SUPREME COURT OF QUEENSLAND

CITATION:	*R v M; ex parte A-G* [1999] QCA 442
PARTIES:	**R** v **M** (Respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (Appellant)
FILE NO/S:	CA No 251 of 1999 Indictment No 1155 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against sentence by Attorney-General
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 November 1999
DELIVERED AT:	Brisbane
HEARING DATE:	8 October 1999
JUDGES:	McPherson and Davies JJA and Jones J
ORDER:	**Appeal allowed. Sentencing orders imposed in the District Court set aside. In lieu, respondent to be sentenced in respect of each offence to imprisonment for 18 months with a recommendation that he be considered eligible for parole after six months. Both sentences to be served concurrently.**
CATCHWORDS:	CRIMINAL LAW – OFFENCES AGAINST DECENCY AND MORALITY JURISDICTION, PRACTICE AND PROCEDURE – Judgment and punishment – intensive correction order – whether a protection order can operate concurrently with a sentence of imprisonment. *Penalties and Sentences Act* 1992 s 92, s 112, s 113 *R v B; ex parte Attorney-General* [1997] 1 Qd R 523 *R v L; ex parte Attorney-General* (CA No 373 of 1998, 3 December 1998) *R v Pham* (CA No 435 of 1995, 6 February 1996) *The Queen v Hughes* (1998) 100 A Crim R 336 *The Queen v Wain* (CA No 178 of 1998, 4 August 1998)
COUNSEL:	Mr M Byrne QC for appellant Mr J McLennan for respondent
SOLICITORS:	Director of Public Prosecutions (Queensland) for appellant Legal Aid Queensland for respondent

1 **McPHERSON JA**: This is an appeal by the Attorney-General against a sentence imposed in the District Court on the respondent, who pleaded guilty to two counts of indecent treatment of a child under the age of 16 years, coupled in each case with the circumstance of aggravation that the child was under 12 years . The sentence imposed in respect of count 1 was imprisonment for 12 months to be served by way of an intensive correction order; and, in respect of count 2, probation for three years. Convictions were recorded, and the learned judge ordered that the respondent undergo psychiatric treatment and counselling as directed.

2 The circumstances of the offence and the personal details of the respondent are set out in the reasons of Jones J, which I have had the advantage of reading. The first point relied on by Mr Byrne QC on behalf of the Attorney is that a sentence which, as in this case, sought to combine a period of probation with an intensive correction order is not authorised by the *Penalties and Sentences Act* 1992. In *Hughes* [1999] 1 QdR 389, 392, it was said that, except 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". Here a sentence of imprisonment for 12 months was imposed, which on the face of it conflicts with what was said in *Hughes*. However, under s 112 of the Act the learned sentencing judge also made an intensive correction order in respect of that sentence. Section 113(1) provides that the effect of an intensive correction order is that the offender is to serve the sentence of imprisonment "in the community and not in a prison".

3 There is, as has been remarked elsewhere, an element of statutory fiction in the notion of a sentence of imprisonment being served outside a prison. However, Parliament if it chooses may, as it is sometimes said, declare white to be black, or a man a woman, or that service of a sentence "in the community" is service in prison. In theory, therefore, the sentencing orders made in respect of these two offences were, on the authority of *Hughes* not capable of being made to operate concurrently. More cogently perhaps, it is apparent that in some circumstances they are capable of leading to inconsistency. If, for example, under s 127(1) an intensive correction order is revoked and the offender is committed to prison, it would not be possible for a concurrently operating probation order to continue being complied with. Even without revocation of the intensive correction order, there is a potential in some circumstances for conflicts to arise in complying simultaneously with orders in both forms. In substance, if not in form, an intensive correction order is a special form of probation order, with particular requirements some of which do not sit altogether comfortably with the more general form of probation order made under Division 1 of Part 5 of the Act or the requirements it imposes.

