SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rowe* [2011] QCA 372
PARTIES:	**R** **v** **ROWE, Duane Raymond John** (applicant)
FILE NO/S:	CA No 241 of 2011 DC No 277 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	16 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2011
JUDGES:	Fraser and Chesterman JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDERS:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to stalking with violence, burglary with violence, assault occasioning bodily harm, common assault, and wilful damage – where the complainant was his former partner – where the offences were committed while the applicant was on parole for offences of violence for which he had been sentenced to three years' imprisonment, but given parole after serving 12 months – where he was returned to custody on being charged with the stalking and related offences after being in the community for 11 months – where sentence imposed for stalking was three years cumulative on the existing sentence with a parole eligibility date set 12 months into the cumulative sentence – whether the sentence of three years' imprisonment for the stalking offence that was cumulative on the existing term of imprisonment was manifestly excessive – whether setting the parole eligibility date after 12 months of the cumulative sentence had been served made the sentence manifestly excessive *R v AN* [2003] QCA 349, considered *R v Keong* [2007] QCA 163, considered *R v Kitson* [2008] QCA 86, considered

R v Kofoed [2005] QCA 438, considered
R v Macdonald [2008] QCA 384, considered
R v Matue [2009] QCA 216, considered
R v Soffy [2008] QCA 129, considered

COUNSEL: J J Allen, with J Lodziak, for the applicant
J A Wooldridge for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Mullins J and the order proposed by her Honour.

[2] **CHESTERMAN JA**: I agree that the application for leave to appeal against sentence should be refused for the reasons given by Mullins J.

[3] **MULLINS J:** The applicant pleaded guilty to five offences arising out of events on 21 and 22 November 2010 involving his former partner. He was sentenced to three years' imprisonment for unlawful stalking, with violence (count 1), two years' imprisonment for each of burglary with violence (count 2) and assault occasioning bodily harm (count 3), and 12 months' imprisonment for each of common assault (count 4) and wilful damage (count 5). Each sentence was concurrent with the other sentences. The effective term of three years' imprisonment was ordered to be cumulative on the applicant's current term of imprisonment of three years for which he had a full time discharge date of 29 December 2011. The date the applicant was ordered to be eligible for release on parole was fixed at 29 December 2012.

[4] The applicant applies for leave to appeal against the sentences on the ground they are manifestly excessive.

The circumstances of the offences

[5] The complainant had been in a relationship with the applicant for about six years which terminated in January 2010. There was one child of the relationship who was two years old when his parents separated.

[6] On Sunday 21 November 2010, the complainant received a telephone call from the applicant who demanded to know what she had been doing. When the complainant terminated the call, the applicant telephoned again, but she refused to answer. For approximately seven hours from 5 pm the applicant sent text messages to the complainant which inquired whether the reason that she was not answering was because she had a new boyfriend.

[7] The applicant did not have permission to enter the complainant's house, unless invited. At 7.30 am on 22 November 2010, the complainant and her son were at home watching television in the lounge room, when she heard footsteps coming down the hallway and looked up and saw the applicant in the house. He yelled at the complainant to give him her telephone and was extremely angry. He persistently demanded that the complainant get the telephone and then punched her on the left side of the temple on her head. She started crying and got up from the lounge and walked into the bedroom to retrieve the telephone. The complainant produced her telephone and the applicant went through the telephone and found

a text message from a man which angered him and he yelled at her. The applicant punched the complainant again to the left temple and repeated yelled at her, accusing her of sleeping with "everyone."

[8] The complainant repeatedly asked the applicant to leave, but he refused. The complainant went outside to have a cigarette. The applicant helped himself to a can of rum and cola from the refrigerator and followed the complainant. The applicant poured the can of rum and cola over the complainant and their child who was sitting on the complainant's lap. He then pushed a lighted cigarette on the complainant's leg, burning her. He threatened to kill the complainant. As the applicant went to pick up the child, the complainant ran towards a neighbour's house calling for help. He chased after her while holding the child. He tackled her to the ground and punched her to the right side of her head several times, whilst holding a hand over her mouth to stifle her screams. The child was also screaming.

[9] The applicant eventually desisted and the complainant was able to get up and return to the house. She complained of difficulty breathing and that her eyes "were going funny" and the applicant said he would take her to the hospital, but that she had to clean herself up first. He watched her while she showered and got ready. The applicant told the complainant that if she did not tell him the code for the safe of the hotel where she worked, he would punch her again. The complainant gave the applicant some numbers that were, in fact, not correct.

