SUPREME COURT OF QUEENSLAND

CITATION:	*R v Boehmke* [2011] QCA 174
PARTIES:	**R** **v** **BOEHMKE, Michael John** (applicant)
FILE NO/S:	CA No 105 of 2011 DC No 689 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Orders delivered ex tempore 15 July 2011 Reasons delivered 26 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	15 July 2011
JUDGES:	Margaret McMurdo P, Muir JA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 15 July 2011:** **1. The application for leave to appeal is granted.** **2. The appeal is allowed to the following extent.** **3. The sentences imposed on counts 3 and 4 and the parole eligibility date are set aside.** **4. On count 3 the applicant is sentenced to 12 months imprisonment.** **5. On count 4 the applicant is sentenced to two years imprisonment.** **6. The sentences imposed on counts 2, 3 and 4 are to be suspended on 15 July 2011 with an operational period of three years.** **7. The sentence imposed at first instance is otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of five counts of indecent treatment of a child under 16 and one count of stealing – where applicant was sentenced to three years imprisonment and was ordered to serve two years probation – where applicant applied for leave to appeal against his sentence, contending that it

was manifestly excessive – where applicant contends for a sentence of 12 to 18 months to operate concurrently with the probation order – where the applicant argues that the judge erred in sentencing him to a probation order in conjunction with a three year term of imprisonment – whether the judge erred in imposing a probation order to operate concurrently with a sentence of imprisonment longer than one year – whether the sentence imposed was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 92(1)(b)

R v Demmery [2005] QCA 462, considered
R v Hood [2005] 2 Qd R 54; [2005] QCA 159, cited
R v Hughes [1999] 1 Qd R 389; [1998] QCA 61, cited
R v MAO; ex parte A-G [2006] QCA 99, considered
R v O [2001] QCA 40, considered
Sharpe v R [2006] NSWCCA 255, cited

COUNSEL: J J Allen for the applicant
M B Lehane for the respondent

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

[1] **MARGARET McMURDO P:** On 15 July 2011 at the appeal hearing this Court made the following orders:

"1. The application for leave to appeal is granted.
2. The appeal is allowed to the following extent.
3. The sentences imposed on counts 3 and 4 and the parole eligibility date are set aside.
4. On count 3 the applicant is sentenced to 12 months imprisonment.
5. On count 4 the applicant is sentenced to two years imprisonment.
6. The sentences imposed on counts 2, 3 and 4 are to be suspended on 15 July 2011 with an operational period of three years.
7. The sentence imposed at first instance is otherwise confirmed."

[2] These are my reasons for joining in those orders. The applicant, Michael John Boehmke, pleaded guilty on 13 April 2011 to five counts of indecent treatment of a child under 16 (counts 1 to 5) and one count of stealing (count 6). He was sentenced to six months imprisonment on each of counts 1 and 5; 12 months imprisonment on count 2; 18 months imprisonment on count 3; and three years imprisonment on count 4. On count 6, he was ordered to serve two years probation. The judge declared 168 days of pre-sentence custody as time served under the sentence. Her Honour set the date for parole eligibility at 12 October 2011, that is, after the applicant had served one-third of the three year sentence. He has applied for leave to appeal against his sentence contending that it was manifestly excessive and that the judge erred in sentencing him to a probation order in conjunction with a three year term of imprisonment.

[3] The respondent rightly concedes that the application for leave to appeal must be granted and the appeal allowed. That is because the judge erred in imposing

a probation order to operate concurrently with a sentence of imprisonment longer than the one year specified in s 92(1)(b) *Penalties and Sentences Act* 1992 (Qld):[1] see *R v Hughes*.[2] This Court must now resentence the applicant.

[4] He was 30 at the time of his offending and 31 at sentence. He had a criminal history in Queensland and in Victoria. In the Gympie Magistrates Court in January 2007, he was fined $150 without conviction for possessing dangerous drugs. Later that year in the same court, he was convicted and placed on six months probation for further drug offences. His Victorian history commenced in December 2000 when he was sentenced to a community based order for aggravated burglary, attempted theft of a motor vehicle and related offences. In December 2001, he was dealt with for breaching that community based order and sentenced to two months imprisonment, wholly suspended for six months, and fined. He had no previous history of sexual offending and had not previously been sentenced to a term of imprisonment.

