SUPREME COURT OF QUEENSLAND

CITATION:	*R v Macdonald* [2008] QCA 384
PARTIES:	**R** **v** **MACDONALD, Blair James** (applicant)
FILE NO/S:	CA No 219 of 2008 DC No 1363 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2008
JUDGES:	de Jersey CJ, Holmes JA and White AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. That a warrant issue for the arrest of the applicant, to lie in the Registry for seven days prior to any necessary execution; and** **2. That the application be refused, save that an order be made fixing the date for the applicant to be released on parole, as the date two months and 19 days from the date of his being returned into custody consequent upon determination of this application**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to stalking with circumstances of aggravation – where the applicant was sentenced to two years imprisonment, with parole fixed after eight months – whether the sentence was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 160B(3) *R v Foodey* [2003] QCA 310, considered *R v Layfield* [2003] QCA 3, considered
COUNSEL:	C A Cuthbert for the applicant (pro bono) B G Campbell for the respondent

SOLICITORS: Douglas Law for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **de JERSEY CJ:** The applicant pleaded guilty to stalking the complainant over the period 27 October 2006 to 9 February 2007, with two circumstances of aggravation. The first was that in 10 of the instances, the applicant intentionally threatened to use violence against the respondent. The second was that three instances involved contravention of court orders, being a temporary protection order made on 14 November 2006 and a protection order made on 12 December 2006.

[2] By the time the applicant was sentenced on 26 August 2008, he had been in custody for 147 days. He was arrested on the instant charges on 1 February 2007, and remained in custody until 28 June 2007 when the Supreme Court granted him bail. He was returned to custody when sentenced on 26 August 2008, and granted bail pending appeal on 5 September 2008, so that he served a further 11 days. The 147 days were declared time served under the sentence imposed, which was two years imprisonment, with parole fixed after eight months, that is, on 26 November 2008, after allowing for that period of 147 days.

[3] The applicant was 35 years old at the time of the offending. He had what the learned sentencing Judge termed a limited criminal history.

[4] The stalking commenced after the breakdown of the applicant's domestic relationship with the complainant. It involved his sending her more than 200 text messages, day and night, at her home and place of work, and numerous telephone calls. The applicant also sought to draw in the complainant's mother and her friends, through messages to them.

[5] At one stage the applicant engaged in a ruse, where he sent messages to the complainant as if from other persons, and they were of an insulting and threatening character. The threats extended to sexual assault, rape and killing her. Many of the messages were of a grossly offensive character, and many bore an offensively sexual orientation.

[6] On one occasion the applicant deflated the tyres of the complainant's vehicle.

[7] The complainant was compelled to change her telephone number. It was necessary for her to secure six protection orders from courts, two of which the applicant breached. There is a protection order in place until 11 December 2008.

[8] Another serious feature of the case was that the applicant persisted despite the protection orders, his conduct coming to an end only with his being arrested.

[9] Her Honour was provided with a victim impact statement from the complainant dated 12 August 2008, in which the complainant described the deleterious effect the applicant's conduct had on her life and well-being, including a serious effect upon her state of mind as the applicant continued to harass her as her father was dying under her care, and thereafter. The complainant resorted to locking her doors with padlocks and chains, and sleeping with an axe nearby. She described the applicant as an evil, cunning and manipulative person.

[10] On the other hand, the applicant voluntarily participated in some seven counselling sessions conducted within a psychology practice between March and May and November and December 2006. He had no contact with the complainant after 9 February 2007, being the last date of the period of the stalking charged. He was in regular employment, and there had been improvement in his condition in life by the time he came to be sentenced.

[11] In imposing the two year sentence, with parole after eight months, against a maximum available period of seven years imprisonment, the learned Judge noted the constancy of the stalking, the involvement of the complainant's mother and friends, its cruelty as the complainant was caring for her ailing father, the menacing character of the text messages, and the applicant's persistence in the face of court orders.

[12] In the course of her sentencing remarks, Her Honour said this:

> "For three months you sent over 200 text messages to her. You sent letters to her home, you appeared at her home and at her place of work, you followed her to places, you made sure that she knew that you were looking out for her and following her. You sat outside of her house, you would ring her doorbell for lengthy periods of time, you deflated her tyres and you continued to pursue her even when she went to care for her father who was dying."

