that one would expect to be led by the prosecution in cross-examination; that a fair trial would be absolutely abrogated through admission of overwhelmingly prejudicial allegations between the counts particularly highlighted in respect of telecommunications propensity in the absence of phone call record evidence in respect of counts 2 and 3."

[7] The appellant swore also that he submitted the pleas "of [his] own free will" and "in the absence of coercion, inducement or under duress from any counsel acting in [his] defence." He swore also that he had "at all times maintained a plea of guilty for counts 1 and 5 of the indictment, *albeit* with significant contesting of the facts in respect of count 1and submissions in mitigation for count 5…[and that his] bone of contention relates squarely to counts 2, 3 and 4 of the indictment."

[8] Even if the judge who refused the application for a separate trial of count 4 erred, it does not appear that any miscarriage of justice occurred. The appellant swore that he always intended to plead guilty to counts 1 and 5. In his notice of appeal he appears to be stating that he intends pleading guilty to count 4 "*albeit* with significant contesting of the facts." He swore that he made his pleas of his own free will.

[9] The appellant was represented by counsel when he pleaded guilty and when, on the sentencing hearing, the substance of the facts alleged by the prosecutor were implicitly admitted. There is no suggestion that the appellant's counsel took the course he did on the sentencing hearing on the understanding that the appellant would appeal against his conviction. If the appellant is to be believed, his counsel failed to follow his instructions on the sentencing hearing by not contesting "a number of elements in the statement of facts; namely the number of phone calls and the time-frames of offending periods…[and by] utterly disregarding submissions provided to him by [the appellant] that held significant mitigating value." Significantly, the appellant does not contend that he was not aware that, by his pleas of guilty, he was admitting that he had committed each of the offences charged.

[10] The appellant thus pleaded guilty in the exercise of a free choice in his own interests and sought to be sentenced on the most favourable terms. In those circumstances, particularly where it is accepted that he always intended to plead guilty to two of those counts and proposes to plead guilty to a third, there can be no miscarriage of justice resulting from the appellant's being held to his pleas. To the contrary, it would tend to bring the administration of justice into disrepute if it were accepted that pleas of guilty, in circumstances where an accused believed that his prospects of acquittal had been weakened by an adverse pre-trial ruling, could be regarded as provisional until such time as the pre-trial ruling had been challenged.

[11] It is also relevant that there is no good reason to believe that the appellant was innocent of any of the four offences.

[12] In the case of counts 1 and 5, there is damning documentary evidence of the offending conduct in the form of emails, in the case of count 1, and SMS messages in the case of count 5. The telephone calls, the subject of count 2, were allegedly made during the period in which the emails relevant to count 1 were sent. The complainant's evidence can be corroborated, to a degree, by that of her father. Also, the nature and content of the emails provide strong corroboration of the complainant's account concerning the telephone calls.

[13] That leaves count 4. On appeal, the appellant relied on selective extracts from the transcript of the complainant's cross-examination on the committal hearing. Those extracts contain evidence by the complainant to the effect that after an incident between the complainant and the appellant at Montville, although the complainant told the appellant that she didn't wish to meet up with him again, he called "probably…every day". She said that she didn't answer and the messages "started to get more aggressive". The complainant gave evidence, also in cross-examination, that the appellant's conduct had such an effect on her that she started seeing a psychologist and lost her job because she was distressed, "crying too much" and "having to leave work." Speaking generally of telephone calls from the appellant, the complainant said:

> "They were during voice messages, so like, the first one he'd call, and he'd be like, 'Hi, it's me, I just – I really want to talk to you,' and the next one would be a little bit more abusive, so each message would actually progress until he was literally screaming and swearing at me."

[14] For the above reasons, this ground of appeal fails and it is unnecessary to determine whether the judge who heard the pre-trial application erred in refusing to sever count 4.