[5] A schedule of facts setting out the circumstances of the present offending was tendered. The complainant was 15 years old[3] when the offences occurred on 24 October 2010. Her mother went to a club with her partner and members of their family. The applicant regularly attended the club and knew the complainant's mother; his partner was a friend of hers. The applicant was at the club and appeared fairly intoxicated. The complainant's mother and her group took a courtesy bus to return home. The applicant was on the bus. She agreed he could come to her home where the applicant, the mother and some of the others in the group continued to drink. At one point during the course of the evening, the applicant was sitting on a sofa with the complainant. He had a blanket over him and offered it to the complainant. He touched her on the side of her leg near her bottom (count 1).

[6] She immediately stood up, walked to her bedroom, shut the door and went to sleep. Later, as the family members retired to their bedrooms, the complainant's mother told the applicant he could sleep on a sofa in the lounge area and offered him a sleeping bag. She considered him far too intoxicated to go home and he was half asleep. She left for her bedroom with him lying down in the lounge area.

[7] At some time during the late evening or early morning, he went into the complainant's bedroom. She woke up, recognised him and asked him what he was doing. He lent over and tried to kiss her. She pushed him away. He stroked her face. She pulled away. She told him "I'm not sleeping with you here." He asked if she thought he was going to molest her and told her "Don't worry, I'm not going to fuck you." She firmly told him "Just get out." She said she was not interested in him and that she knew he was going to marry his partner. He said he did not want to marry his partner because she believed in God. In answer to his questioning, the complainant told him that she also believed in God. He told her that the devil would come down and fuck her before he did. She pleaded with him to leave. He told her she was beautiful. She pointed out his age and asked him why he was in her room. He said "I've wanted you for ages. … Can you just kiss me so we can get it out of the picture?" She refused and again told him to leave. He lent over her and tried to kiss her on the lips on a number of occasions whilst holding her hands so that she was unable to move (count 2). He eventually acceded to her demands to leave.

---

1 See *R v Hughes* [1999] 1 Qd R 389; [1998] QCA 61.

2 [1999] 1 Qd R 389.

3 The schedule of facts misstates the complainant's date of birth.

[8] A short time later, he returned to her bedroom. He undid his pants, pulled out his penis and placed it on her leg (count 3). She immediately told him to get it off her and to leave. She again reminded him of their age difference. He said it did not matter. He got on top of her, holding her hands back and pulled off her boxer shorts and underwear. She unsuccessfully tried to pull up her pants. He held her legs apart, put his head between her legs and performed oral sex on her by licking her vagina. She unsuccessfully tried to push his head away and to move her legs away from him (count 4). He continued to try to kiss her on the mouth and she resisted. He said that he had been attracted to her for a few years until he found out she was 13, but she had grown up in the past 12 months. He then left.

[9] During the evening or early morning he returned and said to the complainant "I swear to Christ if you tell anyone about this I'll come back and slit your throat." During these incidents, he continually asked her if she was scared and the complainant described him as having "a serious face on".

[10] He returned to her bedroom a fourth time, this time without his shirt. She was crying and he asked if he had offended her and if he could stay in her room. She told him to leave. He again tried to kiss her. She moved her head (count 5).

[11] He asked her to get a cigarette from her brother's room. She went into her brother's room where she told his partner what had happened. Her brother's partner confronted the applicant in the complainant's room and asked him what he was doing. He said he was plugging in a light. He left the room and continued drinking on the verandah before going to sleep on a couch.

[12] When the complainant returned to her room, she saw that he had taken a $10 note which had been on the floor near a power point (count 6).

[13] The complainant used her mobile phone to request the applicant's partner to come and get him. Some time later his partner arrived, but he refused to leave with her.

