SUPREME COURT OF QUEENSLAND

CITATION:	*R v Johnston* [2008] QCA 291
PARTIES:	**R** **v** **JOHNSTON, Alan David** (applicant)
FILE NO/S:	CA No 52 of 2008 DC No 404 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	26 September 2008
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2008
JUDGES:	Keane and Fraser JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for an extension of time within which to apply for leave to appeal refused**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – MISCELLANEOUS PRACTICE CASES – where the applicant was convicted of unlawful stalking with violence and sentenced to a term of imprisonment – where the learned trial judge also made a restraining order in respect of the applicant's de facto wife – where the applicant filed an application for an extension of time within which to apply for leave to appeal against sentence – where it was clear that the applicant sought only to challenge the restraining order – where the applicant could have applied to the District Court to have the restraining order revoked or modified instead of making the application for an extension of time to this Court – whether the making of the restraining order formed part of the sentence imposed – whether, when the application was treated as an application under s 118(3) of the *District Court of Queensland Act* 1967 (Qld), the merits of the application warranted the grant of an extension of time within which to apply for leave to appeal *Criminal Code* 1899 (Qld), s 359F, s 668D *District Court of Queensland Act* 1967 (Qld), s 118 *Pickering v McArthur* [2005] QCA 294, cited *R v Blow* [1963] QWN 1, cited

R v Harman [1959] 2 QB 134, cited
R v Marriner [2007] 1 Qd R 179; [2006] QCA 32, applied

COUNSEL: The applicant appeared on his own behalf
M B Lehane for the respondent

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

[1] **KEANE JA:** I have had the advantage of reading a draft of the reasons for judgment prepared by Fraser JA. I agree with his Honour's reasons and with the order proposed by his Honour.

[2] **FRASER JA**: On 14 December 2007 the applicant was convicted on his plea of guilty of an offence of unlawful stalking with violence between 1 January and 3 March 2007. On 18 January 2008 the applicant was sentenced in the District Court to two and a half years imprisonment with a parole release date of 1 February 2008 (representing 11 months in custody, with 322 days of pre-sentence custody declared as time served).

[3] The sentencing judge also made a restraining order in respect of the two complainants and their immediate family members and a separate restraining order in respect of a witness, the applicant's de facto wife Ms Owen.

Jurisdiction to hear the application

[4] The applicant seeks to challenge the restraining order concerning Ms Owen. With that in mind, the applicant filed an application for leave to appeal against sentence on 28 February 2008. The grounds of appeal are restricted to challenges against the restraining order. It is clear that the applicant only seeks to challenge the restraining order concerning Ms Owen.

[5] Section 668D(1)(c) of the *Criminal Code* confers a right to apply for leave to appeal "against the sentence passed on the person's conviction". In my opinion the restraining order is not a sentence against which an appeal may be brought under s 668D(1)(c) of the *Code*. The term "sentence" is defined in s 668(1) as including "any order made by the court of trial on conviction of a person with reference to the person's person or property, whether or not the person is adversely affected thereby and whether or not the order is made instead of passing sentence". The words "on conviction" mean "in consequence of conviction": see *R v Blow* [1963] QWN 1 per Gibbs J at 4, following *R v Harman* [1959] 2 QB 134. *R v Blow* was followed in *R v Marriner* [2007] 1 Qd R 179; [2006] QCA 32, in which Mc Pherson JA observed that it is not every order following chronologically after conviction that amounts to a "sentence" on conviction: "There must be a relationship of some discernible kind between the two in order to make it an order or "sentence" in the defined sense."

[6] As to that, s 359F(2) of the *Code* provides:

> "(2) Whether the person is found guilty or not guilty or the prosecution ends in another way, if the presiding judge or magistrate considers it desirable, the judge or magistrate may constitute the

> court to consider whether a restraining order should be made against the person."

[7] The judge or magistrate may act under that provision on application by the Crown or an interested person or on the judge's or magistrate's own initiative: s 359F(3). Subsection 359F(6) provides that the court may make a restraining order if it considers it desirable to do so having regard to the evidence given at the hearing of the charge and any application under subsection (3) and any further evidence the court may admit. Further, s 359F(10) of the *Code* provides that a restraining order proceeding is not a criminal proceeding. That perhaps explains why s 359F(2) includes what otherwise appears to be the unnecessary provision for the judge or magistrate hearing a charge to "constitute the court to consider whether a restraining order should be made against the person".

