SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tobin* [2008] QCA 54
PARTIES:	**R** **v** **TOBIN, Martin Francis Anthony** (applicant/appellant)
FILE NO/S:	CA No 319 of 2007 DC No 355 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	14 March 2008
DELIVERED AT:	Brisbane
HEARING DATE:	22 February 2008
JUDGES:	Keane, Muir and Fraser JJA
ORDER:	**1. Application for leave to appeal against sentence allowed.** **2. Appeal against sentence allowed and orders below set aside.** **3. In their stead and subject to the applicant agreeing to the order being made after explanation to him required by s 95 of the *Penalties and Sentences Act* 1992 (Qld), the applicant is sentenced to probation for six months on the conditions in s 93 of that Act, together with a special condition that the applicant comply with such anger management and alcohol management as directed by an authorised Corrective Services Officer.** **4. The applicant must report to an authorised Corrective Services Officer at a time and place agreed between the parties or in default thereof, such time and place as are specified by a judge of the District Court.** **5. The Court makes the recommendation that the applicant's probation be transferred to New South Wales.** **6. That no conviction be recorded.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – GENERALLY – where

the applicant was convicted on his pleas of guilty to two counts of bomb threats – where the bomb threat was not taken seriously – where the applicant had significant mitigating factors – where the applicant was sentenced to six months imprisonment wholly suspended for two years – whether the sentence imposed in the circumstances was manifestly excessive

Criminal Code Act 1899 (Qld) s 321A(2)
Penalties and Sentences Act 1992 (Qld) s 9

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
R v Briese; ex parte Attorney-General [1998] 1 Qd R 487; [1997] QCA 010, discussed
R v Brown; ex parte Attorney-General [1994] 2 Qd R 182; [1993] QCA 271, discussed
R v Cay, Gersch and Schell; ex parte A-G (Qld) [2005] QCA 467, discussed
R v Gompelman [2002] QCA 191, discussed
R v Mills [2001] 2 Qd R 662; [2000] QCA 357, distinguished
R v Waugh [1999] QCA 045, distinguished

COUNSEL: B Reilly for the applicant/appellant
M J Copley for the respondent

SOLICITORS: Ryan and Bosscher Lawyers for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** I agree with the reasons of Fraser JA and with the orders proposed by his Honour.

[2] **MUIR JA:** I agree with the reasons of Fraser JA and with the orders he proposes.

[3] **FRASER JA:** The applicant was convicted on his pleas of guilty to two counts of bomb threats. For each offence a conviction was recorded and the applicant was sentenced to six months imprisonment, wholly suspended for two years. The applicant applies for leave to appeal against sentence.

Circumstances of the offences

[4] The offences occurred in two telephone calls made by the applicant on 10 January 2007, five minutes apart, to the police emergency operator. In the first call the applicant claimed that there was a bomb at the Surf and Rescue Club. The transcript reveals, as was accepted on behalf of the respondent, that the police officer found it difficult to understand what the applicant was saying, although by the end of the phone call it seems that the applicant did communicate his intended statement that there was a bomb at the Surf and Rescue Club. The applicant

repeated that statement in the second phone call, with similar difficulties in making himself understood.

[5] Once the applicant's threats were understood, they were met with immediate scepticism, which apparently reflected a lack of conviction in his voice. It was accepted on behalf of the respondent that the police did not take the threats seriously. They seem to have been treated as having only nuisance value. No action was taken to evacuate the Surf and Rescue Club. The calls were rapidly traced. Police spoke to the applicant on 12 January 2007, who made a full confession.

[6] The elements of the offence, which attracts a maximum penalty of five years imprisonment, are (so far as here relevant) that the accused "makes a statement . . . to another person that he . . . knows . . . to be false, with the intention of inducing in that person . . . a belief that an explosive . . . substance . . . is present in a place in Queensland.": *Criminal Code Act* 1899 (Qld), s 321A(2).

[7] It is not an element of the offence that there in fact be such an explosive substance present in any place, nor that any person be induced to believe that, nor even that the threat be made in such a way as to be reasonably capable of inducing such a belief. Nevertheless, the circumstances of this offence demonstrate that it was very much at the lower end of the scale of seriousness of such offences, particularly as the tone and content of the threats were such that they were not taken seriously, no alarm was caused, and the public was not inconvenienced, much less frightened.

