SUPREME COURT OF QUEENSLAND

CITATION:	*R v Armstrong* [2015] QCA 189
PARTIES:	**R** **v** **ARMSTRONG, Barry John** (appellant)
FILE NO/S:	CA No 43 of 2015 DC No 321 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Beenleigh – Unreported 18 February 2015
DELIVERED ON:	9 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2015
JUDGES:	Holmes CJ and Philip McMurdo and Peter Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**The appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISDIRECTION AND NON-DIRECTION – whether the appellant was wrongly deprived of the opportunity to conduct his own cross-examination of the complainant – where the appellant argued he was wrongly charged under s 359E and that the complainant was incorrectly classified as a protected witness under s 21N of the *Evidence Act* 1977 (Qld) – where the trial judge had no discretion to order otherwise and the appellant's argument misunderstood the effect of s 359E CRIMINAL LAW – APPEAL AND NEW TRIAL – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF CROWN CASE – whether the prosecutor misled the court by stating that all persons charged with unlawful stalking are charged under s 359E of the *Criminal Code* or through inaccurate comments in relation to the element of detriment in that offence – where the appellant misunderstood the effect of s 359E – where the prosecutor's statements were not inaccurate or misleading CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant alleged fabrications by investigating police officers

and irregularities in witnesses' evidence in relation to evidence regarding the appellant's identification – evidence irrelevant as no issue about the identification of the appellant at trial

CRIMINAL LAW – APPEAL AND NEW TRIAL – IRREGULARITIES IN RELATION TO JURY – appellant argued the jury did not properly understand that detriment in relation to unlawful stalking must arise reasonably – where the trial judge correctly explained the necessary elements of conduct constituting unlawful stalking – where it was open to the jury to conclude whether the detriment suffered reasonably arose in the circumstances – where the appellant argued the facilities in the jury room were inadequate but provided no evidence to substantiate this claim

Criminal Code (Qld), s 359B, s 359C, s 359E
Evidence Act 1977 (Qld), s 21M, s 21N

Petty v The Queen (1991) 173 CLR 95; [1991] HCA 34, cited

COUNSEL: The appellant appeared on his own behalf
D Balic for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Philip McMurdo J and the order he proposes.

[2] **PHILIP McMURDO J:** After a 12 day trial in the District Court, the appellant was convicted of an offence of unlawful stalking over a period of about five months in 2013. He is yet to be sentenced. He appeals against his conviction.

[3] The complainant was a 19 year old woman who worked part-time at a supermarket at a suburban shopping centre. She had worked there for about six years. She met the appellant, who was then aged 55, in May 2013 as a customer. There were many brief conversations between them over the following four to five months. Several times the appellant asked her to go to dinner with him. Her evidence was that she became distressed by his persistent approaches. On some occasions she was so anxious that she fled the supermarket, crying as she went to a private office. She reported his approaches to security staff at the shopping centre. She became anxious about going to work and several times she called in sick, fearful that if she went to work he would be there. She arranged to be walked to her car at night when finishing work. She felt vulnerable and was fearful that he would follow her home.

[4] The appellant's case was that, in his many conversations with her, the complainant was friendly and not anxious or resentful about his approaches. He agreed that he asked her out on several occasions. His evidence was that, although they did not go out together, she expressed some interest in doing so.

[5] Section 359E(1) of the *Criminal Code Act* 1899 (Qld) provides that a person who unlawfully stalks another person is guilty of a crime. The definition of unlawful stalking is contained in s 359B which is relevantly as follows:

"***Unlawful stalking*** is conduct—

(a) intentionally directed at a person (the ***stalked person***); and

(b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and

(c) consisting of 1 or more acts of the following, or a similar, type—

(i) following, loitering near, watching or approaching a person;

(ii) contacting a person in any way, …

(iii) loitering near, watching, approaching or entering a place where a person … works …;

…

(d) that—

(i) 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; or

(ii) causes detriment, reasonably arising in all the circumstances, to the stalked person or another person."

Section 359C(4) provides:

"(4) For section 359B(d), it is immaterial whether the person doing the unlawful stalking intended to cause the apprehension or fear, or the detriment, mentioned in the section."

[6] The prosecution case was that it was the alternative within s 359B(d)(ii) which was relevant here. Its case was that the appellant's conduct had caused detriment to the complainant, namely the personal distress and the effect upon her work as she related in her evidence, which had reasonably arisen in all the circumstances. By s 359C(4), it was immaterial whether the appellant intended to cause that detriment. In essence, the appellant's case was that the complainant had suffered no detriment or that any detriment could not have arisen reasonably.

