

SUPREME COURT OF QUEENSLAND

CITATION: *Abbott v Martin* [2007] QCA 362

PARTIES: **ABBOTT, Graham Stuart**
(applicant/appellant)
v
MARTIN, Alisa
(respondent)

FILE NO/S: CA No 181 of 2007
DC No 277 of 2006

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s118 DCA (Criminal)

ORIGINATING COURT: District Court at Southport

DELIVERED ON: 26 October 2007

DELIVERED AT: Brisbane

HEARING DATE: 22 October 2007

JUDGES: McMurdo P, Holmes JA and Dutney J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Application dismissed**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND
INQUIRY AFTER CONVICTION – APPEAL AND NEW
TRIAL – PARTICULAR GROUNDS – OTHER MATTERS
– where applicant convicted on one count of stalking in
Magistrates Court – where applicant appealed to District
Court – where District Court appeal dismissed – whether
Magistrate erred in accepting evidence complainant was in
fear of applicant
Criminal Code 1899 (Qld), s 359B, s 359C

COUNSEL: The applicant appeared on his own behalf
B G Campbell for the respondent

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

[1] **MCMURDO P:** I agree with Dutney J's reasons for refusing leave to appeal.

[2] **HOLMES JA:** I have read and agree with the reasons of Dutney J, and with the order he proposes.

- [3] **DUTNEY J:** On 8 June 2006, the applicant was convicted in the Magistrates Court at Southport of the charge of stalking Brian Leigh (“the complainant”) between 1 December 2004 and 11 January 2005.
- [4] The applicant was sentenced to a period of 37 days imprisonment which represented the period the applicant had spent on remand. This period was declared to be time served pursuant to the sentence.
- [5] The sentence imposed upon the applicant a five year restraining order which prohibited him contacting the complainant, the complainant’s wife or any other resident in the street where the complainant lived.
- [6] The applicant appealed to the District Court against the conviction under s 222 of the *Justices Act 1886* (Qld). The appeal was dismissed and the applicant now seeks leave to appeal that decision pursuant to s 118 of the *District Court Act 1967* (Qld).
- [7] The applicant and the complainant had been friends. In early 2004 a laptop computer belonging to the applicant and which he had left at the complainant’s residence disappeared. The applicant suspected that the complainant had disposed of the laptop.
- [8] What followed was an escalating level of harassment of the complainant by the applicant.
- [9] The complainant gave evidence that between March and December 2004, the applicant visited his home on numerous occasions unannounced. Not surprisingly in view of the lapse of time, the complainant and his wife gave uncertain accounts in evidence about the precise number of visits. Estimates varied from as many as three or four times a week to as few as 20 times. Before this Court, the applicant estimated he had visited about 17 or 18 times. The applicant also telephoned the complainant’s home frequently. The stated purpose of these visits and phone calls was to demand the return of the laptop.
- [10] By December 2004, the complainant had changed his land line telephone number which was then unlisted. The complainant gave evidence that this had been done to stop the constant harassing phone calls from the applicant.
- [11] In December 2004, the complainant went to Melbourne for a period. His wife was suffering from cancer and he said that the uninvited contact from the applicant was becoming wearing.
- [12] Leading up to the visit to Melbourne the applicant’s harassing behaviour became more intense.
- [13] On 13 November 2004, the complainant’s mother-in-law’s car was burnt in the complainant’s driveway. Although, the complainant and his wife suspected that the applicant was responsible for the fire, they accept that there is no evidence that it was caused by the applicant.
- [14] Nonetheless, it caused the complainant considerable concern and heightened his reaction to the applicant’s conduct.