4 This being so, it seems to me, that in making these two different forms of order to operate concurrently, his Honour's sentencing discretion miscarried in this instance, and the appeal must therefore be allowed on that ground. It becomes necessary now for this Court to re-exercise that discretion and sentence the respondent afresh.

5 The circumstances of the offence for which the respondent was sentenced are described in the reasons of Jones J. The complainant was a boy aged only 7 years who is the nephew of the respondent, who at that time was living with the boy's family. The two offences were committed on successive nights at some time between late December 1996 and June 1997, and involve his going into the

bedroom and sucking the boy's penis, and on the following night, fondling it. There is, perhaps not surprisingly, no victim impact statement from the boy himself; but it ought not, in my opinion, necessarily to be assumed that these two incidents have had, or will have, no effect at all on his outlook. It was some months after the event, and after the family had moved to Victoria, that the boy complained to his parents, which suggests he was still pondering it some time later. What makes the offence more serious in this instance is that the respondent was at the time living as a guest in the boy's home, and, no doubt because he was his uncle, was trusted to enter his room at night when the boy was in bed. The parents could hardly have expected that he would behave like that toward their child. The respondent evidently appreciated the seriousness of his misconduct because he suggested to the child that they should keep it a secret.

6 The respondent himself had an extremely disturbed childhood in which he suffered greatly from continual sexual abuse by older men around him. In his careful psychological report, Mr Hatzipetrou records the respondent's experiences as a child and the detrimental effect it has had on his state of mind and his self-esteem. Almost everything that is said in that report attracts strong sympathy for the respondent, although Mr Hatzipetrou notes that, while it is important to acknowledge the significant impact of the alleged abuse, "there seem to be other variables which may contribute to [the respondent's] behaviour". He also observes that "under the effects of illicit substances or alcohol and perceived distress", the respondent remains at risk of committing a similar offence. That risk, he considers, may be reduced by the respondent's participating in structured rehabilitation under close supervision, and Mr Hatzipetrou's recommendation is that he takes part in the sex offender treatment programme offered by Queensland Corrective Services.

7 The respondent is now some 30 years of age and was about 28 years old at the time of the offences. He has no prior offences of this kind; but has a not inconsiderable history of offending in other ways, in which breaking and entering, and especially drug offences, appear with some frequency. What is of some importance for present purposes is that in 1993 he breached a probation order and in 1994 a fine option order. I consider that his personal background and the circumstances of the subject offences compare, but in some ways unfavourably, with those in *R v L*, *ex p Attorney-General* (CA No 373/1998), in which this Court in December 1998 increased the sentence of a 38 year old offender, who had committed and pleaded guilty to two similar offences committed against a 10 year old boy, who was the son of friends. The sentence originally imposed there of imprisonment for 15 months suspended for four years on one count, and probation for three years on the other, was replaced in this Court with a sentence, on each count, of imprisonment for 12 months to be suspended after three months, with an operational period of two years. In that instance, there was evidence of remorse, a previously unblemished personal record, and some explanation for the offence in the offender's personal circumstances arising from the recent breakdown of his marriage. However, there was, it must be said, evidence there of serious and possibly long-term effects on the complainant boy.

8 No two sentencing cases are ever precisely alike; but, making due allowance for inevitable differences, it seems to me that the *L* case, which is a recent decision of this Court, affords an appropriate sentencing standard in this instance. In *R v Pham* (CA No 435/1995) it was said that "other than in exceptional circumstances, those who indecently assault or otherwise deal with children should

be sent to gaol". That proposition, although not to be taken as an absolute rule, has been applied in so many subsequent cases that it should not now be departed from without compelling reason.