[7] The appellant was represented by counsel for the cross-examination of the complainant. Otherwise he was without legal representation at the trial as he is on this appeal. The appellant advances eight grounds for this appeal. There is also a further question, which has been fairly raised by the respondent, as to the summing up.

The first ground of appeal

[8] The appellant complains that he was wrongly deprived of the opportunity to conduct his own cross-examination of the complainant, rather than that cross-examination being conducted by counsel, as the court required.

[9] By s 21N of the *Evidence Act* 1977 (Qld), a person charged with an offence may not cross-examine a "protected witness" in person. By s 21M, an alleged victim of a "prescribed special offence" is a protected witness. A prescribed special offence is defined in s 21M to mean an offence defined in certain provisions of the *Criminal Code*, including s 359E. Plainly therefore, this was a prescribed special offence and this complainant was a protected

witness, with the result that she was not to be cross-examined by the appellant in person. The trial judge had no discretionary power to order otherwise. The appellant contends that he was denied the opportunity to have the jury witness the "direct interaction" between the complainant and him in cross-examination. That may or may not have been helpful to his case, but it is immaterial because of the operation of s 21N.

[10] The appellant's argument for this first ground misunderstands the effect of s 359E(1). He seems to say that he was wrongly charged with an offence against this provision because there was some other provision of the *Code* under which he could and should have been charged. In the course of his oral submissions he referred to s 359, which provides for an offence of unlawful threats. That has no relevance to the facts as alleged by the prosecution in this case. His submissions also referred to s 359B as a provision under which he could have been charged. But that does not create the offence of unlawful stalking. It simply defines what conduct constitutes unlawful stalking. Therefore his complaint that the charge was for an offence under s 359E rather than some other provision of the *Code* (with the consequence that the complainant was a protected witness) has no substance.

The second ground

[11] In the notice of appeal, this ground is expressed as a belief by the appellant that the apparent signature of the complainant on witness statements in her name were not her signatures. Those witness statements, however, were not part of the evidence at the trial.

[12] The appellant's point on the second ground seems to be that these alleged fabrications of the complainant's signature are indicative of some wider fabrication of evidence by the investigating police officers in this case. The appellant's written submissions refer to some inconsistency between "the Court Brief by Police" and the evidence which was given at the trial. In the cross-examination of the complainant, the appellant's counsel referred to some differences between the complainant's statements and her evidence. Each difference involved something adverse to the appellant being said in her evidence which was not within either statement. Importantly, the cross-examiner accepted that these were indeed her statements.[1] The present argument is thereby inconsistent with the appellant's case at the trial. Further, there is no demonstrated factual basis for it.

The third ground

[13] This ground is similar to the second ground, in that the appellant alleges fabrications by investigating police officers. His argument here relates to a photoboard which contained photographs of several men including the appellant. There was evidence that the complainant had identified the appellant by selecting his photograph from those on the board. There was a signature on the back of the board which was said to be the complainant's signature. The board was tendered in evidence in the prosecution case. There was also tendered a recording of what was said to have been the complainant's voice during the exercise of selecting the appellant's photograph on the board.

[14] The appellant's contention is that the signature on the back of the board is not of the complainant but is a fabrication. Similarly, he contends that the voice on the recording is not that of the complainant.

[15] Cross-examining the complainant, the appellant's counsel did not inquire whether this was her signature or her voice. In his submissions to this Court, the appellant said that

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1 R 63-64.

counsel acted consistently with his instructions, which he had given in the light of advice to him about the risk of the cross-examination suggesting the fabrication of evidence, having regard to a previous conviction of the appellant for unlawful stalking. There was no error in that advice and no miscarriage of justice which resulted from the cross-examiner not exploring these supposed fabrications, at least because there was no issue about the identification of the man who was the subject of the complaint. The evidence of the complainant's identification of the appellant was irrelevant in the way in which the appellant, with and without his counsel, conducted his case at the trial.

The fourth and fifth grounds

[16] In the notice of appeal, the fourth ground was expressed as a belief by the appellant that "the [j]ury did not properly understand that the detriment that was claimed must be 'reasonably arising in all the circumstances'".

[17] As this ground is argued, there is no complaint about the summing up. The trial judge correctly explained the necessary elements of conduct for it to constitute unlawful stalking, including, in this case, the fact of detriment which reasonably arose in all of the circumstances. Her Honour explained this element by reference to the prosecution case that the complainant has suffered "serious emotional harm" which had prevented or hindered her from working in the supermarket. Her Honour further explained the requirement that the detriment must have reasonably arisen by reference to a hypothetical example. From the summing up, the jury should have understood that they had to be satisfied of the truth in substance of the complainant's evidence about the consequences of the appellant's conduct and that these were reasonable reactions by the complainant to that conduct.

