SUPREME COURT OF QUEENSLAND

CITATION:	*R v Huff* [2012] QCA 138
PARTIES:	**R** **v** **HUFF, Celine May** (applicant)
FILE NO/S:	CA No 38 of 2012 DC No 231 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	29 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2012
JUDGES:	Fraser and Gotterson JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **Grant the application for leave to appeal against sentence.**
2. **Allow the appeal.**
3. **Set aside the sentence and orders made in the District Court on 8 February 2012.**
4. **Vary the sentence and orders made in the District Court on 31 January 2012 so that those orders provide that:**
   - **(a) In relation to count 1:**
     - **(i) A conviction is recorded.**
   - **(b) In relation to count 2:**
     - **(ii) A conviction is recorded.**
     - **(iii) A probation order is made having the effect:**
       1) **The applicant is sentenced to a term of imprisonment of six weeks.**
       2) **At the end of that term of imprisonment the applicant be released on probation under the supervision of an authorised corrective services officer for the remainder of the period of three years commencing on 31 January 2012.**
     - **(iv) The order is to contain a general requirement that the applicant must report to an authorised corrective services officer at Townsville on or before 31 May 2012.**

(v) The order is to contain an additional requirement that the applicant submit to such medical, psychiatric or psychological assessment and treatment as it is directed by an authorised corrective services officer.

(c) Pursuant to s 359F of the *Criminal Code* the applicant must not contact Byron Anthony Lund or Joyce Sharron Oates during the period of five years from 31 January 2012.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant charged with two counts of stalking, with circumstance of aggravation for intentionally threatening to use violence – where applicant pleaded not guilty but changed pleas to guilty after Crown case almost concluded – where sentencing was adjourned until preparation of pre-sentence report, including psychiatric or psychological report – where applicant sentenced, and then re-sentenced later after sentencing judge informed of opinion of corrective services officer that one order inconsistent with *Penalties and Sentences Act* 1992 – where applicant re-sentenced to 12 months imprisonment with fixed parole date and a probation order upon satisfaction of conditions in s 93(1) of *Penalties and Sentences Act* 1992 and special condition to attend psychological/psychiatric counselling as required – where sentencing judge made restraining order under s 359F of *Criminal Code* prohibiting applicant from contacting either complainant for five years – where the applicant challenged order for imprisonment on count 2 to extent that it imposed further imprisonment beyond the six weeks served in custody before released on bail pending appeal – where applicant argued that sentencing judge imposed sentence not permitted by law – where applicant suffered from mental disorder – whether leave to appeal against sentence should be granted – whether sentence was manifestly excessive

Criminal Code 1899 (Qld), s 359F
Penalties and Sentences Act 1992 (Qld), s 9, s 91, s 92, s 93, s 96

Muldrock v The Queen (2011) 244 CLR 120; [2011] HCA 39, considered
R v Cook [1995] QCA 210, distinguished
R v Hughes [1999] 1 Qd R 389; [1998] QCA 61, considered
R v Macdonald [2008] QCA 384, distinguished
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, distinguished
R v Morris [2010] QCA 315, distinguished

COUNSEL: J J Allen for the applicant
B J Merrin for the respondent

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

[1] **FRASER JA:** The applicant was charged with two counts of stalking between 7 September 2008 and 11 March 2009 with the circumstance of aggravation that she intentionally threatened to use violence. She pleaded not guilty. On 9 November 2011, the third day of the trial before a jury in the District Court and after both complainants had given evidence and the Crown case was almost concluded, the applicant changed her pleas to guilty. The sentence was adjourned and the trial judge ordered the preparation of a pre-sentence report, including a psychiatric or psychological report.

[2] The applicant was sentenced on 31 January 2012. She was re-sentenced on 8 February 2012, after the sentencing judge was informed of the opinion of a corrective services officer that one of the orders was inconsistent with a provision of the *Penalties and Sentences Act* 1992. The court order sheet for 8 February 2012 records that the original orders were "…upheld but corrected as incorrect on Court Order Sheet" and that the applicant was sentenced as follows:

> Count 1: Conviction recorded, and ("s.91(a) PROBATION ORDER") three years' probation commencing on 31 January 2012, upon the conditions in s 93(1) of the *Penalties and Sentences Act* 1992 and the special condition that "Huff attend such psychological/psychia[tric] counselling as required in the period".
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> Count 2: 12 months imprisonment with release on parole fixed at 30 April 2012

[3] In addition, the sentencing judge made a restraining order under s 359F of the *Criminal Code* prohibiting the applicant from contacting either complainant for five years.