[10] The applicant drove the complainant to the hospital, continuing to yell and threaten her. Their child was in the back seat. At one stage the applicant said to the complainant that he should just kill the child in front of her, so that she would feel the applicant's pain. Whilst driving, the applicant swung his left hand at the complainant and backhanded her to the side of her face. At another stage he accelerated towards the car in front, saying that he should just "kill us all."

[11] The applicant waited with the complainant for a time at the hospital, but then left taking their child with him. The complainant was collected from the hospital by a work colleague and collected clothes from her residence at about 1 pm, but did not stay there. The applicant sent text messages to the complainant demanding to know where she was. When the complainant did not respond, the applicant started texting her at the rate of several times per minute. The complainant drove to work for the commencement of her shift at 4 pm. The applicant then made repeated calls to the telephone at the complainant's workplace. The complainant sent him texts on three occasions between 5 pm and 6 pm asking him to leave her alone. He then attended at the car park of the hotel where the applicant worked, looking for the complainant. He was told that she was not there. Before leaving the car park he damaged her car, by smashing the rear windscreen and a tail light, and deflating a tyre. The applicant then sent the complainant a text message purporting to notify her that their son had been injured in an accident and would be going to hospital, even though the child had not been injured. The applicant was located by police at about 9.30 pm.

The applicant's antecedents

[12] The applicant was 21 years old at the time he committed the offences and 22 years old when sentenced. When the applicant was 19 years old he committed the offences of enter dwelling with intent by break at night with circumstances of aggravation, assaults occasioning bodily harm whilst armed and in company and

associated summary offences to which he pleaded guilty in the District Court at Ipswich on 16 October 2009. He was sentenced to three years' imprisonment in respect of which a pre-sentence custody declaration of 291 days between 29 December 2008 and 16 October 2009 was made. The applicant was released on court-ordered parole on 29 December 2009. He therefore committed the subject offences whilst on that parole and was returned to custody on remand for the subject offences on 23 November 2010, when a parole suspension order was also issued.

[13] The court report prepared for the sentencing for the subject offences described the applicant's response under community based supervision as unsatisfactory. After being released on parole, the applicant was dealt with in the Magistrates Court in September 2010 for two offences of unauthorised dealing with shop goods. He was convicted and fined on each occasion.

[14] At the time of committing the subject offences, the applicant was in conflict with the complainant over the implementation of an agreement that they had made about the shared care of their child. The applicant considered that the complainant was not observing the agreement about the period of time each week that their child was meant to be in his care.

The sentencing

[15] The learned sentencing judge noted that the stalking occurred over a relatively short time, but that it was "very intense and quite violent." The sentencing judge accepted that the actual injuries sustained by the complainant were not particularly serious, but the violence was protracted. The sentencing judge referred to the fact that the complainant was assaulted in front of the parties' young child who must have been terrified and that the complainant was also terrified.

[16] The sentencing judge stated:

> "The facts of this offence are bad enough but you were on parole at the time for an offence of quite significant violence involving you being armed and entering a house of some people in company with others. At that time you were given a fairly generous sentence because you were 19 years of age. You're still a young man but that concession to youth, in my view, weighs much less in this sentence because of the fact that you've already been given that concession in relation to another offence of violence."

[17] The judge noted that any sentence that was imposed had to be cumulative (which was the practical effect of s 156A of the *Penalties and Sentences Act* 1992 (the Act) which applied to counts 2 and 3). The sentencing judge expressly took into account that it was unlikely that the applicant would obtain parole, the guilty pleas and that the offending was committed against a background of some conflict between the applicant and the complainant about access by the applicant to their child. The sentencing judge balanced that, however, against the importance of personal deterrence for the applicant, as well as general deterrence to show that the behaviour engaged in by the applicant is totally unacceptable to the community. On the basis that the applicant was serving a current period of imprisonment for which there was a full time discharge date of 29 December 2011, the sentencing judge ordered that the applicant be eligible for parole on 29 December 2012 which was 12 months into the cumulative sentence of three years.

Arguments advanced for why the sentence was manifestly excessive

[18] There were two reasons advanced on behalf of the applicant for why an effective head sentence of three years' imprisonment for the subject offences that was cumulative on the existing term of three years' imprisonment with a parole eligibility date after one year of the cumulative sentence had been served was manifestly excessive. The first was that, as the cumulative sentence had to be moderated for the totality principle, the sentencing judge must have started with a head sentence in excess of three years which was not supported by the comparable authorities for sentences for the offence of stalking. The second was that the parole eligibility date set by the sentencing judge at four years into a period of imprisonment of six years made the sentence manifestly excessive.