[8] Those provisions make it plain that a restraining order is not a sentence. A restraining order lacks the requisite relationship with a conviction and it is made in the exercise of the relevant court's civil jurisdiction rather than its criminal jurisdiction. It follows that the applicant had no right to apply for leave to appeal under s 668D(1)(c) of the *Criminal Code.*

[9] However, because the order was made in the exercise of the District Court's civil jurisdiction s 118(1)(a) of the *District Court of Queensland Act* 1967 (Qld) did not exclude an appeal from the order under s 118(3). That provision therefore conferred upon the applicant a right to apply for leave to appeal from the restraining order. Importantly though, numerous authorities establish that leave to appeal under s 118(3) is ordinarily granted only where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected: see, for example, *Pickering v McArthur* [2005] QCA 294.

Extension of time

[10] The application for leave to appeal filed by the applicant was not in the appropriate form for an application under s 118(3), but that irregularity is capable of being cured without causing prejudice to the respondent. Treating the application as an application for leave to appeal under s 118(3), the proposed appeal is out of time but the delay is not substantial and the applicant has given an explanation for it which the respondent does not challenge. If the applicant has a meritorious application for leave to appeal under s 118(3) this might be an appropriate case for an extension of time.

[11] I will summarise the factual background against which the restraining order was made and refer to the proceedings before the primary judge before turning to consider whether there is merit in the proposed application for leave to appeal.

Factual background

[12] The applicant was dissatisfied with the advice or conduct of a financial advisor to whom he had been referred by a solicitor for the purpose of restructuring the applicant's finances. The applicant demanded the return of money which the financial advisor denied that he owed. Subsequently, in January 2007, the applicant repeatedly asked Ms Owen to obtain a gun for him from her son for the applicant to use in retaliation against the solicitor and financial advisor. The applicant blamed

them for losing his money. At that time he was spying on those complainants. He showed Ms Owen photographs of houses and a car which they owned.

[13] In early February 2007, the applicant told Ms Owen that he was looking for a gun and he continued to ask her help to find one. She asked him why he couldn't use a fake gun instead. The applicant insisted that he had to use a real gun. He said that he did not want to tell her too much in case she got "caught up in it." Ms Owen responded that she was already caught up in the applicant's wrongdoing. In an attempt to deflect the applicant's purpose she pretended that she had contacted her son and that her son had asked whether the applicant actually had to use the gun. The applicant responded that he would use the gun unless "he will give the money back." There were further, similar conversations until, in late February 2007, Ms Owen became concerned for her own safety and that of the complainants and their families. She then reported the matter to police.

[14] The police conducted a search of the applicant's house on 2 March 2007 where they found photographs and notes which demonstrated the applicant had been observing the residences of the complainants and obtaining information about their families. When confronted by police, the applicant initially denied his actions amounted to stalking and said that he was attempting to obtain details of the complainants' assets for the purposes of legal action against them. Ultimately, however, the applicant pleaded guilty to the offences.

[15] Before the applicant was sentenced the complainants became aware of his offending and they naturally became concerned and fearful for their safety and that of their families.

Proceedings before the primary judge

[16] At the sentence hearing the prosecutor made submissions in the course of which she outlined the facts I have summarised above. At the conclusion of her submissions she applied for a restraining order under s 359F in relation to the complainants and their families and a separate restraining order in relation to Ms Owen. After making submissions on that topic the prosecutor handed up a draft restraining order concerning Ms Owen.

[17] When the applicant's counsel had completed his submissions on sentence he addressed the proposed restraining orders. Counsel submitted: "Certainly those orders would be appropriate, although I should say I'm instructed to say that he has been receiving regular mail from Robin Owen in prison." The judge asked if Ms Owen had sought the order, to which the applicant's counsel responded: "Yes." The prosecutor also responded affirmatively and referred to an affidavit by Ms Owen filed in a bail application in which she had outlined her concerns. The prosecutor added that when a legal officer spoke to Ms Owen in the preceding week Ms Owen had asked if a restraint could be ordered. The judge asked whether Ms Owen had asked for the order recently, to which the prosecutor responded: "Yes. And she ceased contact with [sic] in April where she sent him a letter saying she didn't want any further contact."

[18] The judge then made the order in terms of the draft. The order prohibits the applicant from, amongst other things, having or attempting to have any contact with Ms Owen.

