SUPREME COURT OF QUEENSLAND

CITATION:	*R v Henderson* [2013] QCA 146
PARTIES:	**R** **v** **HENDERSON, Paul Malcolm** (appellant/applicant)
FILE NO/S:	CA No 43 of 2013 DC No 9 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Bowen
DELIVERED ON:	14 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	5 June 2013
JUDGES:	Holmes and Muir JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of unlawful stalking with a circumstance of aggravation – where the appellant and complainant never met but communicated through a dating website, Facebook and text messages – where the appellant's texts became increasingly offensive and abusive – where the complainant asked the appellant to leave her alone – where the complainant reported the appellant to the police – where the appellant continued to text the complainant – where the appellant appeals against conviction – where the trial judge did not direct the jury as to the statutory meaning of "circumstances" – whether a direction was necessary where the evidence was limited to the relevant circumstances CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the appellant was convicted of unlawful stalking with a circumstance of aggravation – where the appellant was sentenced to imprisonment for a period of 18 months with

	a parole release date fixed after five months – where the appellant applies for leave to appeal against sentence on the ground that the trial judge failed to evaluate properly the appellant's true culpability – whether the sentencing discretion miscarried
	Criminal Code 1899 (Qld), s 359A, s 359B, s 359C
	R v Macdonald [2008] QCA 384, cited
COUNSEL:	T A Ryan for the appellant/applicant M R Byrne QC for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant/applicant Director of Public Prosecutions (Queensland) for the respondent

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

[2] **MUIR JA**: I agree with the reasons of Mullins J and the orders she proposes.

[3] **MULLINS J:** The appellant was convicted on 6 February 2013 after a two day trial before a jury of one count of unlawful stalking with a circumstance of aggravation. The charge was particularised that the unlawful stalking occurred between 7 February and 19 April 2011 and that for one of the acts constituting the unlawful stalking the appellant intentionally threatened to use violence against the complainant. The appellant was sentenced to imprisonment for a period of 18 months with a parole release date fixed at 6 July 2013. A restraining order was also made pursuant to s 359F of the *Criminal Code* 1899 (Qld).

[4] The appellant appeals against his conviction on the ground that the learned trial judge failed to direct the jury as to all elements of the offence (and in particular the statutory definition of the term "circumstances") with the consequence that the appellant was deprived of the chance of an acquittal. If he is unsuccessful on his appeal against conviction, the appellant applies for leave to appeal against his sentence on the basis that the trial judge failed to evaluate properly the true culpability of the appellant's conduct.

Evidence at the trial

[5] There were three witnesses at the trial: the complainant, and two police officers Perz and Walsh.

[6] The complainant never met the appellant in person, but they commenced communicating with each other in early to mid January 2011 through a dating website, through Facebook and then by text messages. The first exchanges of texts were prior to 7 February 2011. In that exchange the complainant suggested meeting at a named hotel, but the appellant asked the complainant to go to his yacht instead. The complainant responded that she did not like meeting people on her own and the appellant replied "Is that 'cause you're gay?". The complainant replied to the effect that she was not, but she just did not think it was a good idea to meet on their own.

[7] A video recording of the complainant pointing out the text messages on her phone to the police was played during the course of the trial. The complainant read out the

texts, commencing with the text sent by the appellant to the complainant at 10.42 pm on 8 February 2011. At 11.09 pm on the same date the appellant sent a text to the complainant "I sense some sensual tension" with a wink face. At 11.15 pm on the same date, the appellant sent a text saying "No, but you're gay!"

[8] The next text from the appellant was sent at 1.11 pm on 9 February 2011 "You've got a pretty foul mouth for a princess." The complainant explained during cross-examination that the reference to "princess" came from something she had stated (possibly on the dating website) that she wanted to be treated like a princess. Then on 10 February 2011 the appellant sent a text "So are you coming out of the closet because you're gay!" On the same evening the appellant sent a video file which was apparently of his penis with the message "Do you know what to do with one of these, wink?"

[9] Two further texts were sent by the appellant to the complainant at 5.55 pm and 9 pm on 11 February 2011. There was a further exchange of texts between them on the same date and the complainant then sent a text in robust terms at 9.38 pm teasing the appellant about the size of his penis. The appellant's response at 9.42 pm included "Well, you're not much of a princess. Why don't we fuck and then you can tell everybody how bad I was, wink." The complainant responded at 9.43 pm "You wouldn't know what to do with it." The appellant responded asking for the complainant's whereabouts. There were further exchanges on the same date and then at 9.51 pm the appellant suggested going back to the complainant's place for oral sex. The complainant responded offensively in the negative immediately. The complainant explained in cross-examination that she sent the text in a defensive way to stand up to the appellant.