Comparable authorities

[19] The offender in *R v AN* [2003] QCA 349 was sentenced to three years' imprisonment for stalking with circumstances of aggravation that was cumulative on imprisonment of 14 months that remained to be served under a partially suspended term of imprisonment that was activated at the same time that the sentence of three years' imprisonment was imposed. The practical effect of the sentences was that the offender was liable to serve imprisonment of four years two months and was not eligible for release until about 18 months after the date of sentencing. The offender was 48 years old when he was sentenced and had a prior conviction for stalking with a circumstance of aggravation and other criminal history including convictions for breach of domestic violence orders. The first act of stalking in relation to the subject offence was committed the day after his previous sentence for stalking had been imposed. The sentence was reduced on appeal to two years' imprisonment with a recommendation for eligibility for parole about six months after the date of sentencing. The stalking for which the offender was sentenced did not involve any actual violence or related offending of assault or burglary.

[20] A sentence of two years' imprisonment suspended after six months for an operational period of three years for each of the offences of stalking with a circumstance of aggravation, burglary and assault was not disturbed in *R v Kofoed* [2005] QCA 438. The offender who pleaded guilty after arraignment for trial was 36 years old and had an extensive and serious prior criminal history including convictions for burglary and violence and breaches of domestic violence orders. The offender had been an employee of the complainant and the partner of the complainant's niece with whom he had a child. The burglary was committed when the offender entered the complainant's house over the objection of the complainant. The assault was committed when the offender poked the complainant's shoulder twice with his finger. The stalking offence commenced later the same day with threats made by the offender to the complainant when he attended at her house again. This was followed by harassment by the offender over a period of nine months of the complainant on a regular basis, including driving slowly by her house, being present in her backyard holding a piece of wood, and intimidating the complainant when they were both driving their vehicles on the road, including one occasion when he forced the complainant's vehicle into the path of oncoming traffic. The application for leave to appeal against sentence focused on the imposition of a custodial sentence, when the prosecutor had submitted to the sentencing judge that a non-custodial sentence would be appropriate. On the basis

of the applicant's past criminal history and the violent nature of the subject offending, the sentence imposed was held to be within range. Apart from the initial assault which was not a serious example of that type of offending, the violence that was mainly present in this offending was in the nature of threatened rather than actual violence.

[21] After guilty pleas, the offender in *R v Keong* [2007] QCA 163 was sentenced to two years' imprisonment in respect of stalking with circumstances of aggravation and 12 months' imprisonment for common assault. Those sentences were concurrent with each other, but cumulative upon 508 days' imprisonment that was the activated unserved balance of a suspended sentence of two years six months imposed on 8 November 2005 when the offender was sentenced for offences of deprivation of liberty and sexual assaults. A parole eligibility date was set at 9 October 2008 which was about three months after the end of the portion of the suspended sentence that was activated. The stalking was committed after the offender had been made the subject of an order prohibiting him from contact with the complainant. He was released on parole on 15 September 2006 in respect of an earlier series of offences involving the same complainant and on the next two days made a number of telephone calls to the complainant. He telephoned her again on 27 September 2006 while she was driving to the supermarket where she worked, and then approached her as she entered the shopping centre. He insisted on hugging her which resulted in the common assault offence. Later that day and on the following day the offender approached the complainant a number of times at the cash register she operated. He then telephoned her as she was travelling home from work and threatened her. After the offender telephoned the complainant a week later a number of times, the complainant complained to the police. The offender was 27 years old when sentenced. He had a long criminal history of relevant offending. He had an IQ in the extremely low range. He pleaded guilty to an ex officio indictment. The sentence for stalking was reduced to 18 months' imprisonment and the sentence for the common assault was reduced to six months' imprisonment, but there was no alteration to the parole eligibility date and the sentences remained cumulative on the activated suspended sentence. On the appeal, the reduction was made to the sentences on the basis that they had not sufficiently recognised the early plea of guilty, and the offender's intellectual disability, and the real prospect that the offender was not likely to achieve parole during his sentence.