[14] At about 7.00 am the complainant's brother confronted the applicant accusing him of rape. He then assaulted the applicant, injuring his chest and face. The applicant stumbled out of the house and sought hospital treatment. His injuries by way of extra-curial punishment were bruising to the face around the eye region, a cut to the lip, a fractured rib and a collapsed lung which required the insertion of a drainage tube. He spent four days in hospital. His lung problems continued for some weeks.

[15] The complainant made a complaint to police.

[16] Police officers spoke to the applicant in hospital. He said he could not recall the events but admitted that he had been drinking heavily and mixing alcohol with a prescribed medication contrary to medical advice. He was formally interviewed on 28 October 2010 but maintained that he could not recall any of the alleged incidents. He was charged and remanded in custody until his sentencing, a period of 168 days. DNA analysis found a strong match between the applicant's DNA and swabs from the complainant's abdomen and vulva.

[17] The matter proceeded by way of full hand-up committal, that is, witness statements were tendered without cross-examination. At the committal hearing, the complainant's family made death threats against him. Further, the back window of his car was smashed with a baseball bat, allegedly by the complainant's brother and step-father, in an act of retribution.

[18] He pleaded guilty at an early time.

[19] The complainant's mother provided two victim impact statements, one relating to the complainant and the other to herself. The complainant has had trouble sleeping at night and has had time off school, causing her to fall behind with her studies. She was reluctant to go out alone and wanted to leave the area. She finally agreed to attend counselling sessions. The complainant knows the applicant's offending will affect her for the rest of her life and will take years to get over. The complainant's mother was herself sexually assaulted as a young woman and the applicant's offending against her daughter has caused her to relive that episode. She and her son felt inadequate at not being able to protect the complainant. The family was in crisis as a result of the offences.

[20] The prosecutor at the original hearing submitted that a sentence of two years imprisonment with a recommendation for parole eligibility after one-third of that sentence was appropriate. The respondent now contends that an effective sentence of three years imprisonment suspended after 12 months, that is, on 12 October 2011, should be imposed so that the probation order on count 6 can continue.

[21] Defence counsel at sentence emphasised the absence of prior sexual offending and submitted the applicant's conduct was out of character and explained by his heavy use of alcohol whilst taking prescribed anti-depressants. The applicant thought the consumption of alcohol would undermine the effectiveness of his anti-depressants but did not apprehend that it would result in such behaviour. He had not drunk heavily for some period before the night of this offending. He had only limited recall of the incidents but accepted the prosecution case put against him. He was remorseful. He understood that the complainant would have been frightened and that his offending could have serious and long-term consequences for her. After his arrest, he was suicidal. His partner has continued to support him whilst imprisoned and they planned a future together. He has employment opportunities with an uncle who has a painting business.

[22] His father wrote a letter to the sentencing judge in terms which included the following. The applicant's mother died when he was six years old from a rare blood disorder, which he had inherited. He was a sickly child who struggled at school. During adolescence, he was found to have a chromosomal disorder which made his teenage school years particularly difficult. After leaving school, he continued to have problems with alcohol abuse and generally fitting into the community.

[23] Defence counsel at sentence contended that once the mitigating factors and the extra-curial punishment were taken into account, a sentence of 12 to 18 months should be imposed. The applicant's counsel now submits that an effective global term of imprisonment should be imposed but immediately suspended. This sentence could operate concurrently with the probation order originally imposed on count 6.

[24] Both parties rely on this Court's decision in *R v MAO; ex parte A-G*[4] as a comparable authority. In *MAO*, the Attorney-General appealed from the respondent's sentence of 11 months and three weeks imprisonment, suspended after three months, with an operational period of two years, for two counts of indecent dealing with a female child aged under 12 years. The maximum penalty for those

---

4 [2006] QCA 99.