The ground that false and misleading information was provided to the judge at the pre-trial hearing by the prosecutor and defence counsel made unauthorised admissions and concessions

[15] The most significant piece of information alleged to be false was the prosecutor's submission that the appellant used his mobile phone to contact the complainants in counts 2 and 3. This was said by the appellant to be false on the basis that the contention was not "supported in any way by phone records and was strenuously disputed by the appellant."

[16] It may be that there were no telephone records before the judge which supported the prosecutor's submission but such hearings are not trials. Generally, where a conflict of evidence does not fall to be resolved on such a hearing, the application is to be decided on the basis that the evidence the prosecution intends to lead will be accepted by the jury. The respondent has the further difficulty that all the evidence before the judge was not placed before this Court. If the prosecutor did misstate the facts in relation to the appellant's mobile phone, there is no reason to conclude that he was not genuinely mistaken. Nor, I hasten to add, does it appear to me that the identity of the telephone used by the appellant in his communications was of material significance to the outcome of the application.

[17] The complaint about the conduct of defence counsel seemed to centre upon his failure to take issue with the facts asserted by the prosecution in relation to the number and frequency of telephone communications. This complaint misunderstands the nature of the hearing and has just been addressed in part.

Moreover, as subsequent discussion shows, the appellant has not made out the case that the conduct of defence counsel (who was not the counsel who appeared on behalf of the appellant on the sentencing hearing) constituted a miscarriage of justice.

[18] For the above reasons, I would order that the time in which the appellant may appeal be extended and that the appeal be dismissed.

Application for leave to appeal against sentence

[19] All of the complainants were young women at the time of the offending conduct. The appellant was aged in his thirties. The appellant and the complainant, in respect of counts 1 and 2, had been in a "relationship" for in excess of two years. After the break up of the relationship, the appellant made persistent telephone calls to the complainant at the home in which she resided with her father. Calls were also made to the complainant's mobile phone. The tenor of the calls degenerated. During the telephone conversations, the appellant would become angry, agitated and abusive and threaten the complainant and her friends. The appellant also sent emails to the complainant who kept 32 of them. Some contained threats, grossly offensive abuse and sexually explicit language. In mid-2005, the complainant accidently met the appellant in Albert Street, Brisbane when she was with a friend. He approached her and touched her on the shoulder. She said words to the effect that she didn't want to have anything to do with him and walked away. He followed her and her friend to the train station. After that meeting, the complainant became increasingly concerned and obtained a new mobile telephone number.

[20] The complainants in respect of counts 4 and 5 had never been in a sexual relationship with the appellant. The appellant called the complainant in count 4 frequently. In the course of the conversations, he would become progressively more upset and emotional and conclude with yelling obscenities and name calling. The appellant threatened suicide on at least one occasion and the complainant attempted to comfort him.

[21] The appellant did not contact the complainant for a number of months. After contact resumed, the complainant agreed to go on a car trip with the appellant to Montville. During the trip, the appellant made repeated unwanted advances to the complainant who, at her request, was taken to the nearest train station. The appellant continued to call the complainant, leaving numerous voice messages. Some of the messages were abusive in nature, others were threatening and sexually explicit. Telephone records show 82 telephone calls and text messages over a period of 14 months.

[22] The offending conduct the subject of count 5 occurred on 22 July 2007. The complainant, who had only recently met the appellant, received 15 SMS text messages from the appellant between 5.26 pm and 8.26 pm on 22 July 2007. Some of the text messages were extremely abusive and contained graphic sexual content. The messages also intimated that the appellant would continue to contact the complainant irrespective of her wishes.

[23] In each case there were communications which were undoubtedly menacing and harassing and offensive.

[24] The appellant complained that his counsel "betrayed [his] fundamental instructions" to contest the number of telephone calls alleged and the "time-frames of the

offending periods…". It was also alleged that the appellant's counsel disregarded submissions given to him by the appellant that held "significant mitigating value."

