SUPREME COURT OF QUEENSLAND

CITATION:	*R v KAV* [2020] QCA 28
PARTIES:	**R** **v** **KAV** (applicant)
FILE NO/S:	CA No 242 of 2019 DC No 186 of 2019 DC No 216 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Mackay – Date of Sentence: 1 August 2019 (Richards DCJ)
DELIVERED ON:	Date of Orders: 14 February 2020 Date of Publication of Reasons: 28 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2020
JUDGES:	Morrison and McMurdo JJA and Boddice J
ORDERS:	**Date of Orders: 14 February 2020** **1. The application for leave to appeal is allowed.** **2. The appeal is allowed.** **3. The sentence imposed on 1 August 2019 is set aside to the extent that it set a parole release date at 30 April 2020.** **4. The appellant be released on parole from 14 February 2020.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of unlawful stalking and two counts of unlawful stalking, contravening a Court order – where each count was a domestic violence offence – where the applicant also pleaded guilty to summary offences – where the applicant was sentenced to imprisonment for three years in respect of each count of unlawful stalking, contravening a Court order and a concurrent period of one year's imprisonment for the remaining count of unlawful stalking – where the applicant was convicted and not further punished for the summary charges – where the sentencing

Judge set the parole release date on 30 April 2020 – where the applicant seeks leave to appeal the sentence on the grounds that the sentencing Judge erred in failing to recognise that a term of imprisonment was a penalty of last resort and that the sentence was manifestly excessive – where the applicant's conduct occurred over a protracted period – where the applicant breached protection orders – where 20 months elapsed between the end of the conduct and the sentence and the applicant had committed no further offences – whether the sentence imposed was manifestly excessive

COUNSEL: J Crawford for the applicant
M P Le Grand for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** On 1 August 2019, the applicant pleaded guilty to one count of unlawful stalking and two counts of unlawful stalking, contravening a Court order. Each count was a domestic violence offence. The applicant also pleaded guilty to a number of summary offences.

[2] The applicant was sentenced to imprisonment for three years in respect of each count of unlawful stalking, contravening a Court order and a concurrent period of one year's imprisonment in respect of the remaining count of unlawful stalking. The applicant was convicted and not further punished in respect of each of the summary charges.

[3] After declaring one day spent in pre-sentence custody as time already served, the sentencing Judge ordered the applicant be released on parole after serving nine months of the sentence, namely, on 30 April 2020.

[4] The sentencing Judge also ordered the applicant be subject to a restraining order for 10 years, pursuant to s 359F of the *Criminal Code*.

[5] On 13 September 2019, the applicant filed an application for leave to appeal against sentence. The sole ground of appeal, if leave be given, was that the sentence was manifestly excessive.

[6] On 11 December 2019, the applicant was granted bail pending appeal.

[7] On 14 February 2020, the applicant's application for leave to appeal against sentence was heard in this Court. The applicant was granted leave to amend the proposed grounds of appeal, to add, as a first ground, that the sentencing Judge erred in failing to recognise that a term of imprisonment was the penalty of last resort in this case and to make, as the second ground, that the sentence was manifestly excessive in all the circumstances.

[8] At the conclusion of the hearing, the Court ordered that the application for leave to appeal against sentence be allowed; that the appeal be allowed; and that the sentence below be set aside to the extent that parole be fixed at 14 February 2020.

[9] These are our reasons for joining in those orders.

Background

[10] The applicant was born on 14 May 1981. She was aged 35 and 36 at the time of the commission of the offences. She was aged 38 at the date of sentence.

[11] The applicant is the mother of a teenage daughter and a further daughter, aged less than three months at the time of sentence.

[12] The applicant has a past criminal history. It contains an offence of contravention of a domestic violence order, as well as other offences. All of those offences were committed during or around the period the subject of the offences to which the applicant pleaded guilty on 1 August 2019.

Offences

[13] The offending, the subject of the stalking counts, occurred over three periods between 31 August 2016 and 1 October 2017. Whilst there were three separate counts on the indictment, it was accepted at sentence that the applicant's conduct represented a continuing course of conduct.

[14] The complainant in each stalking count was the applicant's ex-partner. Their relationship ended at the time of commencement of the stalking.

[15] The applicant's stalking persisted despite a temporary protection order being issued on 14 October 2016 (some six weeks after the commencement of the first stalking period) and a further protection order issued on 16 March 2017 (some six months after the commencement of the first stalking period).

[16] The applicant's conduct involved protracted, persistent stalking including repeatedly contacting the complainant by text message, phone calls and Facebook Messenger. There were 4,800 such contacts over the entire stalking period.