There was some overstatement in that summation. For example, there was no evidence that the applicant went to the complainant's place of work, or followed her. It is true that some of the text messages indicated that the applicant knew where the complainant was, and what she was doing. That said, there was nevertheless some overstatement in Her Honour's account. But I do not consider that placed the case onto a materially different plane, for sentencing purposes, than as reflected by the reality of the situation, as discernible from the information put before Her Honour during submissions, and the content of the text messages as particularized from pages 47 to 68 of the record book.

[13] On the other side of the ledger, Her Honour acknowledged the applicant's early pleas of guilty, his good employment history, the minor extent of his past criminal history, and that he had sought and benefited from counselling.

[14] Her Honour drew assistance from *R v Layfield* [2003] QCA 3 especially. Layfield was convicted, after a trial, of stalking his former fiancé over a period of seven to eight months, by means of telephone calls containing threats of serious violence, by following her and by loitering at her place of work. He had kept her under surveillance. He was 33 years old and had no prior criminal history, he was unlikely to re-offend, but he lacked remorse. He was sentenced to two years imprisonment, and this court did not interfere with that.

[15] *Layfield's* stalking took place over a substantially longer period than applies here, although it was of similar character, and it is the fact that *Layfield* was convicted by a jury. On the other hand, the present applicant has the benefit of parole after one-

third of that two year term, and his stalking had the added aggravating feature of its contravention of protection orders.

[16] The learned Judge in this case rightly recognized general deterrence as a predominant consideration.

[17] A feature of this case not present in *Layfield* was that this applicant's conduct, as mentioned earlier, came to an end only with his arrest, the applicant having persisted with the stalking during the subsistence of the protection orders.

[18] As to another case mentioned during the oral submissions, *R v Foodey* [2003] QCA 310, where an 18 month term of imprisonment was suspended after approximately five months, there were more serious features, especially as to the gravity of the stalking, which included the use of a vehicle as a weapon; but on the other hand, there was some suggestion of provoking conduct by that complainant, and the Court of Appeal observed that the sentence imposed was "far" from being manifestly excessive (para 11). Overall, it should be recognized that in that case and the others to which we were referred, the Court of Appeal was not seeking to establish relevant ranges.

[19] Counsel for the applicant submitted that the applicant should not have been required to serve any more time in actual custody than the 147 days, or approximately five months, pre-sentence custody which he did serve. Counsel fairly emphasized there was no actual violence visited upon the complainant, or damage to her property, that the period of the stalking was comparatively limited, approximately three and a half months, there was an absence of any public humiliation of the complainant, and she was not threatened through the applicant's use of a vehicle.

[20] While those sorts of features would have lifted this case onto a more serious level, the significance of the two aggravating circumstances actually charged should not be overlooked, namely, the threats of violence and the applicant's persistence with this misconduct in contravention of court orders.

[21] There is no well-defined and constraining range for stalking offences, obviously because of the particularly wide variety of these cases which regrettably emerges.

[22] No doubt recognizing the plea of guilty especially, the learned Judge selected two years as the appropriate head term, with release on parole after one-third, which is a usual approach. In my view it cannot be said that two years, while substantial for this conduct, was manifestly excessive.

[23] Allowing for the applicant's having been in custody for 11 days following his being sentenced until the grant of bail pending appeal, in order to secure his serving the balance of eight months ordered by the learned sentencing Judge, there should be orders (cf s 160B(3) *Penalties and Sentences Act* 1992 (Qld)):

1. that a warrant issue for the arrest of the applicant, to lie in the Registry for seven days prior to any necessary execution; and

2. that the application be refused, save that an order be made fixing the date for the applicant to be released on parole, as the date two months and 19 days from the date of his being returned into custody consequent upon the determination of this application.

[24] **HOLMES JA:** I agree with the reasons of de Jersey CJ and the orders he proposes.

[25] **WHITE AJA:** I have read the reasons for judgment of the Chief Justice and agree with his Honour that when all the circumstances of the applicant's offending behaviour are considered a sentence of two years to serve eight months cannot be regarded as manifestly excessive.

[26] I agree with the orders proposed by his Honour.