# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v SCM* [2016] QCA 175 |
| PARTIES: | **R**<br>**v**<br>**SCM**<br>(applicant) |
| FILE NO/S: | CA No 5 of 2016<br>DC No 556 of 2015<br>DC No 524 of 2015 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Cairns – Date of Sentence: 8 December 2015 |
| DELIVERED ON: | 24 June 2016 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 31 May 2016 |
| JUDGES: | Margaret McMurdo P and Philippides JA and North J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. The application for leave to appeal is granted.**<br>**2. The appeal is allowed to the extent of setting aside the sentences imposed on 8 December 2015 for the offences of unlawful stalking and failing to appear in accordance with an undertaking and, in lieu thereof, the following sentences are imposed:**<br>**(a) A sentence of two and a half years for the offence of unlawful stalking, with a declaration pursuant s 159A of the *Penalties and Sentences Act* 1992 that 236 days spent in pre-sentence custody between 16 April 2015 and 7 December 2015 inclusive be taken to be time served under that sentence.**<br>**(b) A conviction is recorded but no further punishment is imposed for the failing to appear.**<br>**(c) It is ordered that the applicant be released on parole on 22 January 2016 in lieu of 16 February 2016.**<br>**(d) Otherwise confirm the sentences imposed by the sentencing judge.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR |

INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted upon his plea of guilty of one count of unlawful stalking with a circumstance of aggravation along with 20 summary offences – where one of the summary offences was failing to appear in accordance with an undertaking – where the applicant was sentenced to two years imprisonment for the stalking offence, six months imprisonment to be served cumulatively upon the two year term imposed for the stalking offence for the failure to appear and concurrent sentences of one to six months imprisonment in relation to the other summary offences – where the applicant contended the sentence was manifestly excessive due to the imposition of a six month cumulative sentence for the failure to appear – whether the sentence was manifestly excessive

*Bail Act* 1980 (Qld), s 33(4), 35(2)
*Penalties and Sentences Act* 1992 (Qld), s 159A

*Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, cited
*R v Baker* [2011] QCA 33, considered
*R v Macdonald* [2008] QCA 384, cited
*R v Nagy* [2004] 1 Qd R 63; [2003] QCA 175, cited

COUNSEL: V P Keegan for the applicant
N W Crane for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Philippides JA's reasons and proposed orders.

[2] **PHILIPPIDES JA:** On 8 December 2015, the applicant was convicted upon his plea of guilty to a number of offences. The most serious offence was one count of unlawful stalking, with the circumstance of aggravation that five acts contravened a domestic violence order and that the offending constituted a domestic violence offence. The defendant was sentenced to two years imprisonment for that offence.

[3] The applicant was also sentenced in relation to 20 summary offences. They comprised four charges of contravening a domestic violence order (charges 6-8, 11); nine charges of fraud (charges 5, 13-20); one of stealing (charge 12), one of wilful damage (charge 9), one of unlawful use of a motor vehicle (charge 4), one of driving an uninsured vehicle (charge 2), one of driving an unregistered vehicle (charge 1), one of breaching a bail condition (charge 10) and one of failing to appear in accordance with an undertaking (charge 3). The applicant was convicted but not further punished in respect of the traffic matters. The other summary offences, except for the failing to appear, attracted terms of one to six months imprisonment to be served concurrently. In respect of the failure to appear in accordance with an undertaking, the applicant was sentenced to six months

imprisonment to be served cumulatively upon the two year term imposed for the stalking offence.

[4] The effect of the sentences imposed was that the applicant was sentenced to a total period of two and a half years imprisonment with a parole release date of 16 February 2016 requiring 306 days to be spent in custody (approximately 10 months).

[5] The basis of the applicant's appeal is that the sentence was manifestly excessive in all the circumstances. The crux of the complaint is that a cumulative sentence of six months imprisonment for the offence of failing to appear was manifestly excessive. The applicant obtained bail on 22 January 2016, pending hearing of the application.

**Circumstances of the stalking offence**

[6] The stalking offence, which occurred over a period of 36 days, involved seven particularised occasions of threatening acts. Those acts were described in the Schedule of Facts tendered at sentence as follows:

(a) On 31 August 2014, the applicant attended at the complainant's home and demanded that she come outside. When she failed to do so, he scratched the complainant's car as he had threatened to do and also scratched the word "hole" into the bonnet.

