DISTRICT COURT OF QUEENSLAND

CITATION:	*Shields v The Commissioner of Police* [2021] QDC 51
PARTIES:	**JAY FRANCIS SHIELDS** (appellant) v **THE COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	3431 of 2020
DIVISION:	Appellate
PROCEEDING:	Appeal pursuant to section 222 *Justices Act 1866*
ORIGINATING COURT:	Magistrates Court of Queensland
DELIVERED ON:	31 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	29 March 2021
JUDGE:	Loury QC DCJ
ORDER:	**1. The appeal is allowed to the extent of setting aside the sentence imposed on the offence of using a carriage service to menace, harass or cause offence.** **2. In respect of that offence the appellant is convicted and sentenced to 9 months imprisonment.** **3. Pursuant to section 20(1)(b) of the Crimes Act 1914 I order the appellant be released after having served 3 months upon giving security by recognizance in the sum of $900 conditioned that he be of good behaviour for a period of 12 months.** **4. The sentence of imprisonment is to be served cumulatively with the sentences imposed for the State offences and is to commence on 31 December 2020.**
COUNSEL:	N Larsen for the appellant S Bloom for the respondent K Hales for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Commonwealth Director of Public Prosecutions for the respondent Office of the Director of Public Prosecutions for the respondent

[1] On 20 November 2020 the appellant pleaded guilty to wilful damage, possessing a dangerous drug and using a carriage service to menace, harass or cause offence. In relation to each of the State offences the appellant was sentenced to three months imprisonment with a parole eligibility date of 30 December 2020. For the federal offence he was sentenced to 12 months imprisonment to be released after serving nine months upon giving security by recognisance in the sum of $900 conditioned that he be of good behaviour for a period of 12 months. It was directed that the federal sentence of imprisonment commence on 31 January 2021, one month after the parole eligibility date.

[2] The appellant appeals the sentence imposed on the offence of using a carriage service to menace, harass or cause offence. The right of appeal lies pursuant to section 222 of the *Justices Act* 1886. Such an appeal is by way of rehearing on the evidence before the Magistrate and any other evidence admitted with leave. The appellant must demonstrate that the decision, the subject of the appeal, is the result of some legal, factual or discretionary error.[1]

The circumstances of the offending

[3] The appellant and complainant had been in a relationship for around three and one-half months. They resided together in a caravan. On 14 November 2020 the appellant, whilst drunk, argued with the complainant. He kicked her out of the caravan and smashed some of her personal keepsakes (**wilful damage**). The complainant left the caravan. The appellant telephoned her on numerous occasions that same evening making threats against her, her children and her foster mother (who had collected her from the caravan). The appellant left voicemail messages for the complainant which included threats to kill her and her children, to burn down her house and to have her son assaulted (**using a carriage service to menace, harass or cause offence**). It was apparent to police who listened to the messages the appellant was drunk.

[4] Police served a protection notice on the appellant, finding him in possession of 2.4 grams of cannabis.

The appellant's antecedents

[5] The appellant was 45 years of age at the time of the commission of the offences and at sentence. He had an extensive criminal history. In 1996 when the appellant was 21 years of age he was convicted of armed robbery in company and sentenced to three years imprisonment. He has 22 convictions for breaches of domestic violence orders. Those orders were all said to relate to his long standing relationship with his former partner (not the complainant). He was first convicted of breaching a domestic violence order in 2000. He was extended leniency on a number of occasions (12) being sentenced to fines, probation orders, community service, suspended sentences and immediate parole orders. It appears that it was not until 2017 that the appellant served a period in actual custody for contravening domestic violence orders.

[6] On 26 March 2020 the appellant was sentenced in relation to three aggravated offences of contravening a domestic violence order; contravening a police

[1] *Allesch v Maunz* (2000) 203 CLR 172 at 180.

protection notice, wilful damage and possessing drugs and drug utensils. The domestic violence order had been made in favour of his former partner. He was sentenced to 18 months imprisonment with parole release after having served 35 days in pre-sentence custody. The appellant was on parole for these offences when he committed the offence which is the subject of the appeal.

[7] Consequently, in relation to the State offences the learned Magistrate could only impose a parole eligibility date.

Error?

[8] Ms Bloom appropriately concedes that the learned Magistrate fell into error. The appellant was serving the sentence imposed on 26 March 2020 when he came to be sentenced by the learned Magistrate. Section 19 of the *Crimes Act* 1914 applied to the sentencing of the appellant because he was serving a sentence at the time of his sentence. Section 19(3) also applied to the appellant because he was being sentenced in respect of State and federal offences and being sentenced to imprisonment for each of them. Accordingly the learned Magistrate was required to direct when the federal sentence commenced. Relevantly section 19(3) reads:

> Where:
> (a) a person is convicted of a federal offence or offences, and a State or Territory offence or offences, at the same sitting; and
> (b) the person is sentenced to imprisonment for more than one of the offences;
> the court must, by order, direct when each federal sentence commences but so that:
> (c) no federal sentence commences later than the end of the sentences the commencement of which has already been fixed or the last to end of those sentences; and
> (d) if a non-parole period applies in respect of any State or Territory sentences – the first federal sentence to commence after the end of that non-parole period commences immediately after the end of the period.