[18] If the jury accepted the complainant's evidence, there was a proven detriment suffered by the complainant and it was open to the jury to conclude that the detriment reasonably arose in the circumstances.

[19] In his oral submissions in this court, the appellant suggested that the detriment did not reasonably arise because the number of occasions on which he spoke to the complainant was small and the words which he used were not likely to have had those effects upon the complainant. However, that submission was made by reference to his evidence of what had occurred and not by reference to her evidence.

[20] The appellant's next argument is that this suggested misunderstanding of the element of detriment came from comments which had been made by the prosecutor in his opening of the case. This is the point which is the fifth ground of appeal.

[21] According to the notice of appeal, the prosecutor made a statement to the effect that to constitute unlawful stalking, the relevant conduct need not cause fear on the part of the complainant. The subject part of the prosecutor's opening was as follows:

> "Now, after hearing that the charge is one of stalking your mind probably immediately goes to those popular fictional movies or books that you may have read - Fatal Attraction and Cape Fear - in which violence ensues. Now, you may have some preconceived notions about what is stalking and her Honour in due course will outline to you what the actual law is and what can amount to stalking, but you must understand from the very beginning that a charge of stalking under our criminal law does not necessarily need to involve any violence whatsoever and I say this to you without any

> hesitation: this is a case that does not involve any violence or threat of violence whatsoever."

[22] The prosecutor's statement was not inaccurate or misleading and it was not likely to have caused confusion on the part of the jury. In his oral submissions to this court, the appellant claimed that a similar statement had been made in the prosecutor's final address to the jury, although the appellant did not direct the Court to the transcript of the relevant passage. Assuming that a similar statement was made, it could not have misled the jury.

[23] Had the prosecution said that fear was not a necessary consequence of unlawful stalking, that would not have been incorrect in a case such as this, where the prosecution case was that there was *detriment* within s 359B(d)(ii), rather than the case being within s 359B(d)(i).

[24] Grounds 4 and 5 must be rejected.

The sixth ground

[25] This is in the form of a complaint that the prosecutor misled the court by stating that all persons charged with unlawful stalking are charged under s 359E. This ground is a variant of the appellant's complaint within the first ground of appeal and proceeds on the same misunderstanding of the effect of s 359E.

The seventh ground

[26] The appellant's argument here refers to what he suggests is a remarkable coincidence between two descriptions of his physical appearance, each made before the trial, by the complainant and another witness. The complainant had described the appellant as having the appearance of a certain character in "The Simpsons" television program. The other witness, who was an employee at the shopping centre, had described his appearance by reference to a different character from that program. The appellant's argument seems to be that these references to the program indicate some collusion on the part of these witnesses, especially because, the appellant says, he bears no resemblance to either character.

[27] Neither description was referred to in the evidence in chief in the prosecution case. The subject was raised in the appellant's cross-examination of an employee at the supermarket to whom the complainant had spoken about her distress from the appellant's conduct. This witness agreed that the complainant had described the appellant by reference to a Simpson's character. However the complainant was not cross-examined about the subject.

[28] This ground of appeal raises no rational basis for concluding that there was any irregularity in the evidence of any of the prosecution witnesses, most importantly the complainant.

The eighth ground

[29] The appellant's complaint here is that the facilities which were provided to the jury in the jury room to review the video and audio evidence were inadequate. Those facilities are described in the notice of appeal and the appellant's written submissions as "a very old [n]otebook computer with only tiny internal speakers, which if adjusted loud enough for all the members of the [j]ury to be able to hear simultaneously would very likely have resulted in distorted sound and very significantly hampered the members of the [j]ury from all being able to hear clearly produced sound …"

[30] The short answer to this ground, as is submitted for the respondent, is that there is no evidence to substantiate the appellant's claim that the equipment was inadequate.

[31] The recordings which could have been played in the jury room consisted of three audio recordings and one piece of CCTV footage. One audio recording was that in respect of the photoboard which, as I have discussed, was inconsequential. The CCTV footage arguably showed the complainant working in the supermarket and taking steps to avoid serving the complainant when he approached the counter. The other audio recordings were the product of the complainant using her phone to record a brief conversation with the appellant, relatively late in the sequence of events. This recording became the subject of an extensive oral argument by the appellant which, although having no apparent connection with a ground of appeal, should be discussed.

[32] In her evidence in chief the complainant described how she used her phone to record a conversation with the appellant. She gave some evidence of the content of that conversation without a recording being tendered in evidence in chief. She was cross-examined about that conversation. Counsel for the appellant then caused what he said was a recording of the conversation to be played in court. The recording was upon a USB stick. The prosecutor agreed to tender that recording which was then admitted into evidence. That was on the first day of the trial. The appellant's case was and is that when that was admitted into evidence, it was an accurate recording.