[25] If it was the case that the appellant's counsel disregarded his instructions in some respects, that would not give rise, necessarily, to an entitlement to have the sentences set aside. In *R v Birks*,[6] Gleeson CJ stated the following principles which have application for present purposes:

> "1. A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.
> 2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.
> 3. However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention. "

[26] Although the following passage from the judgment of Gleeson CJ in *TKWJ v The Queen*[7] is directed to tactical decisions made by counsel in the course of the trial, they are relevant to the conduct of counsel on a sentencing hearing.

> "It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial. But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness. It is the responsibility of counsel to make tactical decisions, and assess risks. In the present case, the decision not to adduce character evidence was made for an obvious reason: to avoid the risk that the prosecution might lead evidence from K."

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6 (1990) 19 NSWLR 677.

7 (2002) 212 CLR 124 at 130, 131.

[27] In *TKWJ*, McHugh J observed:[8]

> "The role of counsel in a criminal trial is so important that it hardly needs argument to conclude that his or her conduct of the trial can bring about a miscarriage of justice. *Tuckiar v The King* – where counsel's statement and conduct in front of the jury reinforced the presumption of guilt arising from the judge's charge – is a well-known, if extreme, example. Where an appellant contends that the conduct of his or her counsel has caused a criminal trial to miscarry, however, the appellant carries a heavy burden. This is a consequence of the adversarial nature of our legal system and the role and function of counsel. Criminal trials are not inquisitions. They are contests 'in which the protagonists are the Crown on the one hand and the accused on the other'. Ordinarily, a party is held to the way in which his or her counsel has presented the party's case. That is because counsel is in effect the party's agent. Counsel is 'ordinarily instructed on the implied understanding that he is to have complete control over the way in which the case is conducted'. The discretion retained by counsel in the running of a case is very wide. Counsel may even settle a case without seeking the client's consent. Blackburn J noted in *Strauss v Francis* that 'the apparent authority with which [counsel] is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause'. In *Strauss* – where the issue was whether counsel had authority to consent to the withdrawal of a juror, notwithstanding the client's dissent – Mellor J added:
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> > 'No counsel, certainly no counsel who values his character, would condescend to accept a brief in a cause ... without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter counsel, the only course is to return the brief.' " (citations omitted)

[28] The appellant does not condescend to much in the way of detail concerning the instructions which were said to have been ignored. He conceded in the course of argument that he did not wish to subject the complainants to cross-examination. It is reasonable to conclude also that he did not wish to give evidence himself and, if he did, that his counsel would have advised strongly against that course.

[29] In my opinion, the sentencing hearing was conducted capably and effectively by defence counsel. He avoided reminding the sentencing judge of the appalling content of some of the appellant's communications. Rather, he concentrated on handicaps, disabilities and problems under which the appellant laboured. He skilfully sought to minimise the impact of the offending behaviour in counts 1 and 2 by showing that at times during the offending period, the complainant had contacted the appellant. He noted also that the complainant and the appellant had, in fact, been engaged. He dealt at some length with the appellant's alleged insight into his offending conduct, his remorse and the treatment that he had undergone. He highlighted the appellant's academic qualifications and the difficulties the appellant had experienced in getting work as a result of the subject charges.

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[8] At para [74].

[30] Defence counsel was particularly successful in convincing the judge that instead of re-sentencing the appellant as a result of his failure to comply with the terms of his community service order, that the order simply be set aside and the existing probation order be permitted to continue.

[31] If defence counsel did ignore the appellant's instructions, the probabilities are that the appellant was well served by his counsel's disobedience. It was apparent from the appellant's conduct in relation to his appeal that, not only does he lack insight into his offending conduct, but that he has little, if any, ability to identify those arguments and considerations which might assist his cause.

[32] Some indication of the inability of the appellant to understand what matters were likely to be of material benefit to him in the sentencing process may be seen from his submission that there were two "clear instances of negligence by defence counsel." These examples were that defence counsel stated that the appellant " 'graduated 2003 with Masters of Science from James Cook University' " when in actual fact he should have read: " 'graduated with a Bachelor of Science in Biochemistry and Molecular biology from James Cook University in 2003 and (fully self-funded) a Master of Science in Biotechnology degree from Griffith University in 2005'; (2) further, he stated to the Judge: 'worked at Sullivan and Nicolaides at the RBH in 2007' when in actual fact, it should have said 'worked in the molecular pathology laboratory at Sullivan and Nicolaides Pathology in 2007 and the Neoplasm Immunophenotyping Laboratory at the Royal Brisbane Hospital in 2005'."