The application for leave to appeal

[19] In my opinion an appeal is not necessary to correct any substantial injustice. The order itself contemplates that the Court that made it may revoke it. It recites that it "shall, unless varied or revoked sooner, continue up to and including the day of five years". That is badly expressed but the intention is clear. It reflects the terms of s 359F(7), which provides that a restraining order may be varied or revoked at any time by the court that made the order. Under that provision the District Court could consider the appropriateness of the restraining order afresh, whether or not there was any error in the decision to make the order. It could revoke the order if that were found to be justified by the current circumstances. The applicant would not require leave to apply for such an order or to adduce evidence of the circumstances said to justify the revocation.

[20] The applicant contends that the sentencing judge made the restraining order in relation to Ms Owen as a result of a misleading statement made by the prosecutor to the effect that Ms Owen had asked for a restraining order in the week before the hearing. I am not satisfied that the applicant's case in this regard is sufficiently strong to justify the grant of leave to appeal.

[21] When the application for an extension of time first came before the Court on 27 May 2008 the applicant applied for leave to adduce fresh evidence in the form of a statutory declaration dated 22nd May 2008 and apparently signed by Ms Owen. According to that document, Ms Owen did not give instructions to the Queensland police or any member of the Prosecutor's office to seek the restraining order, she does not fear for her safety from the applicant, and she wishes to have unrestricted contact with him. The respondent's counsel, who had no prior notice of this fresh evidence, applied for an adjournment with a view to investigating a possible conflict between the statutory declaration and the prosecutor's statements and whether Ms Owen in fact now agreed that the restraining order should be revoked.

[22] The Court then explained to the applicant that he was entitled to apply for that revocation in the District Court, which might provide the preferable remedy for the reasons mentioned earlier. The applicant nevertheless persisted in his application. The application was therefore adjourned to enable the respondent to investigate the proposed fresh evidence. The Court also indicated that it might not be prepared to act merely upon the basis of Ms Owen's statutory declaration.

[23] The applicant does not now seek to adduce any further evidence in support of his contention that the prosecutor had misled the sentencing judge. Given the nature of the offences of which the applicant was convicted, the absence of any evidence concerning the circumstances in which Ms Owen's statutory declaration was made, and the conflict between it and the evidence discussed below, I would not be prepared to rely upon that statutory declaration.

[24] There are substantial grounds for doubting the applicant's claim that the prosecutor misled the District Court judge. The applicant was present at the sentence hearing when his counsel made no challenge to the prosecutor's statements and made the statements by the applicant's counsel to the effect that Ms Owen did seek the order and the applicant consented to it. The restraining order states that it was made by consent. It bears a signature which is not easy to decipher but which may represent the applicant's initials. That signature appears above the applicant's name followed

by the text "(after receiving legal advice by solicitor name)". A legal officer in the Office of the Director of Public Prosecutions has sworn an affidavit in which he deposes that in the week before the sentence hearing Ms Owen did express her concern that the applicant would stalk her on his release from prison. Despite all of this the applicant has not sought to adduce evidence that deals with the questions whether he instructed his counsel to make the statements mentioned earlier and whether he signed the order or otherwise consented to it.

[25] I am not persuaded that this is an appropriate case for giving leave to the applicant to adduce fresh evidence in the form of the statutory declaration. Nor am I persuaded that the prosecutor misled the primary judge or that there was any error in her Honour's decision to make the restraining order. In any event, having regard to the applicant's ability to apply in the District Court for revocation of the restraining order, in my opinion it is not in the interests of justice to grant leave to appeal.

[26] A question was raised in the hearing whether the restraining order should now be revoked by this Court on the ground that, as counsel for the respondent informed the Court, when the matter was last in this Court Ms Owen told a senior officer in the Office of the Director of Public Prosecutions that she no longer wished the order to remain in place. There being no error in the primary judge's decision to make the restraining the order it is not appropriate for this Court to grant leave to appeal to consider whether it should make such a revocation order. In any event, it would be inappropriate to make such a significant order merely upon the basis of hearsay upon hearsay from the bar table that Ms Owen consented to it some months ago. Stalking of the character of which the applicant was convicted may have insidious and far reaching effects. If an application is made in the District Court to revoke the restraining order, the respondent would doubtless wish to take care both to ascertain Ms Owen's current attitude and to exercise its own judgment as to whether or not the application should be opposed.

Order

[27] I would refuse the application for an extension of time within which to apply for leave to appeal.

[28] **ATKINSON J:** I agree that the application should be refused for the reasons given by Fraser JA.