[4] The applicant has applied for leave to appeal against her sentence. She did not challenge the restraining order, the recording of convictions, or the probation order (including the special condition), but she challenged the order for imprisonment on count 2 to the extent that it imposed further imprisonment beyond the six weeks she served in custody before being released on bail pending appeal.

[5] One ground of the application is that the sentencing judge imposed "…a combination of sentences for Count 2…" that was not permitted by law. If that was an error, it was rectified by the orders made on 8 February 2012. The only extant orders on count 2 are the conventional orders for imprisonment and release on parole. However the respondent did not contest the applicant's further submission that the order on count 1 was not authorised by the *Penalties and Sentences Act* 1992. The order purports to have been made under s 91(a). It provides that, whether or not the court records a conviction, the court may make a probation order mentioned in s 92(1)(a), which provides that the effect of a probation order is "that the offender is released under the supervision of an authorised corrective services officer for the period stated in the order". Section 92(2) provides that "[t]he period of the probation order starts on the day the order is made …". Reference to s 92(3)

("[t]he requirements of a probation order made under subsection (1)(a) start on the day the order is made") demonstrates that the order under count 1 conflicts with the orders under count 2.

[6] Pincus and McPherson JJA observed in *R v Hughes* that "[e]xcept to the extent specifically permitted under s 92(1)(b), it is neither permissible nor proper to make a probation order to operate concurrently with a sentence of imprisonment."[1] The conflict might be avoided by varying the orders so that the applicant is instead sentenced to a three month term of imprisonment, followed by release under the supervision of an authorised corrective services officer for the remainder of the three years probation order. Such an order is authorised by s 92(1)(b) which (under s 91(b)) applies in a case, such as this, in which a conviction is recorded. Section 92(4) provides that the requirements of such an order start immediately the offender is released from prison.

[7] One issue which was debated before us is whether or not the technical error in the order made on count 1 requires the Court to re-sentence afresh. In view of my conclusion that the remaining ground of appeal, that the sentence is manifestly excessive, must be upheld it is not necessary to resolve that issue in this application.

Circumstances of the offences

[8] Over a period of six months from September 2008, the applicant stalked two separate complainants by means of telephone communications and threatened to use violence against them and their families. The first complainant, Mr Lund, was the former partner of the applicant, the relationship having ended in 2006. The applicant sent him about 75 text messages. He did not know who was sending the messages. The messages included threats regarding money owed, and threats to kill his father and brother, the second complainant, and the second complainant's young daughter. The applicant also included her own name as being the subject of the threats. The applicant also telephoned Mr Lund on about 40 occasions and remained silent when he answered. The prosecutor informed the sentencing judge that Mr Lund had indicated that the offending had no great effect on him personally although he was irritated by it. He was concerned for his family.

[9] The second complainant, Ms Oates, was a close friend of the applicant's and in a relationship with the applicant's brother. The applicant sent her more than 100 text messages. Most were of a threatening nature regarding Mr Lund and $300 he was said to owe. They also included threats against Ms Oates and her eight year old daughter and her sons aged 11 and 13. Ms Oates did not know who was sending the messages. The threats against her daughter included that her house was being watched, her daughter was being watched at school, and her daughter would be molested, raped, mutilated and killed. The applicant also nominated herself as the subject of the threats. Some of the threats were seen by Ms Oates' children. The applicant also called Ms Oates and did not say anything when she answered. Ms Oates was very concerned for the welfare of her children and herself. Not knowing who was responsible, she was also concerned for the applicant. Ms Oates was so concerned for the safety of her children that for two weeks in February 2009 she withdrew them from school. The serious effect of the applicant's offending on Ms Oates was further detailed in her victim impact statement.

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1 *R v Hughes* [1999] 1 Qd R 389 at 392.

[10] The applicant also sent threatening messages to herself. She reported this to police on more than 10 occasions. She made false complaints that: she had been contacted by "Paul" in mid 2008 regarding $300 owed by the first complainant; she and her daughter were the subject of the threats as well since September 2008; she had been assaulted and threatened by an unknown man outside her house; she had been the victim of a home invasion by an unknown man who threatened her, made her undress, shower and masturbate; and "Sean" had approached her and passed on threats said to come from her father. She handed police handwritten notes referring to death threats against her which she claimed she had received in the months before receiving the threatening text messages.