- [15] Following the fire however, the applicant visited the complainant's house at night and spoke with his wife. Mrs Leigh said that the applicant told her that her husband had been having sex with their youngest daughter and asked her to tell the complainant that his troubles were only just starting.
- [16] After going to Melbourne, the complainant received multiple calls from the applicant on his mobile phone. In the end the complainant changed his mobile phone number.
- [17] While the complainant and his wife were in Melbourne, the applicant also visited their house on at least 17 occasions, walking around the yard and leaving notes. Having regard to the multiple phone calls he made to the complainant, the applicant must have known the complainant was in Melbourne. The neighbours became so concerned that they called the police.
- [18] The complainant and his wife returned from Melbourne after a couple of weeks. The complainant said that he was afraid that his house would be burned down. On his return he received the notes left by the applicant.
- [19] A number of the notes could reasonably be construed as threatening. Some examples of the text include the following:
- “The issue with Brian has to be resolved. He either proves his innocence or gets me my laptop back.” (01.01.05)
- “I make no apologies for having written scathing letters to your neighbours, and for openly provoking your neighbours over the last week or two. To turn them against you, for them to be aware of how you treat people close to you including them, to isolate you as much as possible.... It is not necessary to have to light fires to wake you up out of your delusions and dream world. I don't need to do that sort of thing just to make you realise it is simply not worth your while to continue not giving me my laptop back.... Just get me my laptop and at least get me out of your system. You are going to have to get it back, mark my words.” (03.01.05)
- “Everyone loses in a war. If I were to say, to burn your boat, then you would just burn all my stuff in retaliation and what gain is that to anybody. I don't want a war. The bottom line is that you are still going to have to give me back my laptop” (04.01.05).
- [20] These are examples from a great volume of material directed to the complainant. The references to burning also need to be understood in the context of the arson of the complainant's mother-in-law's car. Even though there was no evidence the arsonist was the applicant, the complainant believed he was and this would likely have affected his reaction to the references to burning in the notes.
- [21] The complainant gave evidence that he was upset by the harassment. He was frightened about how far the applicant might go. In particular he was afraid that his house might be burned down. His wife was very distressed.
- [22] The applicant did not give evidence.
- [23] The offence of stalking is defined in s 359B of the *Criminal Code 1899* (Qld) which provides:

“*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, including, for example, by telephone, mail, fax, email or through the use of any technology;
 - (iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;
 - (iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person;
 - (v) giving offensive material to a person, directly or indirectly;
 - (vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;
 - (vii) an act of violence, or a threat of violence, against, or against property of, anyone, including the defendant; and
- (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.”

[24] To establish stalking it is necessary to prove intentional, conduct engaged in on 1 or more occasions and involving, *inter alia*, contacting a person or involving an intimidating, harassing or threatening act directed against them whether or not involving violence or a threat of violence.

[25] These elements were not seriously in dispute and, in my view, could not have been seriously disputed.

[26] The remaining element is that the contact or conduct must be such as “would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person.” The applicant argued that this element was not made out.

[27] The Magistrate addressed all the relevant issues.

[28] The applicant’s principle argument in this Court and below appeared to be that the complainant was only frightened of his house being burned down. This fear arose from the burning of the car. Since the car burning could not be linked to him, there was no basis for attributing any of the complainant’s fears to the conduct complained of. He did nothing to cause the fear because his sole intention was to recover the laptop computer.

[29] This argument entirely misunderstands the relevance of the evidence about the burning of the car. As to this, the Magistrate said:

“The defendant was aware of the fires. His letter to the complainant quoted above makes reference to the fires and upon the evidence of Detective Martin; he was visited after the fires. Circumstances for this purpose of determining whether the fear or apprehension

reasonably arises in all the circumstances include, in fact, the circumstance that Mr Leigh was a victim of anonymous arson.

The letters to the defendant not only indicate knowledge of the fires but indicate a determination almost to exploit the understandable fear that an anonymous arsonist would engender in the complainant.”

- [30] In my view the approach of the Magistrate to the evidence of the arson was entirely appropriate.
- [31] The Magistrate accepted the evidence of the complainant going to the disputed element of the offence. This included his evidence of actual fear. No reason has been advanced which shows this was not a course open to the Magistrate. Indeed, it seems to me, despite not having seen the witnesses, that it would have been a little surprising if the Magistrate had reached any other conclusion.
- [32] The applicant’s conduct in relation to this matter was not what would generally be regarded as a rational or reasonable response to the loss of the computer however it was brought about. It seems to me that the complainant’s fears, both for himself and for his property were reasonable in all the circumstances.
- [33] If there were any doubt about this outcome, s 359C of the *Criminal Code 1899* (Qld) relevantly 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.
(5) For section 359B(d)(i), it is immaterial whether the apprehension or fear, or the violence, mentioned in the section is actually caused.”
- [34] Since the fears expressed by the complainant regarding the applicant’s conduct were reasonable having regard to all the circumstances, it does not matter what the applicant’s actual intention was or that he actually caused fear in the complainant concerning either himself or his property.
- [35] It seems to me that there is no arguable basis for an appeal and any grant of leave would be futile.
- [36] I would dismiss the application.