SUPREME COURT OF QUEENSLAND

CITATION:	*R v Foodey* [2003] QCA 310
PARTIES:	**R** **v** **FOODEY, Simon Hilton** (applicant)
FILE NO/S:	CA No 30 of 2003 DC No 17 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	25 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	17 July 2003
JUDGES:	Davies and Jerrard JJA and Helman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Dismiss the application for leave to appeal against sentence**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant sentenced to eighteen months imprisonment suspended for five years after applicant served 168 days for unlawful stalking and wilful damage – where plea of guilty – where applicant demonstrated no remorse – where learned sentencing judge considered offending behaviour to be so serious as to require a deterrent element in the sentence imposed – where applicant's conduct in constant breach of protection orders – whether sentence manifestly excessive *Domestic and Family Violence Protection Act* 1989 (Qld) *R v Hallett* [1997] QCA 418; CA No 301 of 1997, 21 November 1997, discussed *R v Holznagel* [1998] QCA 26; CA No 426 of 1997, 6 February 1998, discussed *R v Millar* [2002] QCA 382; CA No 198 of 2002, 25 September 2002, discussed

COUNSEL: The applicant appeared on his own behalf
M J Copley for the respondent

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

[1] **DAVIES JA:** I agree with the reasons for judgment of Jerrard JA and with the order he proposes.

[2] **JERRARD JA:** In mid May 2002 the applicant Simon Foodey and his wife Jennifer Louise Foodey separated after an eight year marriage. They had had a relationship for some 14 years and had two children then aged six and two. On 19 May 2002 a Temporary Protection Order, which had been issued by the Toowoomba Magistrates Court on 16 May 2002, was served on Mr Foodey at the Helidon Police Station. That order, issued pursuant to the *Domestic and Family Violence Protection Act* 1989 (Qld), expired on 30 May 2002, and on that date a second Temporary Protection Order was made. The applicant was present when that order was issued, which expired on 8 July 2002. On that last date a further order was made.

[3] Despite those orders, the applicant engaged in conduct between 30 May 2002 and 25 July 2002 which constituted unlawfully stalking Jennifer Foodey; and on 23 December 2002 he pleaded guilty in the Toowoomba District Court to having committed that offence between those dates. By his plea he also admitted two circumstances of aggravation, namely that a number of the concerning acts of that stalking were constituted by his unlawfully using, and threatening to use, unlawful violence against Jennifer Foodey; and that a number of those acts contravened those restraining orders. He also pleaded guilty to a second count that on 5 July 2002 at Toowoomba he had wilfully and unlawfully damaged her motor vehicle. On 7 January 2003 he was sentenced to imprisonment for 18 months, such imprisonment to be suspended for a period of five years after Mr Foodey had served 168 days. It was declared that 168 days of pre-sentence custody from 24 July 2002 was imprisonment already served, and Mr Foodey was released. He appeals against that sentence, arguing that it is manifestly excessive.

[4] The sentencing process before the learned sentencing judge involved a contest of fact about a number of the circumstances of Mr Foodey's stalking of his ex wife. After that contested hearing the learned judge held that, "leaving the phone call matter aside", the judge was satisfied beyond reasonable doubt that the "functional" serious acts occurred as the complainant said. That finding, not contested in the applicant's grounds for leave to appeal against his sentence, means that the applicant's conduct towards Jennifer Foodey included a number of separate occasions on which:

- he assaulted her in different ways;
- he drove his car at her or her car;
- he threatened that she would die;
- he followed her motor vehicle.

[5] The first assault consisted of his pushing a lit cigarette onto the palm of her hand on 2 June 2002, when care of the children was being exchanged at a McDonalds. On 16 June 2002 he spat in her face, again at McDonalds on an occasion of exchanging care of the children, and two days later at 8.00 p.m. at night he approached her in the grounds of her then home, and tackled her to the ground. She was so terrified that she voided her bladder. On 20 July 2002 he went to her home, slapped her, and made her nose bleed.

[6] The threats included one made on 1 June 2002 that "you'll get yours"; one made 22 June 2002 that "you underestimate me, moll"; one made 5 July 2002 that "you'd better hurry up – its going to hurt"; and later that day "you're going to die bitch and so is Erin" (their elder daughter); and one made 12 July 2002 that, "you're going to die bitch".

[7] The occasions when he abused her by his use of a vehicle included following her around Toowoomba on 5 July 2002, driving that same day at her in a shopping centre car park and stopping only inches behind her; swerving his vehicle towards her on 7 July 2002 when they were travelling in opposite directions, and then following her car for six kilometres; and following her around the centre of Toowoomba on 18 July 2002 as she shopped.

[8] The matter about which the learned judge made no specific finding, namely "the phone call matter", was her complaint that on many occasions he phoned and left messages on her mobile telephone. For example, on 2 June 2002, 27 messages were left, on 4 June, 48, and on 21 July, 13. There were many, many, other phone calls. The applicant's version of all that was that orders made by the Family Court of Australia entitled him to telephone contact eight times per week with the children, and he alleged that frequently the complainant Jennifer Foodey would intervene during those calls, say "that's one" and hang up, and if he called back say "that's two". Whatever the merits of that account, and the learned judge thought that some of the complainant's behaviour toward the applicant was provocative to him, simply the number of telephone calls made to Jennifer Foodey appears obsessive and harassing.

[9] The sentencing remarks of the learned judge include the observation that while Jennifer Foodey was giving evidence she was clearly stressed, and that the applicant appeared to be almost enjoying her discomfort; and to that extent Mr Foodey impressed the judge as a heartless, even cruel, person. The judge was satisfied the applicant had not accepted even as at the date of sentence that the parties marital relationship was at an end, and the judge expressed the view that the applicant's offending behaviour warranted a "not insubstantial" custodial term, and further that his conduct was of such seriousness that a deterrent element was more than ordinarily important. The judge noted that the applicant had a criminal history of offending behaviour in both Western Australia and New South Wales, for conduct some considerable time ago and which demonstrated persisting involvement with prescribed drugs.