[10] There was then a further exchange between the parties at 10.07 pm on the same date that included the appellant sending a video file of a penis ejaculating. The next text from the appellant at 10.17 pm stated "I can see you, what your address is. You're up for the fuck of your life tonight, wink." The complainant who was with friends at the time felt threatened by the comment, took the advice of her friends on how to reply, and sent a response at 10.21 pm "Haha Haha Ha Haha, yeah." There was another message from the appellant at 10.27 pm. The complainant who said that she was moderately inebriated at a hotel and anxious then sent at 10.29 pm a video file given to her by one of her friends of a man having sex with a large woman's belly button, in order to deter the appellant. The video file was accompanied by a text "Hey, big boy, get in my belly" with smiley faces and laughter. There were further texts sent by the appellant on the same date commenting on that video file to the complainant at 10.35 pm, 10.51 pm and 10.55 pm. The last text on that day stated "Do you really think you're not a whore?". The complainant described her anxiety as "lifting throughout the night."

[11] The appellant sent texts to the complainant at 8.32 am and 8.37 am on 12 February 2011, the first of which stated "You are dumb or completely out of touch with reality. How could you not think you're a worthless, useless whore that should be treated as such." The complainant responded to the appellant at 9.45 am suggesting that he should be treated as a pervert and accused him of being "a dirty fucking stalking freak." The appellant's response was to suggest that there was nothing wrong with the complainant being gay, but there was plenty wrong with being a whore. The appellant then sent two abusive texts to the complainant at 1.49 pm and 2.05 pm on 12 February 2011. Further texts from the appellant to the

complainant were sent at 6.42 pm on 13 February 2011, 11.17 am and 9.36 pm on 16 February 2011, 5.59 pm and 8.18 pm on 19 February 2011, 12.15 pm, 8.52 pm and 9 pm on 20 February 2011 and 9.17 am on 23 February 2011.

[12] When the complainant received the text from the appellant at 3.58 pm on 24 February 2011 "You're progressively looking sadder and sadder in your profile pic on FB!" (where FB was a reference to Facebook), the complainant then deleted the appellant from her Facebook page and the dating website and reported him to both websites.

[13] The appellant sent a series of text messages to the complainant on 26 February 2011 commencing with one sent at 6.20 pm "Are you getting smashed tonight?" That was followed at 9.20 pm with "Is that you in the floral dress?" The appellant then sent a blank text to the complainant at 10.08 pm on the same night followed by a text a minute later stating "That must be you because you're acting gay!"

[14] On the evening of 26 February 2011 the complainant had been at a local hotel wearing a floral dress. After she received the text that referred to the floral dress, she felt scared and intimidated because she did not know what the appellant looked like. She had her friends walk her to the car and she left the hotel and drove straight home.

[15] The complainant sent a text to the appellant at 1.37 am on 27 February 2011 stating "I'm not sure why you keep persisting but I'd appreciate it if you would leave me alone." The appellant responded with three texts sent at 1.43 am, 1.47 am and 1.55 am. The second of those texts asked the complainant what she was doing and the third of those texts asked "Do I really scare you, smiley face?". The complainant replied at 8.52 am to the effect that she was not scared and was just out for a laugh and a bit of fun with her friends but that it was best if he just left her alone as "It's run its course and it isn't going anywhere." Although the complainant stated in the text that she was not scared, she explained in her evidence that she was scared, but she was taking the approach of not telling the appellant that she was scared of him. The appellant responded with two texts that were sexually suggestive and abusive.

[16] The complainant replied to the appellant at 12.06 pm on 27 February 2011 to the effect that matters had progressed where she did not want to get to know him. The appellant replied at 12.37 pm and 12.46 pm and then at 12.57 pm suggested that the complainant's course was to throw herself off a cliff. There were further exchanges and at 3.37 pm on 27 February 2011 the appellant inquired whether the complainant was going out that night. After receiving that text, the complainant telephoned the appellant and asked him to stop texting and contacting her, because it was scaring her and she did not like it anymore. The appellant said to her it was just a joke, and the complainant responded that it was not a joke anymore and that he needed to stop it, or she would go to the police. At 3.48 pm on 27 February 2011, the appellant sent the complainant a text "Well, I'll try and come up when my car is ready." This did not make sense to the complainant in the light of the telephone conversation between them. It was followed by another text from the appellant at 4 pm. "You're gay for sure!" The complainant sent a text to the appellant at 4.03 pm noting that he had not "let up" and that she would be sorting "this out" which was a reference to her telephone call in which she said she would go to the police. The appellant sent a series of texts to the complainant at 4.05 pm, 4.24 pm, 4.28 pm, 4.34 pm and

