DISTRICT COURT OF QUEENSLAND

CITATION:	*Petersen v Queensland Police Service* [2014] QDC 82
PARTIES:	**Raymond Noel Petersen** **(applicant)** **And** **Queensland Police Service** **(respondent)**
FILE NO:	3 of 2014
DIVISION:	District Court
PROCEEDING:	Appellate
ORIGINATING COURT:	Magistrates Court, Mareeba
DELIVERED ON:	15 April 2014
DELIVERED AT:	Cairns
HEARING DATE:	14 April 2014
JUDGE:	Harrison DCJ
ORDER:	**1. The appeal is allowed.** **2. The sentence of 3 years imprisonment on each of the offences of stalking are set aside and in each case sentences of 18 months imprisonment effective as at 6 December 2013 are imposed.** **3. These sentences are to be served concurrently with each other and concurrent with the other sentences imposed on 6 December 2013 by the learned Magistrate which are not interfered with and concurrent with the sentence imposed in the District Court on 28 November 2013.** **4. The applicant's parole release date is fixed as at 14 April 2014.**
CATCHWORDS:	APPEAL AGAINST SENTENCE – where applicant pleaded guilty in Magistrates Court to 2 charges of stalking, 3 charges of breach of domestic violence orders, 1 charge of trespass, 1 charge of wilful damage and 2 Commonwealth charges of using a carriage service to menace/harass/cause offence – where effective sentence imposed was 3 years imprisonment - where applicant sentenced 8 days earlier in District Court to 1 count of aggravated stalking- where sentencing judge

indicated that 18 month sentence was appropriate but sentenced applicant to 6 months imprisonment after allowing for a period of 343 days already served – where sentencing magistrate fixed parole eligibility date – whether he was required to fix parole release date – whether sentencing magistrate applied proper test when considering totality principles following earlier sentence in the District Court and whether any such failure resulted in sentences imposed being manifestly excessive

Mill v The Queen (1988) 166 CLR 59
Positglione v R (1997) 189 CLR 295
Penalties and Sentences Act 1992 (Qld)

COUNSEL: J Trevino (instructed by Legal Aid Queensland) for applicant
S Morris (Director of Public Prosecutions) for respondent

Introduction

[2] This is an appeal against sentence which was heard before me on 14 April 2014.

[3] On 6 December 2013, the applicant was sentenced on his pleas of guilty in the Magistrates Court in Mareeba for the following offences:

- One charge of stalking between 31 July 2012 and 22 August 2012 – convicted and sentenced to 3 years imprisonment,
- A further charge of stalking between 21 December 2012 and 4 March 2013 – convicted and sentenced to 3 years imprisonment,
- One charge of using a carriage service to menace/harass/cause offence between 25 August 2012 and 29 August 2012 (Commonwealth offence) – convicted and sentenced to 6 months imprisonment,
- One further charge of using carriage service to menace/harass/cause offence on 3 August 2012 (Commonwealth offence) – convicted and sentenced to 6 months imprisonment,
- One charge of trespass between 5 August 2012 and 8 September 2012 – convicted and not further punished,
- One charge of wilful damage between 5 August 2012 and 8 September 2012 – convicted and not further punished,

- One breach of a domestic violence order on 2 December 2012 – convicted and not further punished, and
- Two further breaches of domestic violence orders between 21 December 2012 and 4 March 2013 – convicted and not further punished.

[4] His parole eligibility date was set at 6 April 2014. He was still in custody at the time of the hearing of the appeal.

[5] It is conceded by the Director of Public Prosecutions that the facts surrounding the relevant offending are succinctly summarised in the applicant's outline of argument, namely

> 9.2. The appellant's offending falls into four distinct episodes involving five separate complainants.
>
> 9.3. The first episode concerns the offence of unlawful stalking between 31 July 2012 and 22 August 2012. The complainant in relation to this offence was a 77-year-old woman who operated a fruit and vegetable store at Airlie Beach. In May 2012 the appellant approached her at her store and engaged in conversation about mangoes. He returned a couple of days later and a further conversation took place. In early June 2012 the appellant sent to complainant a pallet of produce. He subsequently contacted the complainant by phone and asked that she sell the produce for him. She responded that she had not requested the produce from him and that it would be difficult for her to sell it. The appellant then embarked upon a campaign of making menacing and threatening demands by telephone and text message for the payment for the produce he had supplied uninvited. The threats made included threats to damage her property if his demands were not met.
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> 9.4. The second episode concerns two offences of using a carriage service to menace, harass or cause offence: the first occurring between 25 and 29 August 2012 and the second on 3 September 2012. The complainant in respect of these offences was a woman who purchased two chickens from the appellant after responding to a classified advertisement that he had placed in the Cairns Post. The chickens he sold the complainant were diseased. On 26 August 2012, the complainant contacted the appellant by telephone to inform him of the condition of the chickens he had sold her to which the appellant responded, "if you bring the fucking chickens back here I'll slit their throats in front of you."