The applicant's circumstances

[8] The applicant was aged 45 at the time he committed the offences and 46 when he was sentenced. He had no criminal history. He was born with partial brain damage and suffers from a mild intellectual disability. He lived between the ages of 24 and 34 in supported accommodation. In that period of time he learned to live independently, but continued to receive support from civic residential services up to the time of sentencing. At the time of the offences he was married and lived with his wife, who is also disabled.

[9] Despite his disability, the applicant commendably sought and managed to lead a productive life for himself. He worked for the previous 10 years as a customer service officer at a local supermarket. References were tendered which gave a very favourable picture of the applicant's character and standing in his local community, where he appears generally to have been regarded as a peaceful and friendly person.

[10] His offences were, on the evidence, completely out of character. His motivation for the offences arose out of a dispute with staff at the Club earlier, when he had been drinking and was refused entry. The applicant was intoxicated when he committed the offences: his excessive drinking, which appears to have aggravated his frustration with his own disabilities and associated depression and anger, contributed to his offending.

[11] The sentencing judge accepted that the applicant was particularly remorseful. He was deeply affected by his offences. He had written letters of apology to the police and to the Club (although it is not clear whether the Club had even been aware of the threats). He pleaded guilty and cooperated with the authorities.

[12] Before sentence, the applicant took significant steps towards his own rehabilitation in relation to the issues which appear to have contributed to his offending, including anger management counselling, treatment for depression, alcohol counselling, and counselling to improve coping and adaptive skills.

[13] The sentencing judge also accepted that it was most unlikely that the applicant would re-offend: personal deterrence is not of real significance here.

Discussion

[14] The applicant does not contend that there was any identifiable error in the sentencing process. His honour took into account all of the matters in the applicant's favour mentioned above. The submission on his behalf is that the sentence was manifestly excessive, in the sense that it is so "unreasonable or plainly unjust" as to give rise to an inference that the discretion miscarried: *House v The King* (1936) 55 CLR 499 at 504-505; [1936] HCA 40 .

[15] The critical question is whether a suspended sentence of six months imprisonment was warranted. The applicant submits that the particular circumstances here called instead for probation, with appropriate special conditions.

[16] As the sentencing judge observed, general deterrence is a paramount consideration in sentencing for offences of this kind: see *R v Waugh* [1999] QCA 045; *R v Mills* [2001] 2 Qd R 662; [2000] QCA 357. It does not necessarily follow, however, that imprisonment must be imposed for such offences in all cases.

[17] In *R v Waugh*, an application for leave to appeal against a sentence of six months imprisonment with three years probation, with a special condition concerning psychiatric treatment, was refused. The offender made a threat against the Office of the State Premier in Townsville, accompanied by a statement that he wished to kill all politicians. As a result, a 10 storey building had to be cleared, inevitably causing terror and inconvenience to many people. A psychiatric report indicated that the offender suffered chronic schizophrenia with psychotic depression and a paranoid personality, but that he was not psychotic at the time of the offences. The report referred to the possibility of re-offending. Little remorse was shown. Thomas JA observed that there was no error or inappropriateness of the sentence, which was a "perfectly moderate response".

[18] In *R v Mills*, a sentence of three months imprisonment followed by probation for two years with special conditions involving psychiatric counselling was held to be within the limits of a proper sentencing discretion. The offender there made three telephone calls in fairly quick succession claiming that there was a bomb at a high

school which would detonate within a short period of time. His early apprehension alleviated any fears that the threat might be carried out. The offender had a relevant record, having been found guilty some two years earlier of a serious assault. He had a reasonably good work record, made a timely plea of guilty, fully co-operated with the police and expressed remorse. A question arose however about the risk of re-offending, and it appeared that the offender had taken few or no steps to fulfil his expressed willingness to undergo psychiatric treatment in the period up until the time of sentence. McPherson JA observed that it would have been open to the sentencing judge to impose a suspended sentence or to take some such step short of sending the applicant into prison custody, but it could not be said that the sentencing judge was wrong in taking the course he did.

