SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kofoed* [2005] QCA 438
PARTIES:	**R** **v** **KOFOED, Charles Christian** (applicant)
FILE NO/S:	CA No 255 of 2005 DC No 252 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED EX TEMPORE ON:	25 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2005
JUDGES:	de Jersey CJ, McMurdo P and McPherson JA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
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 REFUSED – where the applicant pleaded guilty to counts of burglary, assault and stalking – where the applicant was sentenced on each count to concurrent terms of two years imprisonment suspended after six months for an operational period of three years – where the applicant was 36 years old, had an extensive prior criminal history, had breached DVOs and had served extended terms of imprisonment – where the applicant contended the sentence was manifestly excessive because the applicant was responding to the complainant's harassing behaviour, the Crown Prosecutor at sentencing had submitted to the Judge that a non-custodial sentence would be appropriate, there was delay in proceeding with the prosecution and the applicant was the primary carer of a young child – whether the sentence was manifestly excessive

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – where the sentencing Judge had imposed a custodial sentence notwithstanding the Crown Prosecutor had submitted that a non-custodial sentence would be appropriate – whether a Judge's sentencing discretion is fettered by concessions made by the Crown Prosecutor

COUNSEL:	A W Collins for the applicant S G Bain for the respondent
SOLICITORS:	Purcell Taylor for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: The applicant was on 8 September 2005 arraigned for trial on a count of burglary and assault committed on 17 May 2002 and a count of stalking with a circumstance of aggravation committed over the period 17 May 2002 to 25 February 2003. He then pleaded not guilty but changed his pleas to guilty the following morning. He was sentenced on each count to concurrent terms of two years imprisonment suspended after six months for an operational period of three years. He seeks leave to appeal on the ground the penalty is manifestly excessive.

At the time of the offences the applicant was 36 years old. He had an extensive and serious prior criminal history including convictions for burglary and violence. He had breached domestic violence orders. He had served extended terms of imprisonment.

The applicant had been an employee of the complainant. They shared a house for some time and the applicant became romantically involved with the complainant's niece whom the complainant had brought up as if a daughter. The applicant and the niece in fact had a child together. The complainant strongly disapproved of the relationship.

The first offence involved the applicant entering the complainant's house, notwithstanding her strongly voiced objection, and assaulting the complainant by poking his finger twice into her shoulder in the context of offending behaviour. The applicant adopted an extremely aggressive attitude to the complainant yelling at her and making offensive and obscene threats including threats against her life.

The stalking offence commenced later the same day with the applicant attending at the complainant's house again, entering notwithstanding the complainant's strongly expressed objection, and threatening the complainant and her children and assaulting the complainant.

Over the following nine months the applicant harassed the complainant on a regular basis. His conduct included driving slowly by her house, pulling up beside her at intersections and insulting her, gesturing towards her in a throat-cutting fashion as he drove by her or saw her driving, forcing the

complainant's vehicle into the path of oncoming traffic, being present uninvited in the complainant's back yard holding a piece of wood, watching the complainant's house from a distance, intimidating the complainant on the road, driving at her and so on. The road misconduct on the part of the applicant has a particularly serious dimension for its consequences, especially the occasion when he forced the complainant's vehicle into the path of oncoming traffic. Unsurprisingly all of this caused great disturbance to the complainant and her children.

Counsel for the applicant submits that a non-custodial penalty should have been imposed such as a fully suspended sentence or preferably an intensive correction order. In fact the Crown Prosecutor submitted to the sentencing Judge that a non-custodial sentence would be appropriate. Of course the Judge was not bound by that and, as may be drawn from the sentences he imposed, he considered a non-custodial response would have been inadequate.

The primary contention for the applicant is that the Judge failed to recognise that the applicant was in part responding to harassing behaviour on the part of the complainant herself. To the extent that may be said to have been constituted by the complainant's involving the police, one observes the complainant was obviously entitled to do that in order to

protect herself as she saw it necessary in the face of the applicant's misconduct. Insofar as the complainant frequently over a period telephoned the applicant's house, that was apparently referrable to her endeavouring to make contact with her niece.

Relations between the applicant and the complainant were apparently very bad, but expressions of dismay, frustration, even anger on the part of the complainant did not necessarily diminish the inexcusable nature of the applicant's conduct in response.

Another aspect emphasised for the applicant is delay on the part of the police in proceeding with the prosecution, apparently explained by the differing assessments of two police officers respectively and consecutively assigned to her case. The Judge acknowledged the distended nature of the investigation. That feature did not exclude his ordering the applicant's actual imprisonment.