[22] The offender in *R v Soffy* [2008] QCA 129 was convicted after trial of aggravated stalking of his estranged wife between 6 July and 2 November 2005, assault occasioning bodily harm and assault. He was acquitted of some offences. He was sentenced to two years' imprisonment for the stalking offence and concurrent sentences of 12 months' imprisonment for the assault occasioning bodily harm and four months' imprisonment for the assault. Parole was fixed after 12 months' imprisonment. The offender and the complainant were of Sudanese descent and had migrated to Australia in 2004. The offender was 28 years old when he committed the offences, had no prior criminal history and had experienced deprivations in the past. The stalking occurred over a period of four months and included a threat to kill the complainant, her son and himself, attending at the complainant's residence at night when he turned the power off and attempted to enter her home, throwing items of clothing over the complainant while she was at a medical centre and the conduct involved in the convictions for the related offences. The assault occasioning bodily harm developed out of an argument as to how a pension for the offender's son should be used. The complainant took the son to another room in the

house and the offender followed and punched her in the body, face and head. He also grabbed her by the throat and put a cushion over her nose when the son intervened. The assault occurred when the offender was holding a pair of scissors that he used to cut the complainant, causing her to bleed, but the wound was superficial. The sentence was not disturbed on appeal. The stalking in *Soffy* was over a longer period, but the associated violence was not as serious as the applicant's conduct. The offender also had the benefit of favourable antecedents.

[23] The maximum penalty for stalking with circumstances of aggravation provided for in s 359E(3) of the *Criminal Code* 1899 is seven years. The fact that the comparable authorities that are analysed above and were relied on by the applicant suggest that a sentence of two years' imprisonment is not uncommon for the offence of stalking with circumstances of aggravation does not make it the invariable sentence. As was observed by the Chief Justice in *R v Macdonald* [2008] QCA 384 at [21]:

> "There is no well-defined and constraining range for stalking offences, obviously because of the particularly wide variety of these cases which regrettably emerges."

[24] Although the period of stalking by the applicant was short, his offending conduct was intense, accompanied by both actual and threatened violence and terrified the complainant and their child. It had the serious aggravating features of being committed in conjunction with the offence of burglary and whilst the applicant was on parole for offences of violence. Although the applicant relied on the approach taken on appeal in *Keong* where the sentence for stalking was reduced where it was cumulative upon an activated suspended sentence, one of the reasons for the reduction in that stalking sentence was to give appropriate acknowledgement to other mitigating factors that had not been reflected in sentence imposed by the sentencing judge. In contrast to the applicant's conduct, there was little physical contact and no violence in the offending in *Keong*. In fact, the applicant's offence of stalking was more serious overall than in any of the comparable authorities set out above.

[25] Even allowing for the fact that the sentence for stalking was imposed as a cumulative sentence on the applicant's existing sentence for offences of violence, the head sentence of three years was not outside the possible sentences that could have been imposed consistent with the sound exercise of the sentencing discretion in all the circumstances of both the offending and the applicant's antecedents.

Setting the parole eligibility date

[26] Before the applicant was returned to custody on 23 November 2010, he had served 12 months in prison of the effective term of three years' imprisonment imposed on 16 October 2009 and served the further period of the sentence between 30 December 2009 and 22 November 2010 (almost 11 months) whilst on parole. The applicant's submission that the parole eligibility date was set after four years of a period of imprisonment of six years does not acknowledge that almost 11 months of that four years was served in the community when the applicant was on parole.

[27] It is difficult to see the justification for the applicant's submission that the parole eligibility date should be set at the halfway point of the applicant's period of imprisonment. That approach does not take into account that the reason for the

cumulative sentence is the applicant's commission of offences against a provision found in schedule 1 to the Act whilst on parole. The choice of a parole eligibility date when the applicant was sentenced for the stalking and related offences was not analogous to the choice of a parole eligibility date for an offender who had pleaded guilty without the complication of being subject to an existing term of imprisonment.

[28] Similar arguments to those advanced by the applicant's counsel were rejected in *R v Matue* [2009] QCA 216 at [8]-[9]. The selection of the parole eligibility date by the sentencing judge as part of the sentencing of the applicant for the stalking and the related offences did not trigger the requirement referred to in *R v Kitson* [2008] QCA 86 at [17].

[29] The applicant's guilty pleas were reflected in the sentencing judge's setting the parole eligibility date after 12 months of the cumulative sentence had been served. The sentencing judge's contemplation that the applicant would or should be required to serve out the existing term of imprisonment for which he was on parole at the time that he committed the subject offences was not an unreasonable approach. The setting of the parole eligibility date at 29 December 2012 did not make the sentence manifestly excessive.

Order

[30] The following order should be made:
Application for leave to appeal against sentence refused.