11. Those sections were recently discussed in *R v Oliver*.[1] In that case it was stated that there are two relevant categories of offence:

    (a) First offences that involve, "the use of violence" and

    (b) Second those in which violence might not actually have been used but in which it was the plain intention of the offender that violence would be used.

12. It was said that a bare threat to use violence does not easily give rise to a risk of physical harm because many threats are empty threats.

13. In *Oliver* text messages conveying threats of violence were held not to have been made in circumstances where it appeared that the threatened violence would be, or could be, inflicted suddenly.

14. President Sofranoff, with whom JJA Fraser and Phillipides agreed, stated:

> *" I am not prepared to construe s 9(2A) so that an offender who commits an offence while making threats to use violence, in some unstated way and at some unstated time, is to be regarded as committing an offence that "involved the use of violence against another person". The ordinary and natural meaning of the words does not, in any sense, bear such a connotation. Moreover, many empty threats are made with no intention on the part of the offender ever to carry them out. Section 359E ensures that, as a circumstance of aggravation of the offence of stalking that does not matter. However, in s 9(2A) the express expansion of the operation of the section beyond those offences in which violence is "used" to those offences in which violence may not have been used but in which the offender has been shown to be demonstrably committed to its use because he or she had actually attempted to use it, has actively sought by counselling or procuring another to use it or has conspired with others to use it, shows that a bare threat to use violence such as occurred in this case, is not included in the category of offences to which the more severe regime applies."*

15. In *Oliver* it was held that the applicant fell to be sentenced in accordance with the principles stated in s 9(2). The applicant was sentenced to 18 months imprisonment suspended after 3 months, operational for three years.

16. It is accepted that in offences of this kind a custodial sentence can be imposed. However due to custodial sentences being the most severe form of punishment the starting point in any sentencing consideration is that a term of imprisonment should only be imposed when there is no less onerous sanction appropriate in all the circumstances of the offence and even then only imposed when all of the circumstances of the offending and the offender have been fully considered.

[1] [2018] QCA 348

Relevant authorities

17. In *R v SCM*[2] the defendant was re-sentenced on appeal to account for the accumulation of an additional 6 months imprisonment for a Failure to Appear ("FTA") in addition to the stalking offence penalty. Further, there were 19 summary charges dealt with. Rather than a 2 year penalty for unlawful stalking with an additional 6 months for the FTA, the QCA imposed 2½ years for the stalking and convicted but did not further punish on the FTA. In that case there was a threat to "snap her neck" and hand gestures of shooting directed towards a child. Five acts of stalking were in breach of a DVO. The applicant had served 236 days and had been admitted to appeal bail. It was held that the applicant's rehabilitation would not be promoted by returning him to custody.

18. *In R v MacDonald*[3] a period of 2 years imprisonment with 8 months to be served was undisturbed on appeal. Of note in that case there were threats of violence, including threats of sexual assault, threats of rape and threats to kill. On 3 occasions the stalking conduct was in breach of court orders. The conduct persisted until the defendant was arrested.

19. In *Tarasuik*[4] after trial the appellant was found guilty of one count of unlawful stalking and sentenced to 15 months' imprisonment, suspended after five months, with an operational period of four years.

20. In *Coutts*[5] the appellant pleaded guilty to one count of unlawful stalking with violence, and was sentenced to 18 months' imprisonment with parole release after six months. The offending took place over a nine month period. The conduct caused the complainant (a 71 year old woman) significant distress to the point she had become afraid to leave her own house. The conduct was characterised by the primary sentencing judge as "callous and wicked" and a "deliberate course of revenge".

21. In *Conde*[6] the appellant was convicted after trial of one count of unlawful stalking with the use of violence. He was sentenced to a 15 months' imprisonment, suspended after seven months. The conduct took place over a period of two years. In all there were 59 particularised acts. As the case concerned an appeal against conviction, no authoritative statement can be taken from the sentence imposed. However the case provides an example of a first instance sentence for prolonged stalking where one of the acts involved the use of violence.

---

[2] R v SCM [2016] QCA 175
[3] R v MacDonald [2008] QCA 384
[4] [2019] QCA 165
[5] [2016] QCA 206
[6] [2015] QCA 63