4.53 pm. One of those messages was "Do you know that I could pretty much come down and, say, kill you right now and it wouldn't be a problem for me? You're a little bit out of touch with reality but I'll let someone like you call my bluff – wink."

[17] The complainant attended at a police station on 27 February 2011 and made a complaint about the appellant's conduct to Constable Perz. On the same day Constable Perz attended at the appellant's residential address and passed on the complainant's request that the appellant have no further contact with her.

[18] There was no contact between the appellant and the complainant from 28 February 2011 until the appellant commenced texting the complainant again on 17 April 2011 when the following messages were exchanged:

"Appellant:	'Why don't you come around to my place sometime? I think you'd give a great head job – wink.'
Complainant:	'Do not contact me please'.
Appellant:	'Why? I thought you said you wanted to swallow every drop of my come – wink'
Appellant:	'Why don't you come around to my place'?
Appellant:	'1 really like you. Why don't you let me come around and kiss it all better – wink."

[19] On 18 April 2011 the complainant reported the appellant's conduct again to the police station, as she was scared and feared for her safety and her housemate's safety. The last text message that the complainant received from the appellant was on 19 April 2011 "I found out where you live, I'll come around sometime – wink."

[20] Constable Walsh attended at the appellant's residence on 20 April 2011, he was taken back to the police station and charged.

The summing-up

[21] The trial judge explained to the jury that the prosecution had to prove the appellant had engaged in conduct that was intentionally directed to the complainant, the conduct was engaged in on more than one occasion, and consisted of one or more acts of the following acts. The trial judge then listed acts described in s 359B(c) of the *Code* and stated:

> "The conduct must be conduct which would cause the complainant apprehension or fear which arises reasonably in the circumstances. You have heard from counsel about those elements. It is immaterial whether the accused intended to cause apprehension or fear. The question is whether the conduct would cause a complainant apprehension or fear reasonably arising in the circumstances.
>
> There is in this case a circumstance of aggravation which I have told you about that one of the acts involved an intentional threat to use violence against the complainant. Now, it may not be necessary for you to go into the detail of considering which type of conduct that is. Most of the acts relied upon here consist in the contacting of a person if you were satisfied that it was the accused who was sending all those messages and all the messages amount to contact."

[22] The trial judge then identified the three messages from 27 February 2011 relied upon by the prosecution to prove the circumstance of aggravation:

> "The only messages that could constitute the circumstance of aggravation, that is, the threat, are those which [the prosecutor] identified to you and he referred you to three messages and you will recall that on the 27th of February the complainant gave evidence that she received a message, 'Do you know that I could pretty much come down and say kill you right now and it wouldn't be a problem for me. You're a little bit out of touch with reality but I'll let someone like you call my bluff – wink.' And then four minutes later, 'I'll give you the best bit of advice nay' I think it reads 'has given you. Come and suck my cock right now and you might give yourself a slight chance of survival. You lack faith.' And then another six minutes later, 'I don't need you or anyone else so don't go making yourself into a disposable commodity – wink."

[23] The trial judge pointed out that it was a matter for the jury whether any of those three messages amounted to a threat of violence. The trial judge made a statement that the threat must be "one stated expressly not left to be implied." (That is an incorrect statement of the law, but nothing turns on it as it was favourable to the appellant.)

[24] The trial judge summarised the arguments for the appellant which were that the jury would not be satisfied that all the messages were sent by the same person or that they all came from the same telephone and that, in the context of the contact between the appellant and the complainant, the messages did not amount to stalking, because they would not reasonably bring about an apprehension of fear in the complainant, having regard to the way in which she responded at times to the messages sent to her.

[25] The trial judge summarised the arguments of the prosecution as urging the jury to accept the complainant's evidence, including what effect the messages had on her and her explanation of why she sent the more robust messages that were identified among her responses, and that the only person known to have the telephone was the appellant and the messages that had been identified connected him with the other messages.