[11] The police investigation into SIM card information revealed that the calls had originated from handsets including ones registered to the applicant. On 11 March 2009 the applicant was interviewed by police. She denied any involvement in the matter, stating that she was being set up by someone. At the conclusion of the interview police informed her that they had a search warrant to execute on her house. On the way to the applicant's house she admitted that she sent the messages but she said that she did so because "he" made her. She said that she could not identify him because he would hurt her and her family. Police executed the search warrant at the applicant's home. She directed police to a mobile phone in a bag in her bedroom as the source of some of the offending messages and calls to the complainants and the applicant. During the search the applicant made admissions about the calls. She said that she had sent texts to Mr Lund and to herself and she had only sent them to Mr Lund when "Sean" was with her; he had made her do it. She said that "Sean" was responsible for sending the messages to Ms Oates. Her explanation for messages to both complainants being the same was that "Sean" looked at the messages she sent. She said that no one in her house would have seen him because he stood outside her window and she handed him her phone.

[12] There was no apparent motive for the applicant's offences. At that time the applicant and Ms Oates were close friends and there was no apparent acrimony between the applicant and Mr Lund.

The applicant's personal circumstances

[13] The applicant was 30 to 31 years old when she committed the offences and she was 34 years old when she was sentenced. She had no criminal history. The pre-sentence report ordered by the sentencing judge disclosed that the applicant was receiving social security benefits by way of a disability pension and/or sole parent benefit. She was residing with a female friend at Killarney, and intended to remain at that address. She was the sole carer of her young daughter. She was considered to be suitable for a community based order allowing for intensive supervision in relation to her offences and participation in intervention addressing her offending behaviour. The applicant was willing to participate in community based supervision.

[14] The pre-sentence report was accompanied by a report by a psychiatrist who examined the applicant on 23 and 24 January 2012. The psychiatrist referred to mental health service records which revealed that the applicant had attempted suicide by overdosing on 7 August 2010, three weeks after the birth of her baby daughter. She had a history of post-traumatic stress disorder and depression and had been taking an antidepressant and an anti-psychotic mood stabiliser, but had

stopped taking the latter medication during her pregnancy. She had been feeling much better since she had resumed taking it and she was no longer suicidal. She was continued on both medications as required. On 17 September 2010, she had been diagnosed with complex post-traumatic stress disorder. She had a history of psychogenic amnesia.

[15] The applicant told the psychiatrist that she had no memory of the offences and no rational motivation for committing them. The applicant gave a history of being persecuted during and since her childhood. The psychiatrist observed that it was impossible to know whether the persecution was real or fantasised, but that the applicant believed the severe trauma (including sexual abuse) which she reported had occurred. However, her reports of harassment by "Sean", "Paul", and the home intruder were probably fantasised memories.

[16] The psychiatrist considered that the applicant suffered a "…serious disorder… comprising a concatenation of Post Traumatic Stress Disorder symptoms and Severe Personality Damage and a variety of Anxiety and Depressive symptoms". She had a "…severely damaged sense of self" and had "…acted out her fears and fantasies through quite irrational and purposeless behaviour… ". In the psychiatrist's opinion, the applicant was badly in need of ongoing psychotherapy. Appropriate treatment might make a "considerable difference" and reduce the chances of self harm and her acting out in "antisocial and self-defeating ways". The psychiatrist thought that there was no significant dangerousness, that there was a risk of suicide or self harm, the risk of her re-offending in the same way was "probably quite low" because of the adverse consequences that had accrued, and the risk of her offending in other ways was "minimal." The psychiatrist recommended that the applicant be required to obtain ongoing counselling or therapy.

[17] The sentencing judge accepted the psychiatrist's assessment, including that the applicant suffered from post-traumatic stress disorder and chronic depression and that her risk of re-offending was probably quite low. The sentencing judge nevertheless found that the applicant's statements to the psychiatrist that she had no memory of the offences were untrue, that the applicant knew perfectly well what she was doing for the whole of the period of her offending, and that she had lied in an endeavour to absolve herself from responsibility.