[33] These misstatements were said to lend "support to the hypothesis of collusion between the barristers in biasing the sentencing hearings." The appellant complained of defence counsel's not seeking an adjournment in order to obtain a psychiatric report. It has not been shown that any report which might have been obtained would have proved beneficial to the appellant. In any event, the appellant was dealt with leniently. He was a serial offender who had caused distress and fear to four women who had given him no cause to maltreat them. The primary judge, rightly, regarded it as significant that the appellant came to be dealt with on the basis that his offending conduct was not confined to an isolated incident.

[34] The appellant complained of the use by the prosecutor of "highly inflamed rhetoric". This was a reference to the submission by the prosecutor that the appellant had been "bombarding" the complainants with emails, phone calls and text messages. This description of the appellant's communications was not demurred from by defence counsel, although he sought to minimise the extent of offensive communications. It appears to me that the description was amply justified by the facts in the statement of facts.

[35] The appellant alleged that defence counsel had a conflict of interest as he was "a Commonwealth prosecutor" who happened to share an office with the prosecutor and was a good friend of the prosecutor. There was no evidence to support the allegation and certainly no evidence to support any allegation that either the prosecutor or defence counsel had acted in any way that breached his or her duty or behaved in a way which was professionally inappropriate.

[36] Complaint was made that the sentencing judge took into account the earlier conviction and sentence in respect of the Queensland stalking offence which was committed after the subject offences. The complaint was misguided. Later offences

may be taken into account in the exercise of the sentencing discretion.[9] The stalking conviction was relevant to the assessment of the risk of recidivism and the appellant's prospects of rehabilitation. The appellant relied on *R v Walton*[10] and *R v Leach*[11] to support his argument that the sentences were manifestly excessive. In *Walton*, the 56 year old female applicant had been married for about 30 years. After she and her husband separated, he rekindled a relationship with the complainant who came to live with him. The applicant then made some 330 telephone calls, which were often abusive and obscene, to the complainant over a period of in excess of one month. The telephone calls ceased only when the complainant moved interstate to avoid the harassment.

[37] Another count on the indictment concerned numerous such calls made over a period of about four months after the complainant's return to Queensland to live with the applicant's former husband. The applicant had no prior criminal history, she cooperated with authorities and entered an early plea. Her application for leave to appeal against the sentence of six months imprisonment wholly suspended for an operational period of two years was refused even though the offending conduct did not involve threats of violence or surveillance of the complainant by the applicant. In his reasons, Williams JA expressed the view that:

> "…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."

[38] Keane JA noted:

> "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."

[39] Although the conduct in *Walton* involved a great many telephone calls, there were no threats of violence and, having regard to the absence of any direct relationship between the complainant and the applicant, it is highly unlikely that there was explicitly sexual abuse which would have had anything like the impact of the abuse levied at the subject complainants. Moreover, the Court, while finding that the sentence imposed was not manifestly excessive, was not required to and did not determine whether a higher sentence may have been within range.

[40] The applicant in *Leach* succeeded in having sentences of 12 months imprisonment and 18 months imprisonment imposed respectively for an offence of stalking and an offence of stalking with a circumstance of aggravation set aside and replaced with terms of imprisonment of nine months with three years probation. After the

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9 *R v Kirby; ex parte A-G (Qld)* [2009] QCA 35.
10 [2006] QCA 522.
11 [2004] QCA 189.

applicant had had social contact with a female student in his class, he commenced making threatening telephone calls to her and refused to desist despite being requested to do so. After the complainant threatened to report him to the authorities, the calls ceased, but soon resumed. The applicant followed the complainant after lectures and laughed at her requests that he leave. He also followed her to her work place and watched her from outside causing her to change her employment. He made various threats, including a threat to have her deported. The applicant was charged and given bail on condition that he not approach the complainant directly or indirectly. He breached that condition on five occasions. The circumstances of the breaches constituted the offence with the circumstance of aggravation. The applicant also had a prior conviction for stalking a young woman with whom he had become infatuated.