[9] Whilst the prosecutor informed the learned Magistrate of the content of section 19(3)(c) he did not inform the learned Magistrate of the content of section 19(3)(d). The prosecutor informed the learned Magistrate that he could nominate when the sentence starts.

[10] The learned Magistrate intended to partially accumulate the sentences by making the federal offence cumulative on the State offences however he was led into error by the prosecutor informing him that he could nominate when the sentence starts. Section 19(3)(d) of the *Crimes Act* 1914 only allowed for accumulation from the date the defendant became eligible for parole.

Re-sentencing

[11] Whilst error is conceded, Ms Bloom argues that in re-exercising the discretion no different sentence should be passed and so the appeal ought to be dismissed.[2]

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[2] *Kentwell v R* (2014) 252 CLR 60 at [35].

[12] In determining the sentence to be passed for a federal offence the sentence must be of a severity appropriate in all the circumstances.[3] A sentence of 12 months imprisonment was the jurisdictional limit of the sentence that could be imposed by the learned Magistrate. He considered that sentence ought to be imposed cumulatively on the sentences imposed for the State offences.

[13] In addition the learned Magistrate was required to take into account the non-exhaustive list of factors referred to in section 16A(2) of the *Crimes Act* 1914 which relevantly include:

(a) the nature and circumstance of the offence - section 16A(2)(a);
(b) the personal circumstances of any victim – section 16A(2)(d);
(c) the plea of guilty – section 16A(2)(g);
(d) personal and general deterrence – sections 16A(2)(j) and (ja);
(e) adequate punishment –section 16A(2)(k);
(f) character, antecedents, age, means and physical or mental condition of the appellant – section 16A(2)(m);
(g) prospects of rehabilitation – section 16A(2)(n)

[14] The nature and circumstances of the offence are serious because of the domestic relationship that existed between the appellant and complainant. The offence was serious because the menacing phone calls involved threats to kill and/harm the complainant, her children and her foster mother. The complainant and appellant had experienced a miscarriage in the short period before the offending. I infer that caused a deal of emotional upheaval for both parties. The appellant has an alcohol problem and acknowledged that he was significantly intoxicated at the time of the offending. He did not recall what he said to the complainant in the phone calls but accepted that he threatened her and her children. He did not mean what it was that he said.

[15] The appellant pleaded guilty at a very early time, within one week of his having committed the offence. Despite the appellant's alcoholism he was employed as a cabinet maker at the time of the offending. His incarceration which was inevitable necessarily meant that he would lose his employment.

[16] The complainant was present in court in support of the appellant. Whilst she had not spoken to the appellant since the incident (assumedly due to the existence of the police protection order) she indicated that she wanted to reconcile with him.

[17] Given that the appellant was on parole when he committed the offence personal deterrence loomed large in the exercise of the sentencing discretion. The appellant's criminal history is such that it is difficult to make any assessment as to his prospects of rehabilitation. Whilst having employment might be a protective factor his alcoholism for which it seems he has not sought any treatment is a feature which suggests his ability to maintain functional and healthy relationships is doubtful.

[18] Nonetheless it was a significant factor in my view that the complainant had forgiven the appellant and that he pleaded guilty at a very early stage.

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[3] Section 16A.

[19] I have been referred to the single judge decisions of *R v JZQ* (Judge Kent QC) and *R v Demitrios Conias* (Judge Dick SC) and the decision of *Barry v Commissioner of Police*[4] by way of comparable sentences. I have not found any of those decisions to be of particular assistance in determining the appropriate penalty given the very different circumstances of the offending and the very different antecedents.

[20] In exercising the sentencing discretion afresh I am not of the view that a sentence as high as 12 months imprisonment is the appropriate penalty accumulated on the penalty for the State offence. Taking into account the relevant factors set out in section 16A most particularly the very early plea of guilty and the attitude of the complainant I would impose a sentence of 9 months imprisonment cumulative on the State offences with a recognisance release order after serving three months. The appellant was on parole when he committed the offences. Given the penalties imposed for the State offences involved terms of imprisonment, the only appropriate sentence for the federal offence is a sentence of imprisonment.

[21] To give effect to the sentence my orders are:

1. The appeal is allowed to the extent of setting aside the sentence imposed on the offence of using a carriage service to menace, harass or cause offence.
2. In respect of that offence the appellant is convicted and sentenced to 9 months imprisonment.
3. Pursuant to section 20(1)(b) of the *Crimes Act* 1914 I order the appellant be released after having served 3 months upon giving security by recognizance in the sum of $900 conditioned that he be of good behaviour for a period of 12 months.
4. The sentence of imprisonment is to be served cumulatively with the sentences imposed for the State offences and is to commence on 31 December 2020.

[4] [2015] QDC 61.