Consideration

[18] The sentencing judge correctly took into account by way of mitigation that the applicant had accepted responsibility for sending the offending text messages, that she had pleaded guilty (albeit that it was a very late plea), that the applicant had no criminal convictions either before or after the offending, that the risk of re-offending was probably quite low, and that the applicant was a single woman who was the sole carer of her 18 month old daughter. On the other hand, the sentencing judge was also right to take into account the "disgraceful and gravely serious" nature of the applicant's offences, that they had and might for some time continue to have serious negative impacts upon Ms Oates and her children, that the offending involved two complainants over a six month period and included threats to kill or to molest an eight year old girl, and that the applicant lied to police and hampered the police investigation.

[19] The respondent disclaimed any contention that the applicant's offences involved the use of violence for the purposes of s 9(3) of the *Penalties and Sentences Act* 1992.

It follows that the sentencing judge was obliged to have regard to the principles expressed in s 9(2)(a) of that Act that a sentence of imprisonment should only be imposed as a last resort and that a sentence that allows the offender to stay in the community is preferable. The sentencing remarks suggest, as the respondent accepted, that the sentencing judge's decision that a term of imprisonment involving actual custody was nevertheless required was strongly influenced by his Honour's perception that general deterrence was an important sentencing principle in this case. In that respect, the sentencing judge observed that "…there needs to be a clear signal given to those who would act in the way that you acted that conduct of this nature will not be tolerated". The sentencing judge added that the applicant needed to be punished for what she had done.

[20] Certainly general deterrence and punishment are purposes for which sentences may be imposed,[2] as are personal deterrence and denunciation,[3] but the significance of those sentencing purposes in a particular case may be reduced by a mental disorder, including, as in this case, a mental disorder which bears upon the offender's moral culpability (as distinct from legal responsibility) for the offence.[4] In *Muldrock v The Queen*[5] the High Court said:

> "One purpose of sentencing is to deter others who might be minded to offend as the offender has done. Young CJ, in a passage that has been frequently cited, said this: [*R v Mooney* (unreported, Court of Criminal Appeal (Vic), 21 June 1978) at 5, cited in *R v Anderson* [1981] VR 155 at 160]
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> > 'General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others.'
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> In the same case, Lush J explained the reason for the principle in this way:
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> > '[The] significance [of general deterrence] in a particular case will, however, at least usually be related to the kindred concept of retribution or punishment in which is involved an element of instinctive appreciation of the appropriateness of the sentence to the case. A sentence imposed with deterrence in view will not be acceptable if its retributive effect on the offender is felt to be inappropriate to his situation and to the needs of the community.'
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> The principle is well recognised. It applies in sentencing offenders suffering from mental illness, and those with an intellectual

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2 *Penalties and Sentences Act* 1992, s 9(1)(c) and (a).

3 *Penalties and Sentences Act* 1992, s 9(1)(c) and (d).

4 See *R v Yarwood* [2011] QCA 367 at [23] – [26], referring to *R v Tsiaras* [1996] 1 VR 398 at 400, *R v Verdins* (2007) 16 VR 269; [2007] VSCA 102 at [5], [32], and *R v Goodger* [2009] QCA 377 at [21], referring also to *R v Dunn* [1994] QCA 147 and *R v Neumann; ex parte A-G (Qld)* [2007] 1 Qd R 53.

5 (2011) 244 CLR 120 at [53] – [54], per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

> handicap. A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community."

[21] The accepted evidence of the psychiatrist was to the effect that there was a substantial causal relation between the applicant's mental disorder and her offending. (That accorded with the absence of any apparent, rational motive for the applicant's offences, particularly her offences against her close friend, and the odd and transparently false explanations which the applicant gave police for her offending.) In the particular circumstances here, the sentencing purposes of general deterrence, punishment, and denunciation assumed much less significance than in cases involving persons of ordinary capacity. In my respectful opinion, the sentencing judge's emphasis upon general deterrence and punishment was misplaced.

[22] The respondent referred to *R v Macdonald*[6] and *R v Morris*[7]. Those cases involved the same offence, but neither offender suffered from any mental disorder. It is therefore unsurprising that general deterrence was regarded as a significant consideration in the sentence of imprisonment in each case.[8] The respondent referred also to *R v Cook*[9] and *R v Maniadis*[10], in which offenders who had made obscene telephone calls involving some threats were re-sentenced on appeal to a wholly suspended sentence of imprisonment (*Cook*) or probation (*Maniadis*). In *Cook*, the sentence was strongly influenced by the fact that the offending was attributable to problems associated with his alcoholism and a custodial sentence would be detrimental to his mental health. In *Maniadis* the sentence was influenced by accepted psychiatric evidence that there was a connection between the offences and the offender's extreme depression and that his prospects of rehabilitation would be improved by continuation of his treatment outside the prison system. The circumstances here are quite different, but this is another example of a case in which the significance of general deterrence, punishment and denunciation is substantially reduced by the effect upon the applicant's offending by a mental disorder.