There was also the circumstance that the applicant was the primary carer of a young child. The mother of the child had care of the boy two days of the week and the applicant the remaining five days. This is a relevant consideration, of course, but it cannot control the sentencing discretion. It

is not a case where the incarceration of the applicant meant that the child would be left without a carer.

Particularly in view of the applicant's past criminal history for crimes of violence especially and the violent nature of this offending, I consider the sentences imposed by the learned Judge were within range. The applicant has not demonstrated that the Judge fell into error in any particular respect. The applicant has not established that the penalties imposed were manifestly excessive.

Mr Collins' submission essentially involved a contention the Judge's balancing exercise went awry. That, for example, too much weight was attributed to the applicant's past criminal history and too little to any provoking or irritating conduct on the part of the complainant herself. I do not consider that this contention can succeed. I would refuse the application.

THE PRESIDENT: I agree. I will make a few additional observations. The applicant's criminal history included convictions in December 1989 for breaking and entering a dwelling house with intent, rape, carnal knowledge against the order of nature, burglary and armed robbery for which he was sentenced to an effective term of 10 years imprisonment with a recommendation for parole eligibility after four years.

Although he had no subsequent criminal convictions until July 2001, he then breached a domestic violence order for which he was convicted and fined $100. In September 2004 he was convicted of two charges of breaching a domestic and family violence protection order but was discharged with no conviction.

The prosecutor submitted at sentence that a non-custodial sentence was appropriate, but the learned sentencing judge immediately expressed his dissent from that view, subject to hearing defence counsel.

The victim impact statement indicated that the complainant has been deeply detrimentally affected by the applicant's conduct and was at sentence receiving psychological assistance. She is constantly concerned for her own safety and that of her family. She has relocated her home and her children have left their previous school as a result of the offence.

Defence counsel also contended at sentence that a non-custodial sentence should be imposed. He emphasised that the applicant had custody of his three year old son from an earlier relationship and cared for him five days a week. Two references were tendered on the applicant's behalf which attested to his good parenting skills and other positive attributes. He submitted that the applicant believed the

complainant had been making false accusations about his parenting to the Department of Families and interfering in his relationship with the complainant's niece. He also emphasised that the applicant committed no further concerning acts of stalking after he was served with the complaint and summons in March 2003. He submitted that the complainant was herself not without fault in the background to these offences and said that she had made 32 phone calls from her residence to the applicant's residence between May and June 2002. On questioning from the judge, counsel conceded that the complainant's niece was residing with the applicant and that many of the phone calls may well have been to the niece. The police officer who originally investigated the matter took no action because he formed the view that the applicant and the complainant's niece, who were then still in a relationship, were being stalked just as much by the complainant as the complainant was by the applicant.

The learned primary judge did not accept that submission. He took a serious view of the applicant's conduct, rejecting the contention that the complainant was mutually harassing him, although accepting that the complainant was not entirely blameless. That view was open on the sentencing submissions made and was consistent with the applicant's recent breaches of court orders.

Neither the delay in prosecuting the matter nor the applicant's role in caring for his young child were factors that alone or in combination required the imposition of a non-custodial sentence. The applicant had a bad criminal history. Although he had apparently reformed since his serious convictions in 1989, the judge was entitled to conclude that the more recent breaches of domestic violence and temporary protection orders made the applicant's irrational and seriously intimidatory conduct in the commission of these offences more concerning. Nor was the learned primary judge obliged to accept the concession made by the prosecution at sentence that a non-custodial sentence was appropriate.

Mr Anthony Collins, who appears for the applicant in this application and appeared below, contends that when such a concession is made, unless it would result in a manifestly inadequate sentence, a judge is bound to accept it. No more need be said about that submission other than that it is manifestly wrong: the judge's sentencing discretion is not fettered by concessions made by the prosecutor.

All that remains is to consider whether the sentence that was imposed is demonstrated to be manifestly excessive in all the circumstances. The applicant pleaded guilty at a very late stage but must get some credit for that. His offending was, as I have said, intimidatory and serious and occurred over a

nine month period with devastating results for the victim. He has a bad criminal history and recent relevant convictions. He is a mature man.

Whilst another judge may have taken a more favourable view of the facts to the applicant and imposed a non-custodial sentence, the applicant has not satisfied me that the sentence which was imposed was manifestly excessive. I agree with the Chief Justice that the application should be refused.

McPHERSON JA: For the reasons that have been given I agree that the application for leave to appeal should be refused.

THE CHIEF JUSTICE: The application is refused.