[19] The applicant also referred to *R v Gompelman* [2002] QCA 191, in which reference is made at pp 5-6 to a sentence imposed on one Millington, who was sentenced to six months imprisonment suspended for two years after he pleaded guilty to perpetrating a bomb hoax. Millington was obsessed with scaring the complainant and placed a replica bomb in her car. He then telephoned the complainant and told her there was a bomb in the car. The description of the replica bomb suggests that it may well have appeared dangerous, but it was not. He had no prior criminal convictions.

[20] In each of those three cases, the circumstances of the offences were much more serious than this and the personal circumstances of the offenders were not shown to have been as compelling. None of those cases involved the important feature, present here, that the tone and content of the offending threat was such that it was understood to lack substance. Public inconvenience and terror was caused in *Waugh* and similar consequences were apparently avoided in *Mills* only by the swift apprehension of the offender. *Millington* – in which the sentence was the same as that imposed here - also appears to have been a much more serious case than this, involving as it did significant premeditation, the placing of a replica bomb, the intended fright, and certainly a good deal of inconvenience to the public and to the authorities.

[21] The *Penalties and Sentences Act* 1992 (Qld) provides, by s 9(2)(a), that in sentencing a court must have regard to the principle that a sentence of imprisonment should only be imposed as a last resort. That principle applied here: the order for the suspension of the term of imprisonment substantially ameliorated the effect of that sentence, but it did not detract from the fact that a sentence of six months' imprisonment was imposed. The contentious question whether a person upon whom a suspended sentence had been imposed has been sentenced to "serve" imprisonment in terms of s 156 is a different question: *R v Anderson* [1995] 1 Qd R 49, per McPherson JA at 53 and per Mackenzie J at 54-55; [1993] QCA 462. An order for suspension of a term of imprisonment presupposes that a sentence of imprisonment has been imposed: see s 144(1).

[22] The effect of s 9(3) is that the principle that a sentence of imprisonment should only be imposed as a last resort does not apply to sentencing for an offence that involved "the use of…violence against another person" or resulted in physical harm. There was here no physical harm. The reference to "violence" may, in some circumstances

at least, comprehend threats to do violence: see *R v Lovell* [1998] QCA 036; *R v Steven Albert Barling* [1999] QCA 016; *R v Breeze* [1999] QCA 303. Here, however, the applicant's threats were so expressed that they did not induce any belief that there was a bomb. It was accepted that there was no apprehension of the potential for an explosion or harm of any kind. It is therefore clear, in my opinion, that this offence did not involve the use of "violence" within the meaning of in s 9(3) of the *Penalties and Sentences Act* 1992 (Qld).

[23] It follows, as was submitted on the applicant's behalf, that the Act obliged the Court to have regard to the principle that a sentence of imprisonment should be a last resort.

[24] Of course that conclusion does not mean that imprisonment is necessarily inappropriate for offences of this character. As the cases show, such a sentence may well be appropriate in light of other factors, such as the significant need for general deterrence in offences of this kind, which are all too prevalent. Each case must turn on its own particular circumstances.

Conclusion

[25] Having regard to the principle that a sentence of imprisonment should only be imposed as a last resort, the circumstances and comparable cases to which I have referred demonstrate, in my respectful opinion, that the sentence of six months imprisonment was manifestly excessive. That is so even though its effect was substantially ameliorated by the order for its suspension.

[26] Particularly because it was immediately apparent that the threats were not to be taken seriously, the need for general deterrence did not require such a sentence. For the reasons I have given, it was not otherwise justified by way of punishment or personal deterrence. The applicant's unhesitating cooperation with the authorities, his genuine remorse, and his other personal circumstances all militated against a term of imprisonment being ordered.

[27] It is therefore necessary to exercise the sentencing discretion afresh.

The sentence to be imposed

[28] Taking into account the circumstances I have mentioned, including the applicant's plea of guilty, for the reasons I have given I would accept the submission made on behalf of the applicant that an order for probation is an appropriate response in this case. This applicant appears to be a person whose rehabilitation would be assisted by such an order, and no more severe penalty is warranted. A period of six months appears appropriate in the unusual circumstances I have outlined.