[10] The learned judge made an allowance for the applicant's co-operation with the administration of justice by the plea of guilty, which he considered had certainly saved a trial of very real length; but thought it inappropriate to make any allowance for remorse, since he could see none. In the result he imposed the sentence described, which effectively released the applicant back into the community

immediately, but with what will be a 12 and a half month suspended sentence for five years. The learned judge made the effect of that sentence very clear to the applicant, who said he understood it.

[11] The applicant's behaviour towards Jennifer Foodey in the two and a half months between their separation and his incarceration was persistently cruel and aggressive. At different times he insulted, degraded, and terrified her. His conduct throughout was in breach of court orders intended to give her protection. Considered in isolation, the sentence imposed by the learned judge does not appear manifestly excessive, and indeed far from it. The same result occurs if regard is had to other sentences for unlawful stalking imposed or approved by this court.

[12] In a matter *Hallett* [1997] QCA 418 this court upheld a sentence of two years imprisonment for an offence of stalking. The reasons for judgment on that applicant's appeal against conviction reveal that he had interfered on more than one occasion with the complainant's motor vehicle, and had threatened to kill her. The learned judge's sentencing remarks in that case included the following statement:

> "I accept that the jury's verdict carries with it a finding that you made, in particular, many, many telephone calls to herself and her friends and that you damaged her vehicle, including the cutting of the brake hose, itself a highly dangerous thing which could have resulted in death or injury to her or to someone else on the road."

[13] That applicant was aged 27 when sentenced, and had no previous convictions. He had been in a de facto relationship with the complainant and had a good employment record. In rejecting his appeal against sentence, Williams J (as he then was) remarked when delivering the judgment of the Court, that that applicant showed no remorse and had embarked on a calculated and persistent campaign of intimidation against the complainant. Some of the conduct complained of, particularly that involving interference with the car, was serious and could well have had disastrous consequences for the complainant and other road users.

[14] All of those remarks actually apply to the present applicant, save that he had not interfered with his ex wife's motor car. He had however driven his vehicle at hers, when both were travelling on a public roadway. That had potential consequences for each of them and other road users.

[15] A Tracey Holznagel ([1998] QCA 26) unsuccessfully appealed a sentence of 15 months imprisonment for two counts of stalking with circumstances of aggravation. She had pleaded guilty on 24 October 1997 to those counts. The complainants were her ex partner and his mother. She had been engaged in a course of obsessive conduct regarding both of them for a number of years.

[16] That conduct had resulted in her conviction on 17 November 1995 for using a telecommunications service to harass another person, and a conviction for that same offence again on 8 July 1996, as well as for breach of a Domestic Violence Order on that date. She had been taken into custody on 24 July 1997, because of continuing breaches of that order and of a probation order made 8 July 1996, and while in custody had continued to make phone calls to the complainants until her telephone privileges were terminated. Thereafter, she wrote alternatively abusive and appealing letters to the male complainant and some of his friends. As late as the day before sentence the male complainant had received a letter from her. The

history of her offending behaviour included what was described as "an enormous number of insulting and threatening phone calls, sometimes as many as 23 in one day"; this had resulted in the complainants unplugging their telephone, changing telephone numbers, moving house, and the male complainant selling his business.

[17] That applicant had co-operated with police and made an early plea of guilty. She had no prior convictions. Despite that, the sentence was upheld because of the view taken by the court that at the time of sentence it was highly likely that she would resume her offensive behaviour. It appeared she had not done so since being sentenced to imprisonment. The then applicable provisions entitled her to consideration for release on parole on 11 March 1998.

[18] Finally, in a matter of *Millar* [2002] QCA 382, that applicant unsuccessfully appealed a concurrent two year sentence for stalking with circumstances of aggravation, that sentence being concurrent with a six month sentence for dangerous operation of a motor vehicle and common assault, and with a nine month suspended sentence, which had been fully activated for offences for fraud and receiving.

[19] That applicant had been in a relationship for some nine months with that complainant, and had lived in a de facto relationship for a fortnight before the complainant moved out, as a result of physical and verbal abuse from that applicant. He pleaded guilty to stalking her between 11 September and 26 December 2000. His stalking behaviour consisted of menacing telephone calls, banging on her door, making threats, and leaving letters and other items at her residence, all of which culminated in an attempt to run her off the road during the day of 24 December 2000. Later that day he drove his vehicle into hers, and assaulted an off duty police officer who had attempted to give her assistance. That conduct was the basis of the dangerous operation and assault charges.

[20] That applicant had a criminal history of dishonesty, including some earlier terms of imprisonment, and the offences of dangerous driving and assault, part of the stalking, had occurred some three months into a period of a suspended sentence. The stalking itself occurred during the period of a domestic violence restraining order, as well as during that period of suspension.

[21] That applicant was 30 years old, had been on bail for a year during which he made no contact with the complainant, and he expressed remorse. Despite those features, this court was satisfied that the sentence of two years imprisonment was not manifestly excessive.

[22] An examination of those decisions shows that this applicant has no grounds upon which he can validly complain about the sentence imposed on him. Mr Foodey asked that this court consider three sentences imposed for stalking with circumstances of aggravation by District Court Judges in 1995 and 1998. The circumstances of those offences are arguably similar, and in each a wholly suspended sentence was ordered. That was the practical effect of the sentence imposed on Mr Foodey. I would dismiss the application for leave to appeal that sentence.

[23] **HELMAN J:** I agree with the order proposed by Jerrard JA and with his reasons.