offences was 20 years imprisonment. The respondent was 34 years old with no relevant criminal history and had been in stable employment supporting his wife and six children. He touched the eight year old complainant in the genital area inside her pants, rubbing her clitoris and genitals inside the outer labia. When she tried to sit up he pushed her back, opened her legs, held her down, pulled her panties to one side and licked her genital area, using his tongue against her clitoris. When she began to shake and cry, he desisted. He initially denied the allegations but later told the police he was drunk and conceded the complainant must have been telling the truth. The offending had a considerable detrimental impact on the complainant. The Chief Justice, with whom Williams and Keane JJA agreed, noted that, notwithstanding the mitigating features, the offending justified a head sentence of up to two years imprisonment, suspended after six months. The judge had erred in reducing the sentence below 12 months simply to avoid the respondent's mandatory deportation under the *Migration Act* 1958 (Cth). Noting the "moderation which attends the disposition of an Attorney-General's appeal", the Court resentenced the respondent to 12 months imprisonment suspended after six months with an operational period of two years.

[25] Neither *MAO* nor any of the other authorities to which the parties have referred this Court precisely match the exacerbating and mitigating features of the present case. *MAO*, *R v O*[5] and *R v Demmery*[6] do suggest, however, that the three year effective global sentence imposed by the primary judge was too high when the mitigating features of the present case are considered. On the other hand, *R v LU*[7] provides some support for the three year sentence initially imposed, although it was overall a more serious example than the present offending. The respondent also relied on *R v Troop*[8] to support his submission that a three year sentence was appropriate. The facts in *Troop* are very different from the present case. Further, Troop went to trial and, in addition to his sexual offence, was convicted of a related burglary offence punishable by life imprisonment. I do not find it of particular assistance in determining the appropriate sentence in this case.

[26] The maximum penalty for each of the present counts 1 to 5 was 14 years imprisonment. There were aggravating features. At 30 years of age, the applicant was a mature man who committed these offences. He abused the hospitality shown to him by the complainant's family. Although he claimed to have no recollection of his offending, he was persistent in the face of the complainant's clear statements and actions that she wanted nothing to do with him. There was, as the complainant emphasised, a significant age difference between them. He used a degree of force in committing count 4 and later threatened to seriously harm the complainant if she told anyone about what he had done. The complainant and her family have suffered significant detriment from his offending.

[27] But there were also significant mitigating features. The applicant had no comparable prior criminal history. He pleaded guilty at an early stage with the result that witnesses, most importantly the complainant, were not required for cross-examination at committal or trial. That is an important mitigating feature, especially when sentencing for sexual offences. The fact that an offender has suffered extra-curial punishment will not necessarily result in a significantly

---

5 [2001] QCA 40.
6 [2005] QCA 462.
7 [2007] QCA 62.
8 [2009] QCA 176.

reduced sentence: see *Sharpe v R*.[9] But nor can this Court ignore the detriment the applicant suffered at the hands of the complainant's family acting as vigilantes in determining the appropriate sentence. Like the trial judge, I emphasise that our community does not tolerate vigilantism. The complainant's family must understand that the applicant's sentence would have been longer but for their anti-social retributive behaviour. The applicant has the support of both his female partner and his father and has employment opportunities. His rehabilitation prospects seem promising, at least if he does not continue to abuse alcohol and drugs.

[28] The odd and concerning aspects of the applicant's offending, together with the matters referred to in his father's letter, suggest that both the community and the applicant would benefit from him completing an extended period of supervision in the community under a probation order. Probation can be combined with a suspended period of imprisonment provided the period of imprisonment actually served is no longer than the one year specified in s 92(1)(b) *Penalties and Sentences Act*: *R v Hood*.[10] I consider that an effective global sentence of two years imprisonment suspended after about one-third, with an operational period of three years, together with a two year probation order, best addresses the competing exacerbating and mitigating factors.

[29] For these reasons, I joined in this Court's orders of 15 July 2011.

[30] **MUIR JA:** I agree with the reasons of Margaret McMurdo P.

[31] **DALTON J:** I agree with the reasons of Margaret McMurdo P.

---

9 [2006] NSWCCA 255.

10 [2005] 2 Qd R 54, Jerrard JA, Helman J agreeing, esp at [48]; [2005] QCA 159.