> On 28 August, he left the complainant a voice mail message informing her that he had received a visit from the stock squad and making a threat that she may have put her "fucking life in danger". On 3 September 2012 the complainant received another voice mail message from the appellant in which he made further threats.
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> 9.5. The third episode involves the offences of trespass and wilful damage. The appellant entered the yard of his female neighbour without permission and cut down two of her banana trees. When confronted by the complainant about his actions, the appellant was verbally abusive to her.
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> 9.6. The fourth episode involves the offence of stalking between 21 December 2012 and 4 March 2013 and the associated 6 breaches of domestic violence order, and the use of a postal service to menace, harass and cause offence. The appellant's ex partner, now deceased, was the complainant to the breach of domestic violence order of 20 December 2012. It involved the appellant leaving threatening and abusive messages for her in breach of an order in place. The appellant was arrested on the date of this offence and taken into custody. The complainant to the stalking, the use of postal service charge and the 5 other breaches of domestic violence orders said to have occurred between 21 December 2012 and 4 March 2013, is the appellant's stepdaughter. From prison the appellant sent a series of abusive and threatening letters to his stepdaughter. This conduct forms the factual basis for all the charges in respect to his step daughter.

[6] The matter is complicated by the fact that on 28 November 2013, the applicant was sentenced on his own plea of guilty, in the District Court at Cairns before his Honour Judge Rafter, to one count of aggravated stalking. On that occasion, he was sentenced to 6 months imprisonment.

[7] When the learned Magistrate sentenced the applicant on 6 December 2013, he made the various sentences he imposed concurrent with each other, but made no specific order as to whether they were to be served concurrently with or cumulative upon the sentence imposed in the District Court. The sentences imposed by the learned Magistrate are, therefore, to be served concurrently.

[8] His Honour Judge Rafter fixed a parole release date of 28 November 2013, although that was academic because he had been made aware that the other

charges were pending in the Magistrates Court at Mareeba to be dealt with the following week.

[9] This case highlights why it is inadvisable to sentence people on a piecemeal basis, particularly when the charges pending in the Magistrates Court are at least as serious, if not more serious, than those dealt with in the District Court. I was informed from the bar table, that attempts were made to bring the outstanding State charges before the District Court but such attempts failed. Apparently, it was not possible to bring the two Commonwealth matters up before the District Court.

[10] The matter dealt with in the District Court was serious. It involved the applicant regularly making abusive and threatening telephone calls to the complainant between 1 May 2012 and his arrest on 20 December 2012. I have read the reasons of his Honour Judge Rafter[1] and it is clear that his Honour had particular regard to the fact that the applicant had served 343 days in custody from 20 December 2012 to 27 November 2013. It was not possible to declare that time because that time also related to the various matters which were still pending in the Magistrates Court.

[11] His Honour, however, reduced the sentence to make allowance for that. He indicated that he would have imposed a sentence of 18 months imprisonment but reduced that the 6 months imprisonment to allow for the time served.[2]

[12] It is clear that his Honour was made aware of the pending charges and he confirmed that he had not taken them into account in determining the appropriate sentence and he left that as a matter for the sentencing Magistrate.[3]

Basis of appeal

[13] Essentially, the applicant's appeal was argued on the following basis:

[1] Exhibit TEP4 to affidavit of T Price filed on 13 February 2014.
[2] See exhibit TEP5 to affidavit of T Price p2 l 45 to p3 l 2.
[3] See exhibit TEP5 to affidavit of T Price p3 l 10-16.

1. That the learned Magistrate erred in setting a parole eligibility date when he was required under s 160B(3) of the *Penalties and Sentences Act 1992 (Qld)* to fix a parole release date, and

2. That he failed to properly consider the principles of totality of sentencing, and

3. That because of such failure the sentences imposed were manifestly excessive.

Parole release date/ parole eligibility date

[14] I have read the transcript of the sentence.[4] Section 160B of the *Penalties and Sentences Act 1992 (Qld)* provides:

(1) This section applies if neither section 160C nor 160D applies.

(2) If the offender has had a court ordered parole order cancelled under the *Corrective Services Act 2006*, section 205 or 209 during the offender's period of imprisonment, the court must fix the date the offender is eligible for parole.

(3) If subsection (2) does not apply, the court must fix a date for the offender to be released on parole.

(4) If the offender had a current parole eligibility date or current parole release date, a date fixed under subsection (2) or (3) must not be earlier than the current parole eligibility date or current parole release date.

[15] Section 160D was not relevant because it applies to sentences for a serious violent offence or a sexual offence.

[16] The learned Magistrate, however, seemed to think that s 160C which applies to sentences of more than 3 years was relevant in this case.

[17] The police prosecutor submitted that the sentence which he was imposing of 3 years was in fact longer than 3 years because of the sentence imposed by his Honour Judge Rafter on 28 November 2013. This submission was clearly

[4] Exhibit TEP8 to affidavit of T Price.

wrong because the sentences imposed by the learned Magistrate were not made cumulative with the existing sentences and the Magistrate did not have the power to declare nor did he declare any of the earlier time served. The Magistrate, however, seemed to accept that submission when he said

> yes there's the – I have to look at the act every time, but it is the difference between the period of imprisonment, I think, and a term of imprisonment. And the term that is used includes the whole of the sentence that he is serving plus the sentence today.[5]

[18] He then went on to conclude that it was a sentence of in excess of 3 years and it has been conceded on appeal here that that was not the case.