[41] The sentences imposed at first instance were set aside, not because they were found to be manifestly excessive, but because of sentencing error on the part of the sentencing judge. The offending conduct in *Leach* was more serious than that involved in the subject offences, but it involved only one complainant and it does not appear that it was as grossly offensive in nature as the conduct here. Significantly, the applicant was sentenced to a term of actual imprisonment and it appears that he was much younger than the appellant.

[42] For the above reasons, the appellant failed to establish that the sentences imposed on him were manifestly excessive or, for that matter, excessive.

[43] On the hearing of this application a question arose of whether one sentence had been imposed for all offences or whether separate sentences had been imposed and, if so, whether they were concurrent or cumulative. The parties were invited, if they wished, to make further submissions on the point. They availed themselves of the opportunity and both sets of submissions were considered.

[44] There was some doubt in my mind that the sentencing judge pronounced a sentence for each offence as he was required to do[12] but after further consideration, and having regard to the presumption of regularity, I have concluded that the sentence of 12 months imprisonment was imposed for each offence. If that was not the case it would have been necessary for this court to re-sentence the appellant. In that event, the sentence I would have considered appropriate by way of head sentence would have been not less than the sentences imposed by the sentencing judge.

[45] I accept the submissions by counsel for the respondent that by application of s 155 of the *Penalties and Sentences Act* 1992 (Qld) made applicable by s 68 of the *Judiciary Act* 1903 (Cth) the sentences were concurrent.[13] There is also a common law presumption[14] to that effect.

[46] The appellant also submitted that this Court should vary the sentences by ordering that convictions not be recorded. He was concerned that the recording of convictions would damage his employment prospects in Australia and limit his ability to study and work in the United States.

[47] This Court is unable to interfere with the sentences imposed at first instance unless they were affected by error. No error has been identified. It does not appear that

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12 *Putland v The Queen* (2004) 218 CLR 74 and *Crimes Act* 1914 (Cth) s 4K.

13 *R v Mara* [2009] QCA 208 and *Putland v The Queen* (2004) 218 CLR 74.

14 *Hicks v The Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 757 at pp 28, 29.

the sentencing judge was requested not to order a conviction. If he had been so requested, and assuming the application of ss 12 and 152 of the *Penalties and Sentences Act* 1992 (Qld), he could not have imposed the terms of imprisonment which he plainly considered to be merited.

[48] If he had exercised his discretion against the non-recording of a conviction, his discretion would not have miscarried having regard to the nature and number of the offences on the indictment as well as the prior conviction in respect of which a conviction had been recorded.

[49] I would order that the time within which the appellant may appeal against his convictions be extended to 4 February 2011. I would grant leave to appeal against sentence and order that the appeals against conviction and sentence be dismissed.

CA No 216 of 2011

Introduction

[50] The applicant was convicted on 4 February 2010 after a trial in the District Court of unlawfully stalking the female complainant between 25 July 2008 and 22 August 2008. He was sentenced to perform 240 hours community service and placed on two and a half years probation with a special condition that he have medical, psychological and psychiatric treatment. A two year restraining order was also made against him.

[51] On 3 March 2010, the applicant filed a notice of appeal against conviction and an application for leave to appeal against sentence.

[52] The appeal against conviction, apart from being well out of time, is incompetent, an earlier appeal by the applicant[15] having been dismissed on its merits.[16]

[53] The applicant had filed a notice of appeal and application for leave to appeal against sentence on 3 March 2010. He abandoned the application for leave to appeal against sentence on 3 September 2010 by filing a notice of abandonment.