[17] During the stalking period, the applicant falsely alleged that she was pregnant to the complainant; threatened the complainant; made a false complaint to police which resulted in the complainant being spoken to by police, who initially applied for a temporary protection order against the complainant in favour of the applicant.

[18] The applicant also egged the complainant's motor vehicle and home on more than one occasion, and damaged the motor vehicle's paintwork and removed a windscreen wiper. When the complainant moved house, the applicant sought out the complainant's new location and persisted with the stalking thereafter.

Sentence hearing

[19] The sentencing Judge found that the applicant's offending conduct involved relentless stalking of the male complainant, in breach of protection orders. The breaches included contacting the complainant on 2,496 occasions by telephone and the sending of 61 text messages after the first protection order.

[20] Notwithstanding the applicant being charged with a breach of that domestic violence order and pleading guilty to that offence on 21 February 2017, the applicant continued to leave messages for the complainant. She also sent messages to his new partner accusing the complainant of being violent, of being a paedophile, of sleeping with other women and of stalking the applicant. When the new partner did not respond, the applicant became abusive to her, threatening to ruin her career and to expose her as the stalker. There were some 687 messages to that person.

[21] Further, on the day a formal domestic violence order was obtained against the applicant, the applicant sent an abusive message to the complainant's mother, in breach of that order. The applicant thereafter egged the complainant's house on multiple occasions. The applicant repeatedly visited that house. The applicant made 2,224 calls to the complainant and sent 11 text messages in breach of that order. She also damaged the complainant's motor vehicle.

[22] The sentencing Judge found that bail conditions imposed on 24 March 2017, restricting travel in the area in which the complainant was living at that time, did not deter the applicant. On five separate occasions, the applicant was found on the complainant's street in breach of those bail conditions. The applicant egged the complainant's car. When the complainant moved to a new address, the applicant found him and started driving past that address. A newly installed CCTV camera was removed and stolen. The applicant's house was egged on a number of occasions.

[23] The sentencing Judge observed that stalking could cover many different types of behaviour but that this stalking was particularly persistent. The complainant had done everything possible to discourage the applicant, including taking out orders. The applicant had ignored those orders, made false complaints to police and had even suggested to police that the complainant was stalking her.

[24] The sentencing Judge had regard to victim impact statements from the complainant and his daughter. They described the great distress experienced as a consequence of the applicant's ongoing persistent behaviour.

[25] The sentencing Judge noted a number of mitigating factors. The applicant had pleaded guilty, although in the context of an overwhelming case. A psychiatric report opined that the applicant did not have any mental disorder but probably suffered from borderline personality disorder. Further, the applicant suffered complicated emotional problems and lacked insight into her own emotional difficulties. The sentencing Judge accepted that the applicant was now prepared to undergo counselling.

[26] The sentencing Judge accepted that any time in custody would be difficult as the applicant had recently given birth to her second daughter. The sentencing Judge expressly noted that taking a young child from its mother is something that Courts do not readily do.

[27] The sentencing Judge found that, notwithstanding those mitigating factors, the applicant's offending was extremely serious. Time and again the applicant had ignored Court orders. Particularly serious aggravating circumstances of the applicant's conduct included threatening to take out orders against the complainant, falsely pretending to be pregnant, making a false complaint to police and stalking members of the complainant's family and his new partner.

[28] After noting that the applicant's own counsel had conceded a sentence of two and half to three years' imprisonment was appropriate, the sentencing Judge sentenced the applicant to an overall head sentence of three years' imprisonment. Taking into account the existence of a very young baby and the effect that a custodial sentence would have on that child's welfare, as well as the applicant's pleas of guilty, the sentencing Judge found the circumstances of the persistent ongoing offending despite efforts to get the applicant to stop rendered a period of time in custody of no

less than nine months appropriate. Accordingly, a parole release date was set at 30 April 2020.

Submissions

[29] The applicant submitted that both the head sentence and the period of actual custody were manifestly excessive. A specific error in the exercise of the sentencing discretion was that the sentencing Judge did not have regard to the need for a sentence of actual imprisonment to be a sentence of last resort.

[30] The applicant submitted that manifest excess was established having regard to comparable authority, none of which involved a sentence as high as three years' imprisonment. The longest sentence was two and a half years' imprisonment. Whilst the applicant's offending involved persistent conduct over an extended period, nothing in the applicant's offending justified the imposition of a sentence in excess of those existing yardsticks.

[31] The respondent submitted that the sentence was not manifestly excessive and there was no error on the part of the sentencing Judge in failing to specifically refer to the principle that a sentence of imprisonment was a sentence of last resort.