[29] If such an order is made it must contain the requirement mandated by s 93(1)(f) of the *Penalties and Sentences Act* 1992 (Qld), namely, that the offender not leave or

stay out of Queensland without the permission of an authorised corrective services officer. The evidence before the Court strongly suggests that for probation to have its intended beneficial effect the applicant should continue to reside in his local community in New South Wales. It therefore would seem most unlikely that such permission would not be readily forthcoming. Accordingly, if the applicant agrees to probation (as is required by s 96 of the Act before it can be ordered), I see no impediment to it being ordered.

[30] The applicant also contends that this Court, in the exercise of the sentencing discretion afresh, should order that no conviction be recorded. Such an order is authorised by s 12(2) of the *Penalties and Sentences Act* 1992 (Qld).

[31] That provision requires reference to all the circumstances, expressly including the nature of the offence, the offender's character and age, and the impact that recording a conviction will have on the offender's economic or social wellbeing or chances of finding employment. All of these features must be considered with no bias in favour of any of them, although the particular circumstances might lead to one or other in fact having greater weight: *R v Brown; ex parte Attorney-General* [1994] 2 Qd R 182 at 185; [1993] QCA 271, *R v Briese; ex parte Attorney-General* [1998] 1 Qd R 487 at 493; [1997] QCA 010, *R v Cay, Gersch and Schell; ex parte A-G (Qld)* [2005] QCA 467 at [40].

[32] The elements of this offence, which focus on an offender's state of mind and do not necessarily involve any violence, damage or loss, differentiate it from those offences in which the nature of the offence itself militates against a favourable exercise of this discretion: *R v Briese; ex parte Attorney-General* at 493, 498; *R v Cay, Gersch and Schell; ex parte A-G (Qld)* at [9], [50], and [71]. In this case, the offence was a "victimless" crime of a kind which might attract this beneficial order: *R v Briese* at 493.

[33] The evidence also strongly suggests, as I have mentioned, that the offence was so far out of character that there is no real likelihood of its repetition or that members of the public dealing with the applicant would be misled as to his true character by not knowing of his conviction. This consideration weakens one of the most powerful arguments against an order that no conviction should be recorded: *R v Briese* at 491; *R v Cay, Gersch and Schell; ex parte A-G (Qld)* at [11], [47], and [76].

[34] Another consideration against making such orders, that the non-recording of a conviction can sometimes lead to the deception of authorities whose duty it is to determine whether an applicant is a fit and proper person to hold a licence under some particular statute (see *R v Briese* at 493), does not have weight in relation to this applicant.

[35] In light of the applicant's disability, his acceptance of the benefit of assistance in his commendable, voluntary efforts at rehabilitation to date, and his unblemished history, his mature age also does not militate against a favourable exercise of discretion.

[36] It may also be said that recording a conviction "will" impact on his chances of finding employment, if he loses his current position, because of the particular difficulties he would have in finding work because of his disability: *R v Cay, Gersch and Schell* at [6]. In that light, the absence of evidence of any threatened specific employment opportunity does not have the significance it otherwise might: cf *R v Condoleon* (1993) 69 A Crim R 573 at 576; [1993] QCA 272, *R v Fullalove* (1993) 68 A Crim R 486 at 492-493; [1993] QCA 276, *R v Cay, Gersch and Schell* at [43]; see also at [74]-[75].

[37] The circumstances expressly mentioned in s 12(2), when taken together, therefore favour not recording a conviction, as do the other circumstances of this out of character offence and the applicant's personal circumstances discussed earlier.

Orders

[38] I would therefore order:

1. That the application for leave to appeal against sentence be granted.
2. That the appeal be allowed and the orders made below be set aside.
3. That in their stead and subject to the applicant agreeing to the order being made after the explanation to him required by s 95 of the *Penalties and Sentences Act* 1992 (Qld):
   (a) The applicant be sentenced to probation for six months, such order to contain the conditions in s 93 of that Act, together with a special condition that the applicant comply with such anger management and alcohol management as directed by an authorised Corrective Services Officer.
   (b) The applicant must report to an authorised Corrective Services Officer at a time and place agreed between the parties or in default thereof, such time and place as are specified by a judge of the District Court.
   (c) That the Court makes the recommendation that the applicant's probation be transferred to New South Wales
4. That no conviction be recorded.