(b) On 15 September 2014, the applicant called the complainant and threatened to "snap her neck". When she returned home with their child, the applicant was on her front lawn drinking alcohol. He made threats to her and a gesture of a gun shooting at the child.

(c) Later on 15 September 2014, the applicant again attended at the complainant's home, came to the closed door and yelled that he wanted their son. This occurred for a number of minutes, after which he went to sit in his car where he remained when the police arrived.

(d) On 17 September 2014, the applicant again attended at the complainant's home. This occasion was subject to a summary conviction on 20 September 2014.

(e) On 3 October 2014, the applicant sat outside the complainant's workplace at a service station for approximately two hours until 10.00 pm.

(f) In early October 2014, upon the complainant moving to a caravan park, the applicant attended at the park and made enquiries as to the location of her new residence.

(g) On 4 October 2014 at approximately 1.00 am, the applicant attended at the complainant's home, a unit, knocking on the door and called out to see their son. On that day alone, he had forwarded approximately 124 text messages to the complainant's phone.

[7] In addition to those particularised occasions, the applicant repeatedly called the complainant's mobile phone and sent harassing text messages. The applicant would turn up at the place where the complainant was staying and cause trouble by yelling out or being abusive to her. This resulted in the complainant being asked to leave.

[8] As mentioned, the applicant committed the offence of stalking in breach of a Domestic Violence Order (DVO). He was sentenced for four such offences. He also breached a bail condition that he was not to have contact with the complainant (which amounted to a further breach of a DVO). Further, the offending occurred in circumstances where Family Court Consent Orders were current concerning arrangements involving their son.

**Circumstances of the summary offences**

[9] The nine fraud offences concerned the repeated use of a stolen credit card (in total amounting to $912.62). Further, the offences of unlawful use of a motor vehicle and of stealing and the two traffic offences were unrelated to the offence of stalking.

[10] The offence of failing to appear in accordance with an undertaking was committed on 13 April 2015. The applicant was released on a bail undertaking at the Magistrates Court at Beenleigh on 24 March 2015, on a condition that he appear at the Wynnum Magistrates Court on 13 April 2015. Upon his failure to appear, a warrant was issued for his arrest. He surrendered to the Cairns Police Station on 16 April 2015. When asked why he had failed to appear, he said, "because I had court in Cairns, I was in Cairns, and I didn't have the funds to go back and forth".

**Antecedents**

[11] The applicant was 49 years of age at the time of offending and 50 at sentence.

[12] The applicant had a significant criminal history of violence. The more serious offending included convictions for unlawful wounding in 1985, for which a sentence of three and a half years imprisonment was imposed. He also had convictions for two counts of breaching a DVO, assault occasioning bodily harm and unlawful assault in 1993, for which a sentence of nine months' imprisonment wholly suspended was imposed. In 1994, he was convicted of stealing with actual violence whilst armed, for which a sentence of eight years imprisonment was imposed. In 2001, he was convicted of armed robbery with actual violence, for which a sentence of two and a half years imprisonment cumulative upon the sentence for stealing was imposed. In 2006, he breached release conditions imposed under the *Domestic and Family Violence Protection Act* 2012 (Qld), for which a sentence of two months' imprisonment was imposed. In 2008, he was convicted of assault occasioning bodily harm whilst armed in 2008, for which a sentence of three years imprisonment was imposed. Relevantly, the applicant had breached court domestic violence orders and has, on occasion, breached bail conditions. The respondent submitted that the applicant also appeared to breach parole with respect to the offence of armed robbery on 22 January 2001.

**Submissions at sentence**

[13] In relation to the applicant's personal circumstances, it was submitted on his behalf at sentence that he suffered from bipolar disorder and schizophrenia and had not been compliant with his medication at the time of the offending. The offending arose out of a dispute as to who the child of the relationship should be living with. The applicant's instructions were that (irrespective of the Family Law Consent Orders) the couple's son had been living with him and the complainant went to Cairns for what he thought was a holiday with the child and did not return. The applicant had travelled to Cairns to retrieve his son. When he could not do so, he

resorted to alcohol and ice consumption. It was further submitted that the applicant was remorseful and that he intended seeking legal aid assistance with his family law matters upon his release from prison. The applicant had attained a Certificate I in Construction and a Certificate II in Hospitality whilst in custody.