[26] The trial judge suggested the following approach to the jury:

> "You might think it wise to consider first what things you are satisfied actually occurred. Are you satisfied that all of the messages were sent by the same person and that that person was the accused? Do you accept the evidence of the complainant about the way in which she responded? Those initial questions might have you well along the way to making up your mind about the outcome of this case.
>
> Then you might ask these more specific questions. Was the conduct intentionally directed at the complainant? Well, if you find that the accused was the person who sent the messages you might find it is a little difficult to imagine anything else but that they were directed to the complainant intentionally. Were they the type of conduct and threatening and harassing behaviour that I identified to you when I mentioned the different categories of conduct? Did they occur more than once? Was the conduct such as to cause apprehension or fear in the complainant? Would that apprehension or fear arise reasonably in

> the circumstances? And finally, are you satisfied that one of the contacts was an intentional threat?"

[27] The trial judge also directed the jury that they could return a verdict of guilty only if the jury were agreed about at least the same two acts constituting unlawful stalking.

Was there a misdirection on the elements of the offence?

[28] The element of the offence of unlawful stalking under s 359B(d)(i) of the *Code* required proof that at least the two acts found by the jury to have been acts engaged in by the appellant "would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person." The term "circumstances" is defined in s 359A as:

> "**circumstances** means the following circumstances
> (a) the alleged stalker's circumstances;
> (b) the circumstances of the stalked person known, foreseen or reasonably foreseeable by the alleged stalker;
> (c) the circumstances surrounding the unlawful stalking;
> (d) any other relevant circumstances."

[29] For the purpose of applying s 359B(d)(i), it is specified in s 359C(4) that it is immaterial whether the person doing the unlawful stalking intended to cause the apprehension or fear and in s 359C(5) that it is immaterial whether the apprehension or fear or the violence is actually caused.

[30] Although the trial judge directed the jury in terms of s 359B(d)(i) and the qualifications relevantly set out in s 359C, the trial judge did not specifically direct the jury in terms of the definition of the term "circumstances".

[31] It is submitted on behalf of the appellant that had the jury been directed to the statutory meaning of the term "circumstances," they would have been directed to turn their minds to the appellant's perception of the messaging, as well as his perception of the way the complainant was treating their communications. This submission was directed particularly at the texts sent by the appellant before the complainant requested him to desist, on the basis that the jury may have based its verdict on two acts which occurred before 27 February 2011. (As the jury found the appellant guilty of the charges with the circumstance of aggravation, at least one of the acts proved to the satisfaction of the jury occurred on 27 February 2011 after the complainant had asked the appellant to stop contacting her.)

[32] The relevance of the appellant's perception of the messaging is limited by s 359C(4) and (5).

[33] The relevant circumstances for the purpose of s 359B(d)(i) were delineated by the ambit of the evidence which was the nature of the contact between the appellant and the complainant, the content of the appellant's text messages, the complainant's texts in response, and the complainant's evidence of her reaction to the appellant's messages. The appellant's counsel at the trial (who was not the counsel on this appeal) put in issue that the appellant's texts would not reasonably bring about an apprehension or fear in the complainant in the light of the way she responded to the messages sent to her. The evidence covered the circumstances relating to the conduct relied on to constitute the charge of stalking, whether the term

"circumstances" was given its ordinary meaning or the statutory meaning. In the circumstances of this particular trial, it was not necessary for further elucidation of the term "circumstances" to be given by the trial judge in explaining s 359B(d)(i).

[34] There was no misdirection as a result of the trial judge not reading out the definition of the term "circumstances" where the circumstances were confined by the limited evidence that was adduced in the trial. The appeal against the conviction cannot succeed.

The appellant's antecedents

[35] The appellant was 34 years old when he offended. He was the carer for his brother. He had been convicted in the Australian Capital Territory Magistrates Court on 20 June 2008 for stalking. At the same time he was convicted of contravening protection orders and breaching good behaviour orders that had been made on 15 February 2008. On that occasion he was sentenced to a total sentence of 22 months' imprisonment with a non-parole period of 14 months. The sentence for the stalking was 12 months' imprisonment.

[36] Although the appellant was granted bail initially for the stalking charge, he was remanded in custody on 13 June 2012 for other charges. His bail on the stalking charge was revoked on 16 November 2012 and he therefore had 83 days between 16 November 2012 and 6 February 2013 in pre-sentence custody for the stalking charge which was not declarable under s 159A of the *Penalties and Sentences Act* 1992 (Qld). The pre-sentence custody certificate set out the period in custody for the other charges which was 238 days from 13 June 2012, inclusive of the period of 83 days that also related to the stalking charge. During the sentencing submissions before the trial judge, the prosecutor submitted that the period of 83 days could be taken into consideration.

