SUPREME COURT OF QUEENSLAND

CITATION:	*R v AN* [2003] QCA 349
PARTIES:	**R** **v** **AN** (applicant/appellant)
FILE NOS:	CA No 196 of 2003 DC No 665 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	11 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	11 August 2003
JUDGES:	McMurdo P, Muir and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal granted.** **2. Appeal allowed. The sentence imposed on the 28th of May 2003 is set aside and a term of two years is substituted with a recommendation for parole on 5 November 2003.**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – TOTALITY – where the applicant pleaded guilty to a charge to stalking which activated suspended sentences for other offences – where the terms of imprisonment for the suspended sentences were ordered to be served cumulatively – whether the sentence imposed was manifestly excessive in all the circumstances *Domestic and Family Violence Protection Act* 1989 (Qld) *R v Allie* [1998] QCA 75; CA No 463 of 1997, 28 April 1998, [1999] 1 Qd R 618, referred to *R v Foodey* [2003] QCA 310; CA No 30 of 2003, 25 July 2003, considered *R v Holznagel* [1998] QCA 26; CA No 426 of 1997, 6 February 1998, referred to *R v Layfield* [2003] QCA 3; CA No 271 of 2002, 29 January 2003, considered

R v Millar [2002] QCA 382; CA No 198 of 2002, 25 September 2002, considered
R v Tupper [1998] QCA 362; CA No 208 of 1998; 22 September 1998, referred to

COUNSEL: K C Eberhardt for the applicant/appellant
S J Farnden for the Crown

SOLICITORS: Boe & Callaghan for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

MUIR J: On 28 May 2003 the applicant, having pleaded guilty to stalking with circumstances of aggravation, was sentenced in the District Court to three years' imprisonment with a recommendation of eligibility for post-prison community based relief after 23 July 2004. At the same time, a 14 month concurrent suspended sentence of two and a half years suspended after 16 months with an operational period of four years imposed on 16 October for stalking was activated.

The applicant was also sentenced on 16 October 2000 for common assault and wilful damage. The practical effect of the sentences and the order is that the applicant is liable to serve a term of four years and two months imprisonment and is not eligible for release until after about 18 months. The applicant, who was 48 in May 2003, had been sentenced on 4 March 2002 to 267 days' imprisonment for stalking with a circumstance of aggravation.

Two hundred and sixty seven days spent in pre-sentence custody were declared to be time spent in serving the sentence. That conviction breached the terms of the suspended sentence imposed on 16 October 2000, and for that breach the applicant was sentenced to the rising of the Court. This does not complete the list of the appellant's stalking convictions. On 23 October 1997 he was convicted of stalking with a circumstance of aggravation and sentenced to 12 months' imprisonment wholly suspended for three years.

In breach of the terms of that suspended sentence he committed two offences under the *Domestic Violence Act* for which he was in prison for two months, and the suspended sentence was activated. The applicant's criminal record also includes convictions for

stealing, wilful exposure, soliciting, and more significantly six convictions for breaches of domestic violence orders.

The applicant contends that the sentence was manifestly excessive as failing to have proper regard to the totality principle. The applicant's plea of guilty, his attempts to rehabilitate whilst in prison, and the circumstances of the offence. Those circumstances are as follows. The complainant befriended the applicant whilst he was on remand prior to being sentenced on 4 March 2002. The applicant and the complainant lived together for a short period until the applicant left the complainant's house on 5 February 2002 on the breakdown of their relationship.

On 5 March 2002, the day after his most recent sentence for stalking, the applicant telephoned the complainant and threatened to get square with her and to blow her head off. He made four other death threats, and also a threat of serious injury to the complainant's children in the course of the next month. The complainant complained to police about the applicant's conduct early in March 2002 but after the applicant promised to cease his conduct she withdrew her complaint.

She renewed it after receiving a further threatening call on 31 March. A psychologist's report before the learned sentencing Judge contains the following expressions of opinion and observations. The applicant "presents with many of the features of a borderline personality disorder, 9DSM-IV." And further that "his typical pattern of behaviour was to express jealousy, be abusive verbally and/or physically to the partner or person he was suspicious of, to a point where the partner in question felt that [the applicant] needed some form of legal restraint and/or they needed to end the relationship. So it is unlikely, without one-on-one counselling, that [the applicant] will be able to significantly alter his behaviour in this regard."

Plainly, the applicant can have no legitimate complaint concerning the activation of the suspended sentence. The applicant's counsel at first instance conceded that such a course was appropriate and it was impossible to demonstrate that it was unjust for the term of the suspended sentence to be served. Nor, in my view, can it be said that it was inappropriate

for cumulative terms to be imposed. Failure to do so would have resulted in an inadequate sentence for the subject offences or in the applicant being absolved from the consequences of breach of the terms for the suspended sentence.

There is, however, a question of whether in the circumstances - and having regard to the totality principle - a three year cumulative term was excessive. The Court was referred to the decisions of *The Queen v Tupper*, Court of Appeal 22 September 1998; *The Queen v Allie*, Court of Appeal 28 April 1998; *The Queen v Holznagel*, Court of Appeal 6 February 1998; *The Queen v Layfield* [2003] QCA 3; *The Queen v Millar*, Court of Appeal unreported 25 September 2002; and *The Queen v Foodey* [2003] QCA 310.

Those decisions indicate that a three year term of imprisonment - to use the language in one of the cases - is "at the top of the range" for offences of this kind. Some of these cases pre-dated the increase in the maximum penalty in 1999 from five years to seven years where circumstances of aggravation exist. *Layfield* and *Millar*, however, concerned events after 1999. In *Millar*, the Court refused leave to appeal against a two year sentence for conduct over a four month period which included menacing phone calls, threatening letters, banging on the door of a dwelling house, and an attempt to run the complainant off the road, coupled with an assault on a police officer who came to the complainant's aid.

In *Layfield*, the offending conduct consisted mainly of telephone threats of serious violence but included surveillance of the complainant by the offender. No complaint was made about the sentence of two years imposed after a trial, but the applicant argued that it should be suspended after 12 months. That application was dismissed.

In *Foodey*, an application for leave to appeal against an 18 month sentence was refused. The offending conduct in that case was worse than that here.

In my view, taking into account the totality principle and the applicant's plea of guilty, the authorities to which the court was referred demonstrate that the subject sentence is manifestly excessive, even after taking into consideration, as one must, the applicant's criminal history, including his persistent pattern of re-offending.

I would set aside the sentence of three years, imposed on 28 May 2003, and substitute a term of two years with a recommendation that the applicant be eligible for post-prison community release on 5 November 2003.

THE PRESIDENT: I agree.

HOLMES J: I agree also.

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THE PRESIDENT: The orders are the application for leave to appeal against sentence granted. Appeal allowed to the following extent. Set aside the sentence imposed on 28th of May 2003 and substitute a term of two years imprisonment with a recommendation for parole on 5 November 2003. The sentence imposed at first instance is otherwise confirmed.