[33] On the fourth day of the trial, by which time the appellant was without his counsel, the appellant told the trial judge that he had become "very concerned" that two words, which he claimed had been spoken and recorded on that exhibit, in some way had been deleted after the exhibit had been marked. This claim was made although her Honour was able to assure the defendant that the exhibit had remained in the court's possession. The appellant then produced to the court a CD on which, he said, was another copy of the same recording. That was played to the jury and also admitted into evidence.[2] The appellant told this court that the jury thereby heard a correct recording (as they had on the first day of the trial).

[34] The upshot was that, whatever had been the imperfection in the recording upon the USB stick, by the fourth day of the trial, the problem was overcome to the appellant's then satisfaction by the tender of the CD. Therefore it cannot be supposed that what he claims was a wrongful interference with the USB stick had any consequence. Ultimately this argument is but a further example of a claim by the appellant of impropriety on the part of the prosecution or the police, which has no evidentiary foundation or relevance.

[35] For these reasons, none of the grounds of appeal or that further argument about the audio recording for the appellant can be accepted. What now must be considered is an apparent oversight in the summing up, to which counsel for the respondent drew the court's attention.

An omission in the summing up?

[36] In the evidence in chief of an investigating officer, evidence was led that the appellant refused to be interviewed when he was arrested. That fact was also the subject of evidence in the cross-examination of another police officer. The fact was irrelevant to any issue in the trial and the evidence ought not to have been led in the prosecution case.[3] Shortly after the fact emerged in the evidence, the trial judge told the appellant that she would direct the jury that they were not to draw any adverse inference from it. But her Honour did not give that specific direction.

[37] However her Honour did direct the jury in several relevant respects. The jury was directed as to the presumption of innocence and the burden and standard of proof. And

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2 The USB and the CD each becoming part of ex 3.

3 *Petty v The Queen* (1991) 173 CLR 95; [1991] HCA 34.

the jury was directed that the circumstances of his arrest and the process, beginning with his being charged and culminating in the trial, was in no respect unusual and it was irrelevant for the purpose of their decision-making.

[38] The appellant gave evidence at the trial. The trial judge correctly directed the jury that the fact that he had done so did not mean that he had assumed in any way any responsibility for proving his innocence.

[39] The fact that the appellant had declined to be interviewed was not the subject of any submission to the jury. Having regard to her Honour's directions as to the burden and standard of proof and her particular directions as to the irrelevance of the process by which he had come to be tried, in my view there is no real risk that the jury may have drawn an inference adverse to the appellant from his declining to be interviewed.

The trial judge's report

[40] It is appropriate to mention one other matter, although it was not raised in either side's submissions. When asked, under r 94 of the *Criminal Practice Rules* 1999 (Qld), for any comment which was relevant to this appeal, the trial judge referred to the contents of a report by a psychiatrist which was written for the purpose of the appellant being sentenced. The psychiatrist's opinion was that the appellant suffers from "paranoid delusions regarding the police, ideas of reference regarding comments and phone calls he has heard, and auditory hallucinations regarding voices he has heard on his property." It was also the psychiatrist's opinion that more likely than not the appellant suffers from schizophrenia.

[41] At the hearing of the appeal, the appellant was asked whether the court should act upon this report in any way. The appellant declined any reliance upon it.

[42] The diagnosis of paranoid delusions regarding the police was based upon descriptions given by the appellant to the psychiatrist of what he believed were the voices around his house of police officers involved with the investigation of this case. The appellant also told the psychiatrist that the police were acting improperly towards him because he had made complaints about police to the then Crime and Misconduct Commission in the late 1990s and again more recently.

[43] This psychiatric opinion would be plainly relevant to the sentencing of the appellant. If correct, it may also explain some of the arguments which the appellant has advanced in this appeal which accused the police of concocting and interfering with evidence. But the opinion does not address the question of whether the appellant lacked the capacity to control his actions or to know that he ought not to do the acts which constituted the offending conduct in this case. In other words the opinion does not constitute evidence which raises the possibility of a defence of insanity.

[44] And, as earlier discussed, it is unnecessary that a person intends his conduct to cause detriment for that conduct to constitute unlawful stalking. Intention is an element of this offence only insofar as the conduct must be intentionally directed at the complainant. Indisputably, in the present case the conduct was so directed.

[45] Therefore the psychiatric report does not matter to what I regard as the proper disposition of this appeal.

[46] I would order that the appeal be dismissed.

[47] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Philip McMurdo J, with which I agree. I also agree with the orders proposed by his Honour.