[54] Even though the application for leave to appeal against sentence was abandoned, this Court may set aside the abandonment and re-instate the appeal if it considers such a course necessary in the interests of justice. It has been accepted that, where an application for leave to appeal or an appeal has been abandoned, an application to extend time in which to appeal should be treated as an application to set aside the abandonment and re-instate the appeal.[17] Relevant to the determination of such an application are:

(a) the reason for the abandonment for the appeal or application;
(b) the explanation for any delay that has occurred since the abandonment; and
(c) the prospects of success on appeal.

[55] The applicant advances no explanation for the abandonment of his application or for the delay between 23 September 2010 and 4 February 2011.

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15 *R v Vaughan* [2010] QCA 268.

16 *Grierson v The King* (1938) 60 CLR 431 at 435; *R v MAM* [2005] QCA 323; *R v Nudd* [2007] QCA 40 and *R v RAH* [2011] QCA 35 at 3.

17 *R v Basacar* [2008] QCA 285 and *R v Hansen* [2008] QCA 351.

[56] The application for leave to appeal against sentence is on grounds:

> "(a) That, in light of substantial mis-truths\false allegations in police\DPP allegations, precluded the possibility of the defendant submitting a guilty plea at an early opportunity and that
>
> (b) the sentence was manifestly excessive."

[57] The applicant relied on a fourteen page written "outline" of argument. It is replete with scurrilous and improbable allegations against the prosecutor and defence counsel in, and in relation to, a sentencing hearing in respect of four *Crimes Act* 1914 (Cth) offences ("the Commonwealth proceedings"). An appeal against conviction and sentence in respect of the Commonwealth proceedings was heard together with these applications. Reference was made to errors alleged to have been made by the judge in that proceeding. The outline explains that "the elementary structure of the appeal is based on errors of fact in the four-count Commonwealth indictment and cognate disparate case authority; the sentencing process was corrupted by criminal conduct of defence counsel and the prosecutor…".

[58] From this unpromising start, the applicant proceeded to complain or rely on matters such as:

(a) alleged false and misleading submissions by the prosecutor in the Commonwealth proceedings;

(b) the mitigating circumstance that the applicant had desisted from sending offending emails for "over three years" before being charged;

(c) the applicant's feeling "betrayed by his former fiancé moving back in with her ex-boyfriend in 2004";

(d) the "very convoluted and intrinsically contradicting nature of the corroborating testimonial evidence of the complainant";

(e) a contention that the "testimony" of the complainant's father supported a submission that alleged telephone calls were never rejected or otherwise "indicated as unwarranted, harassing, abusive or offensive";

(f) an analysis of telephone calls made by the applicant to the complainant, seemingly with a view to showing that such calls were infrequent and that the telephone records did not support the complainant's evidence of the frequency and nature of such calls;

(g) various other challenges to the "false and misleading" submissions of the prosecutor in the proceedings;

(h) a contention that the allegations in the Commonwealth proceedings overlapped factually with the subject stalking offence and that the applicant should be given "a single sentence served concurrently as opposed to cumulatively at present"; and

(i) alleged inconsistencies between evidence on committal in the Commonwealth proceedings and prosecution submissions in those proceedings.

[59] In conjunction with the sentencing hearing in the Commonwealth proceedings, the Director of Public Prosecutions (Qld) applied for revocation of the community service and probation orders. The application in respect of the community service order was not opposed and was granted. By that time, the applicant had performed 91 hours community service. The revocation of the probation order was resisted successfully by the applicant's counsel.

[60] The conduct and outcome of the Commonwealth proceedings cannot bear on the appropriateness of the sentence imposed by the primary judge at an earlier date. However, the fact that there has been an intervening proceeding which has resulted in part of the applicant's penalty being set aside, is a reason why this Court should be reluctant to interfere with the subject sentences. There is a strong public interest in finality in legal proceedings.[18] Moreover, the applicant's appeal against conviction and sentence in the Commonwealth proceedings was heard together with this application. If the sentences imposed in the Commonwealth proceedings resulted in any injustice to the applicant, that could have been redressed in the appeal in the Commonwealth proceedings.