**Sentencing remarks**

[14] The sentencing judge had regard to the serious nature of the offending constituting unlawful stalking, involving intimidation and the instilling of fear in the complainant and the consequences for her and their son and to the applicant's criminal history. His Honour also took into account the applicant's early pleas, his cooperation with the police and prosecuting authorities and other matters of mitigation concerning his personal circumstances, including his mental health disorders, for which he had sought assistance while in custody, his efforts to improve himself and his willingness to consent to an extension of the protection order.

[15] In imposing sentence, the sentencing judge first dealt with the offence of unlawful stalking. Referring to the comparative decision of *R v Baker*[1] where a head sentence of two years was imposed, his Honour observed:

> "It seems to me that your offending involving the stalking is of a similar order. However, you also stand before me with other unrelated offending which I will deal with shortly."

[16] After imposing concurrent terms for the majority of the summary offences, his Honour imposed the six month term for the failure to appear offence, stating:

> "I've taken into account in setting those sentences the totality of your criminal behaviour, reviewed the aggregate of those sentences and tried to determine what is just and appropriate so as not to be too crushing or disproportionate."

[17] As was submitted by the respondent, it is apparent that his Honour was intending to impose a total term of imprisonment greater than two years to reflect the summary offending.

**The submissions**

[18] In contending that the sentence imposed for the failing to appear was manifestly excessive, it was submitted on behalf of the applicant that, whilst the applicant had a substantial criminal history, he had only one previous fail to appear which occurred on 12 March 2015, for which he was convicted and fined $500. In relation to the offending constituting the failing to appear, the applicant voluntarily surrendered himself into custody and did so in a timely fashion. He had attended the Cairns police station on 16 April 2015 (three days after failing to appear) and advised that he had failed to appear as he was in Cairns for court and did not have the funds to travel back to the Magistrates Court in question.

[19] Noting that where a term of imprisonment was imposed for the offence of failing to appear, it was required to be imposed cumulatively[2] and that the maximum period of

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1 [2011] QCA 33.

imprisonment was two years,[3] the respondent submitted that the sentence imposed for the failure to appear was not manifestly excessive. It was accepted that, viewed in isolation a six month term of imprisonment for the failure to appear may appear high but it was not manifestly excessive in the circumstances of this case, where the term of imprisonment imposed was required to be cumulative, and it resulted in a global term of imprisonment of two and a half years as that, it was said, appropriately reflected the totality of the offending. In making those submissions, the respondent accepted that the applicant's criminal history did not demonstrate that he had a long-standing pattern of bail offences and that the applicant's previous failure to appear had been the subject of a fine, nevertheless, it was submitted that the applicant did have a history of breaching court orders. Further it was submitted that, when the authority of *Baker* was considered, a sentence of two and a half years was within the applicable range for the stalking offence. Having regard to the applicant's threats of violence to the complainant and persistent harassing conduct, his concerning criminal history and the further offending, a global sentence of two and a half years was within the sound sentencing discretion. His Honour had weighed all of the relevant matters and imposed a sentence that was appropriate in all of the circumstances.[4] That included taking into account features of mitigation and setting a parole release date after serving approximately 10 months, or one third, of the combined sentences.

**Did the sentencing discretion miscarry?**

[20] When sentencing for multiple concurrent sentences, it is permissible to attach a higher sentence to the most serious offence than would be imposed if sentencing solely in respect of it, provided the sentence is not in excess of an appropriate range for the actual offending involved in the offence attracting the head sentence. In *R v Nagy*, Williams JA said:[5]

> "Where a judge is faced with the task of imposing sentences for a number of distinct, unrelated offences there are a number of options open. One of those options is to fix a sentence for the most serious (or the last in point of time) offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality. But that approach should not be adopted where it would effectively mean that the offender was being doubly punished for the one act, or where there would be collateral consequences such as being required to serve a longer period in custody before being eligible for parole, or where the imposition of such a sentence would give rise to an artificial claim of disparity between co-offenders. That list is not necessarily exhaustive. Such considerations may mean that the other option of utilising cumulative sentences should be adopted."

[21] Even so, a six month term of imprisonment imposed cumulatively for the failure to appear was manifestly excessive, bearing in mind the circumstances of that offending and the relevant mitigating considerations. In particular, it failed to give due weight to the applicant's limited criminal history for failing to appear, his

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2 *Bail Act* 1980 (Qld) s 33(4).
3 *Bail Act* 1980 (Qld) s 35(2).
4 *Markarian v The Queen* (2005) 228 CLR 357.
5 [2004] 1 Qd R 63 at 72-73.

having provided an explanation for it and his having voluntarily surrendered himself into custody and having done so in a timely fashion.