[19] That of itself would probably justify this court interfering with the sentence and exercising its own discretion.

Argument about totality and whether sentences were manifestly excessive

[20] During the course of submissions below the solicitor for the applicant did raise the issue of totality.[6] She argued, in effect, that in looking at the issue of totality the learned Magistrate should have more regard to the notional head sentence of 18 months imprisonment referred to by his Honour Judge Rafter as opposed to the actual sentence of 6 months imprisonment which took into account that he had served almost 12 months. She argued that, for practical purposes, he had basically served 12 months of an 18 month sentence which was more than what would normally be served on a plea of guilty.

[21] The learned Magistrate seemed more concerned that he was being asked to credit him twice for the period of almost 12 months that he had served already when he said, 'well I am not going to give him credit for that twice, and I probably won't give him credit for that from the parole point of view either.'[7]

[22] It is now well settled as to how a court should approach the exercise of the sentencing discretion when confronted with this situation. The learned Magistrate was required to consider what head sentence would have been likely

[5] See Transcript exhibit TEP8 to affidavit of T Price.
[6] See discussion exhibit TEP8 p23 l 30 to p25 l 15.
[7] See Transcript exhibit TEP8 to affidavit of T Price p 1-25 l 14-15.

to have been imposed on all of the matters (including the earlier matter dealt with in the District Court) if he was dealing with all of those matters at the same time. The sentences could then be structured accordingly.[8]

[23] The reasons given here were very brief and no such exercise was undertaken. It would have been impossible for him to undertake the notional exercise referred to in the proceeding paragraph without taking into account the period of almost 12 months that he had already served.

[24] Effectively, the final result in this matter was a sentence of approximately 4 years from 20 December 2012 when the applicant was first placed in custody up until 3 years from 6 December 2013 following the sentence imposed by the learned Magistrate.

[25] The real issue here is whether or not that effective result was manifestly excessive in all the circumstances and, for reasons set out below, it clearly was.

[26] The applicant's behaviour in relation to all complainants, including the complainant for the matter dealt with in the District Court was indeed very serious and this is one of the more serious examples of persistent stalking, in part, in the face of existing domestic violence orders.

[27] The applicant was 60 years of age at the time he was sentenced in the Magistrates Court. His criminal history[9] was somewhat limited at the time he was sentenced. He had one conviction for threatening words and possession of a weapon in a public place in 1996, another for possession of weapons and or firearms on 3 July 2006 and two seemingly minor matters of assault or obstruct police and being drunk and being in possession of a knife on 16 July 2012. There were also 2 breaches of the *Bail Act 1980* (Qld) dealt with in the Atherton Magistrates Court on 20 November 2012.

[28] He had spent almost 1 year in custody prior to being dealt with by the Magistrate and all matters were disposed of by way of pleas of guilty. There was no suggestion that these were anything other than timely pleas of guilty.

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[8] See *Mill v The Queen* (1988) 166 CLR 59 which was followed in *Positglione v R* (1997) 189 CLR 295.
[9] See Criminal History part of the court file which was tendered on sentence.

[29] To properly reflect the seriousness of his offending and the issues of general and personal deterrence balanced with his age, his limited criminal history and his pleas of guilty an overall effective sentence of 3 years to serve approximately 1 year was justified. Despite the seriousness of his offending an effective sentence of 4 years to serve at least 16 months (possibly more because of the error in relation to parole release) was a crushing one.

[30] He has already serve 16 months which is more than what he would normally have been required to serve on pleas of guilty where the head sentence was 3 years. If all matters were dealt with together it would also have been possible to declare the time served from 20 December 2012 onwards which would have resulted in a 3 year sentence effective from 20 December 2012.

[31] Clearly, the failure to conduct the notional exercise as set out in *Mill v The Queen*[10] has resulted in a sentence which is manifestly excessive.

[32] Because I cannot make any declarations in relation to the time served the sensible way to resolve the matter is to impose a head sentence of 18 months for the two charges of stalking concurrent with the other sentences imposed on 6 December 2013 and concurrent with the sentence imposed by his Honour Judge Rafter on 28 November 2013.

[33] That would result in an overall effective sentence of 3 years from 20 December 2012 which would be reasonable in the circumstances.

Orders

[34] Because of the urgency of the matter I confirm I made the following orders at the conclusion of the hearing of the appeal, namely

1. The appeal is allowed.
2. The sentence of 3 years imprisonment on each of the offences of stalking are set aside and in each case sentences of 18 months imprisonment effective as at 6 December 2013 are imposed.
3. These sentences are to be served concurrently with each other and concurrent with the other sentences imposed on 6 December 2013 by

[10] Supra.

the learned Magistrate which are not interfered with and concurrent with the sentence imposed in the District Court on 28 November 2013.

4. The applicant's parole release date is fixed as at 14 April 2014.