[61] The sentencing hearing, which took place immediately after the jury's verdict was delivered, was brief. The prosecutor informed the judge that there were 34 emails, nine text messages and at least five telephone calls from the applicant to the complainant between 26 July and 17 August 2008. She submitted that these communications were evidence of "consistent harassment" of the complainant which continued despite the complainant's boyfriend and mother telling the applicant to stop. There was no factual dispute between defence counsel and the prosecutor, except that defence counsel submitted that there were 26 emails, nine text messages and five telephone calls in the relevant period. The prosecutor contended that the appropriate sentencing range was six to nine months imprisonment and that a period of actual custody should be imposed on the grounds of personal deterrence.

[62] Defence counsel accepted that a head sentence of six to nine months imprisonment was open but submitted that any such sentence should be fully suspended and include a five year restraining order. He accepted, inferentially, that probation and/or community service were "applicable in the circumstances".

[63] The work history of the applicant was provided. Defence counsel informed the sentencing judge that the applicant: had a Master of Science degree from Griffith University; was on depressant medication and had an ambition to engage in scientific research in the United States. It was submitted that the applicant's "inconsistent employment" led to a "financially influenced depressive disorder".

[64] In his sentencing remarks, the primary judge drew attention to the fact that the complainant was only 18 years of age. His Honour found that:

> "There were constant communications to the complainant, nothwithstanding that it was obvious that the complainant wished to have nothing further to do with [him]. The communications involved quite unnatural assertions of love for her. [He] had no basis for making such assertions. [The applicant] and she had been nothing more than friends and for a relatively brief period of time.
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> The fact of these constant communications, as well as the content of them, was undoubtedly frightening for the complainant. Her

[18] See eg, *Liberti v R* (1991) 55 A Crim R 120 at 121-122.

> ignoring [his] advances did not deter [him]. The telephone conversation with her brother asking [him] to stop the communications did not deter [him]."

[65] The applicant seeks to minimise the extent and gravity of his offending communications by concentrating on the complainant's evidence about frequent telephone calls and the lack of substantiation for that evidence in telephone records. The exercise is of no benefit to the applicant for present purposes. The primary judge made no erroneous finding in respect of the telephone calls. The record of electronic communications provides ample proof of the applicant's harassment of the complainant with emotionally charged and frequently offensive and abusive emails. The sentencing judge could have concluded, justifiably, that the telephone communications were likely to have followed a similar pattern to the emails. In the emails, the applicant referred to his own "horribly threatening behaviour".

[66] His Honour remarked on the applicant's absence of remorse and lack of genuine insight into the wrongfulness of his convictions. He considered that it would be in the best interest of the applicant and of the community for the applicant to receive the benefit of a lengthy period of supervision.

[67] The sentencing judge's findings were amply supported by the evidence. There was nothing in defence counsel's submissions which contradicted or falsified them in any way.

[68] The applicant referred to decisions in *R v Walton*[19] and *R v Leach*.[20] There is nothing in either of those decisions, which are discussed in my reasons in CA No 13 of 2011, which support the contentions that the subject sentences were manifestly excessive. The sentence is clearly not manifestly excessive. The applicant's conduct was protracted. It was likely to engender fear and distress in the complainant and there was evidence that it did. The applicant ought to have known that, and it is probable that he did.

[69] Any appeal against sentence would have no reasonable prospects of success and I would order that the application for an extension of time within which to appeal against conviction and sentence be refused.

[70] **MARGARET WILSON AJA**: I agree with the orders proposed by Muir JA in both matters, and with his Honour's reasons for judgment.

[71] **PHILIPPIDES J**: I have had the advantage of reading the reasons for judgment of Muir JA in CA No 13 of 2011 and No 216 of 2011. I agree with the reasons of his Honour and with the proposed orders.

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19 [2006] QCA 522.

20 [2004] QCA 189.