[23] The maximum penalty for each offence is seven years imprisonment.[11] Despite the effect of the applicant's mental disorder, the respondent's submission that the sentence was not manifestly excessive finds some support in the seriousness of the applicant's threats to the complainants, particularly in count 2, and her inability to claim the benefit of remorse or an early plea of guilty in circumstances in which she was found to have known what she was doing and had falsely told the psychiatrist that she had no memory of committing the offences. It must also be borne in mind,

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6 [2008] QCA 384.
7 [2010] QCA 315.
8 See *R v Morris* at [21] and *R v Macdonald* at [16].
9 [1995] QCA 210.
10 [1997] 1 Qd R 593.
11 *Criminal Code*, s 359E(1).

however, that the *Penalties and Sentences Act* 1992 provides that the sentencing purposes include providing conditions in the court's order that that the court considers will help the offender to be rehabilitated.[12] The sentencing judge was not bound by the psychiatrist's "strong recommendation" that the applicant should not receive a custodial sentence but should remain in the community with a requirement that she obtain ongoing counselling or therapy. Nevertheless, that recommendation evidently reflected the psychiatrist's opinion that the applicant's rehabilitation would best be promoted in the community rather than in the prison system. Furthermore, for that reason and because of the sentencing judge's finding that there was a low probability that the applicant would re-offend, the custodial sentence imposed upon the applicant could not be justified by reference to personal deterrence[13] or protection of the community.[14] In my respectful opinion, the sentence imposed on count 2 was manifestly excessive.

[24] Accordingly, it is necessary to sentence the applicant afresh. The applicant did not challenge the provision for six weeks in actual custody. That period in custody, coupled with the order for three years' probation upon the conditions imposed by the sentencing judge, is certainly sufficient to fulfil all of the legitimate sentencing purposes, including the attenuated requirements in this case of general deterrence, punishment and denunciation. I would therefore accede to the applicant's submission that this Court should re-sentence the applicant on count 2 to six weeks imprisonment followed by the balance of the three years probation order made by the sentencing judge. That sentence is intended to reflect the applicant's criminality in both counts.

Proposed orders

[25] In a supplementary submission made at the court's request on 9 May 2012, the applicant's counsel confirmed that, in accordance with s 96 of the *Penalties and Sentences Act* 1992, the applicant agrees to the probation order set out below being made and agrees to comply both with the requirements in s 93 of the Act and the requirement that she submit to such medical, psychiatric or psychological assessment and treatment as is directed by an authorised corrective services officer.

[26] In my opinion the following orders are appropriate:

1. Grant the application for leave to appeal against sentence.

2. Allow the appeal.

3. Set aside the sentence and orders made in the District Court on 8 February 2012.

4. Vary the sentence and orders made in the District Court on 31 January 2012 so that those orders provide that:

   (a) In relation to count 1:
      (i) A conviction is recorded.

   (b) In relation to count 2:
      (i) A conviction is recorded.

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12 *Penalties and Sentences Act* 1992, s 9(1)(b).
13 *Penalties and Sentences Act* 1992, s 9(1)(c).
14 *Penalties and Sentences Act* 1992, s 9(1)(e).

(ii) A probation order is made having the effect:
1) The applicant is sentenced to a term of imprisonment of six weeks.
2) At the end of that term of imprisonment the applicant be released on probation under the supervision of an authorised corrective services officer for the remainder of the period of three years commencing on 31 January 2012.

(iii) The order is to contain a general requirement that the applicant must report to an authorised corrective services officer at Townsville on or before 31 May 2012.

(iv) The order is to contain an additional requirement that the applicant submit to such medical, psychiatric or psychological assessment and treatment as it is directed by an authorised corrective services officer.

(c) Pursuant to s 359F of the *Criminal Code* the applicant must not contact Byron Anthony Lund or Joyce Sharron Oates during the period of five years from 31 January 2012.

[27] **GOTTERSON JA**: I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[28] **FRYBERG J:** I agree with the orders proposed by Fraser JA and with his Honour's reasons for them.