[32] The applicant's stalking conduct was particularly serious, involving over 4,800 telephone calls and texts over an extended period of 13 months. A number of threats were issued to the complainant. The applicant physically approached the complainant's home in breach of domestic violence protection orders and bail conditions. The applicant's offending conduct also was directed towards the applicant's new partner and his family. The applicant persisted in that conduct, notwithstanding being interviewed by police and being dealt with for breach of a domestic violence order.

Consideration

[33] The sentencing Judge rightly observed that the applicant's conduct involved a serious example of stalking. The applicant engaged in persistent conduct over a 13 month period, much of which was committed in breach of domestic violence orders and conditions of her bail. The conduct persisted notwithstanding the applicant being dealt with for breach of a domestic violence order during the offending period.

[34] Whilst the applicant had no criminal history at the commencement of the stalking period, and there were personality and associated circumstances which provided context to her persistent behaviour, her conduct in breach of Court orders was so serious as to justify sentences of imprisonment, including a period of actual imprisonment.

[35] Against that background, there is no basis to conclude that the failure of the sentencing Judge to specifically refer to a sentence of imprisonment as a sentence of last resort constituted an error in the sentencing discretion.

[36] The imposition of a head sentence of three years' imprisonment was also not manifestly excessive. Whilst comparable authorities referred to at sentence and on

appeal[1] contained yardsticks of 18 months to two and a half years' imprisonment by offenders with more significant past criminal history and who engaged in, on occasions, more serious conduct, none of those authorities involved such persistent conduct over a protracted period, repeatedly breaching orders; and bail; and after being convicted of breaching a domestic violence order. Further, apart from *SCM*, none involved the aggravating factor of each offence being a domestic violence offence.[2]

[37] Whilst *SCM* did have that aggravating factor, *SCM* involved stalking over a far shorter period, by an offender with diagnosed psychiatric conditions. *Macdonald* did involve conduct in contravention of Court orders. However, the stalking period was less than four months. *Coutts* and *Oliver* also involved stalking over a far shorter period, with the stalking ceasing upon police involvement. *Tarasiuk*, whilst involving stalking over a protracted period, involved one count without the circumstance of aggravation in contravention of a Court order, and without the offence being a domestic violence offence.

[38] The magnitude of the applicant's conduct, its persistence in breach of orders, and the circumstance that each stalking offence was a domestic violence offence justified a sentence of imprisonment in excess of those yardsticks.

[39] Whilst a head sentence of three years' imprisonment fell within a proper exercise of the sentencing discretion, a requirement that the applicant serve nine months in actual custody failed to have proper regard for all the mitigating factors in the applicant's favour.

[40] Although the sentencing Judge rightly observed that the plea of guilty had been timely, albeit in the context of an overwhelming case, and that imprisonment would cause hardship for the applicant's newly born child, the sentencing Judge failed to have regard to another significant mitigating factor.

[41] The applicant not only had no relevant criminal history at the commencement of the offending conduct, some 20 months had elapsed between the end of the stalking conduct and sentence and the applicant had committed no further offences. That lengthy period of non-offending, in the context of previously persistent stalking in breach of orders, was a compelling factor when considering the applicant's prospects of rehabilitation.

[42] Having regard to that pertinent mitigating factor, a sentence requiring the applicant to serve nine months actual custody was plainly unjust in all the circumstances. The sentence imposed, to that extent, was manifestly excessive.

[43] In re-exercising the sentencing discretion, there is no basis to reduce the effective head sentence of three years' imprisonment. Such a sentence properly reflects the serious aspects of the applicant's persistent conduct, notwithstanding the mitigating factors.

[44] However, the mitigating factors in the applicant's favour, being the pleas of guilty, lack of pre-existing criminal history, relatively recent childbirth and the significant period of no further offending (now in excess of two years) render fixing the

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1 *R v Macdonald* [2008] QCA 384; *R v Baker* [2011] QCA 33; *R v Conde* [2016] 1 Qd R 562; *R v Manning* [2015] QCA 241; *R v SCM* [2016] QCA 175; *R v Coutts* [2016] QCA 206; *R v Oliver* [2018] QCA 348; *R v Tarasiuk* [2019] QCA 165.

2 *Penalties and Sentences Act* 1992, s 9(10A).

applicant's parole eligibility date at 14 February 2020 an appropriate exercise of the sentencing discretion.

[45] Such a date recognises that the applicant had served slightly in excess of four months actual custody at the time she was granted bail pending appeal. Such a period of actual custody represented an appropriate reflection of the seriousness of the applicant's conduct and the mitigating factors. A re-exercise of the sentencing discretion does not warrant the applicant being returned to actual custody.

[46] For the abovementioned reasons, we joined in the orders made on 14 February 2020.