[37] Counsel for the appellant on the sentencing relied on a psychological assessment that was undertaken whilst he was held on remand on 6 October 2012. The report recorded the appellant's view that he did not think he had done anything wrong. The psychologist made the provisional diagnosis that the appellant may suffer features of a delusional disorder "which results in him developing erotomanic thoughts about women whom he may come into contact with, however, who are actually not known to him." The psychologist also concluded that the appellant "had developed deviant sexual attitudes such that his behaviour indicated he regarded woman (*sic*) as sex objects for the wonton (*sic*) gratification of males." The psychologist favoured treatment for the appellant that comprised individual specialised intervention involving both a consultant psychiatrist and clinical psychologist. During the course of the sentencing hearing, the appellant interjected to assert that he did not think he had done anything wrong.

[38] Counsel for the appellant submitted that the trial judge should factor into the sentence that the appellant had spent seven months in custody in relation to the subject stalking and other charges and suggested that be done by a short period of imprisonment in combination with a lengthy period of probation. During the sentencing submissions the appellant conveyed, however, that he was unwilling to agree to probation.

Sentencing

[39] The trial judge regarded the offence as a serious case of stalking in which the appellant harassed the complainant "over a significant period of time" and "the

harassment continued even after [the appellant] had been spoken to by the police and asked to cease that behaviour." Although the trial judge did not make an express finding as to the date when the acts of stalking commenced, these observations are consistent with his finding that they commenced early in the period particularised in the charge.

[40] The trial judge noted the psychologist's report confirmed that the appellant was in denial about the seriousness of the stalking offence. The trial judge expressed the view that the appellant was at risk of further offending. It was also noted that the complainant was distressed by the appellant's threats. In the light of the appellant's convictions in the Australian Capital Territory, the trial judge noted that the appellant did not appreciate the seriousness of what he had done to the complainant, even after he had been dealt with previously for the offence of stalking. The trial judge took into account there was no actual violence, even though it was threatened.

[41] The trial judge set the parole release date after five months which was earlier than it might have otherwise been set to reflect the fact that the appellant had been in custody for the period dealt with in the pre-sentence custody certificate. Although the trial judge did not expressly articulate to which of the periods in the pre-sentence custody certificate he was referring, in light of the submissions on how to deal with the pre-sentence custody and the structure of the sentence that was imposed, it is apparent that he had regard to the period of 83 days that related to the stalking charge.

Was there a proper evaluation of the appellant's culpability?

[42] The appellant did not seek to appeal against his sentence on the basis that it was manifestly excessive, but confined the ground of appeal to a miscarriage of the sentencing discretion. The appellant submits that the trial judge failed to take into account that, for a substantial part of the period of the charge between 8 and 27 February 2011, the culpability of the appellant had to be assessed differently from the culpability associated with the messages sent between 17 and 19 April 2011 which was after the police had requested that he cease contacting the complainant.

[43] The appellant's culpability increased in respect of each of the texts he sent after the telephone conversation with the complainant on 27 February 2011 when she requested that he stop contacting her. That included the texts sent on 27 February 2011 after that telephone call. Even prior to that telephone call, there had been an escalation in the offensiveness of the appellant's texts (at least from when he sent the video files of a penis) and a sinister aspect in the texts on 26 February 2011 that suggested to the complainant that the appellant was observing her, when she did not know what he looked like. There was no challenge on this application to the trial judge having taken into account as acts of stalking the texts that commenced in the early part of the period particularised in the charge. The trial judge was entitled to consider the overall seriousness of the conduct, even though it became more serious as it progressed. There is nothing in the trial judge's findings that point to an error in the evaluation of the appellant's culpability.

[44] As the sentence was imposed after trial, and where there was absolutely no remorse on the part of the appellant, the appellant had a previous conviction for like offending for which he had been imprisoned, and he was found to be at risk of

further offending, the sentence that was imposed reflected a sound exercise of the sentencing discretion: cf *R v Macdonald* [2008] QCA 384.

[45] The application for leave to appeal against sentence must be refused.

Orders

[46] The orders I propose are:

1. Appeal against conviction dismissed.
2. Application for leave to appeal against sentence refused.