[22] While the imposition of a global sentence of two and a half years for the stalking offence, taking into account the totality of the offending, would have been within range, as is apparent for the reasons that follow, that result could not be achieved by the imposition of a manifestly excessive cumulative sentence on the failure to appear. In adopting that approach, the sentencing discretion miscarried.

**Re-exercise of the sentencing discretion**

[23] The error in the exercise of the sentencing discretion requires the discretion to be exercised afresh in relation to the offence of failing to appear. Counsel for the applicant was advised on the hearing of the application that the Court was minded to increase the penalty on the stalking offence if it was required to re-exercise the sentencing discretion in respect of the failure to appear. Submissions were heard with that prospect in mind.

[24] I consider that the appropriate course is to re-exercise the sentencing discretion in relation to both the offences of failing to appear and unlawful stalking. The approach of imposing a global sentence of two and a half years on the unlawful stalking offence reflects the totality of that offending and is appropriate in the circumstances of this case. A sentence of that order is supported by *Baker*.

[25] Reference was made in *Baker*[6] to the statement of de Jersey CJ in *R v Macdonald*[7] that because of the "particularly wide variety of these cases which regrettably emerges" there is "no well-defined and constraining range for stalking offences". McMurdo P observed that an appropriate sentence for the conduct in *Baker* was a head sentence of between 18 months and three years with some period of actual imprisonment.[8]

[26] The conduct constituting the stalking in *Baker* was not of a dissimilar nature, generally involving offensive communication without actual violence or the overt threat of violence, although the offending there occurred over five months. The offender in *Baker* was sentenced after a trial and when the maximum penalty was five years, rather than seven years imprisonment, as is presently the case.[9] On the other hand, Baker had not breached court orders, as the applicant has done. Additionally, *Baker* did not have the feature of the additional offending present in the current case. Relevantly, the applicant in *Baker* only had a "minor" criminal history, principally drug-related, for which he had been convicted and fined. He had received probation for a recent drug offence. Further, he had no like convictions or offences of violence.

[27] I would re-exercise the sentencing discretion in relation to the failure to appear by recording a conviction but imposing no further punishment.

[28] As to the stalking offence, I would re-exercise the discretion by imposing a sentence of two and a half years to reflect the overall criminality of that offence and the failure to appear. A declaration is made pursuant s 159A of the *Penalties and*

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6 [2011] QCA 33 at [54].
7 [2008] QCA 384 at [21].
8 [2011] QCA 33 at [31].
9 Although the Schedule of Facts stated the maximum penalty is three years, it was clearly a slip (repeated by the sentencing judge) and not one that was suggestive of an error that affected the sentence.

*Sentences Act* 1992 (Qld) as to time served under the sentence of 236 days between 16 April 2015 and 7 December 2015. As mentioned, the applicant was granted appeal bail on 22 January 2016. I consider that it is appropriate to amend the parole release date from 16 February to 22 January 2016. The applicant has been integrated into the community since that time and there is nothing before the Court to indicate any conduct of concern in the interim. In the circumstances of this case, the applicant's rehabilitation would not promoted by requiring his return to custody. On the other hand, the heavier head sentence imposed will result in the applicant being required to undergo a longer period of supervision in the community, which will promote his rehabilitation and reduce the risk of his reoffending.

[29] I would otherwise confirm the sentences imposed by the sentencing judge for the remaining summary offences.

**Orders**

[30] The orders that I propose are:

1. The application for leave to appeal is granted.

2. The appeal is allowed to the extent of setting aside the sentences imposed on 8 December 2015 for the offences of unlawful stalking and failing to appear in accordance with an undertaking and, in lieu thereof, the following sentences are imposed:

   (a) A sentence of two and a half years for the offence of unlawful stalking, with a declaration pursuant s 159A of the *Penalties and Sentences Act* 1992 that 236 days spent in pre-sentence custody between 16 April 2015 and 7 December 2015 inclusive be taken to be time served under that sentence.

   (b) A conviction is recorded but no further punishment is imposed for the failing to appear.

   (c) It is ordered that the applicant be released on parole on 22 January 2016 in lieu of 16 February 2016.

   (d) Otherwise confirm the sentences imposed by the sentencing judge.

[31] **NORTH J:** I agree with the orders proposed by Philippides JA for the reasons given by her Honour.