9 The only reason that can be suggested for departing from it here is the respondent's own unhappy and abused childhood, and his present depressive or anxious state of mind. There is, however, not enough to suggest that he is intellectually impaired or otherwise not fully responsible for his actions. His condition merits sympathy and treatment; but, while the factor of rehabilitation is prominent in his case, it is not the exclusive or even the dominant consideration to be borne in mind. Other matters, such as personal and general deterrence, and vindication of the right of this victim and others to be protected from such conduct, have a proper place in the sentencing process. In any event, the psychologist's report suggests that the respondent's prospects of successful treatment under the Queensland Corrective Services programme are at least as good under a sentence of detention in prison as they would be outside it.

10 When all these factors are brought to account, the offences are in my opinion sufficiently serious to call for a sentence to be served in prison. The appeal should be allowed and the sentencing orders imposed in the District Court should be set aside. In lieu, the appellant should be sentenced on each count to imprisonment for 18 months, with a recommendation that the respondent be considered eligible for parole after serving six months of that sentence. It is not intended to disturb the orders recording convictions, or the recommendation that the respondent undergo psychiatric or psychological treatment.

[11] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of McPherson JA and of Jones J. I agree with both of their Honours that the sentences imposed below, because they cannot operate together, must be set aside. In this respect I do not need to add to the reasons given by Jones J in par [40] and par [41] of his reasons. It follows that this Court must sentence the respondent afresh.

[12] I also agree with both of their Honours that the respondent's personal history commands considerable sympathy; and, to some extent it explains his conduct here. It is also true that this offence is at the lower end of the range of offences of this kind as, of course, were those in *L* (CA No 373 of 1998, 3 December 1998), which provides a useful analogy.

[13] On the other hand, as Jones J has noted, it appears from the psychologist's report that there is a real risk that the respondent may re-offend, particularly under the influence of illicit substances or alcohol, a risk which may be reduced by the respondent's participation in structured rehabilitation with close supervision. It seems plain that this can best be achieved within the structured environment of the prison system.

[14] Had it not been for the factor mentioned in the preceding paragraph this case would have been a borderline one, in my view, as to whether a term of actual imprisonment was required although cases such as *L* indicate that the circumstances of these offences fall on the more serious side of that borderline.

[15] I therefore agree with the orders proposed by Jones J.

[16] **JONES J:** On 2 July 1999 the respondent pleaded guilty to two counts of indecent dealing with a child under the age of 16 years with a circumstance of aggravation.

[17] He was sentenced in relation to the first count to 12 months imprisonment to be served by way of an intensive correction order and on the second count to three years probation.

[18] The Honourable the Attorney-General appeals against such sentences on the grounds that:
(i) the sentences were manifestly inadequate;
(ii) they failed to take into account the aspect of general deterrence; and
(iii) the learned sentencing judge gave too much weight to mitigating factors.

[19] At the time of the offences the complainant was seven years of age. He was the son of the respondent's older sister.

[20] The respondent was born on 20 May 1969 and was therefore 28 years old at the time of the offences and is 30 years of age now. The respondent commenced to live with his sister and her children in late December 1996. Some time between then and the next few months, the respondent on consecutive nights went to the complainant's bedroom and sexually interfered with him. On the first visit his conduct involved the sucking of the complainant's penis and on the second night the handling of the complainant's penis.

[21] The incidents were reported to Victorian Police in August 1997. The respondent was interviewed by the police in September 1998 - a considerable time after the offence. At first he denied the conduct but now accepts that he did engage in the acts complained of but has little recollection of them.

[22] There is very little information about the effects this conduct had on the seven year old lad. The incidents occurred over a two-day span and were reported quickly. The likelihood of any long-term damage would seem to me to be slight in a child of this age, provided the child received appropriate care and advice about the events.

[23] The respondent himself was a victim of serious and prolonged sexual abuse at the hands of his stepfather, his stepfather's friends and his older brother. This abuse commenced when he was approximately 12 years of age and continued until he was 15 years when he left home because of the mistreatment. The details of this abuse are set out in a statement made by the respondent to the police on 28 January 1999 some months after he was spoken to about this matter. That statement was tendered as Exhibit 3 in the sentence proceedings and was apparently accepted by the learned sentencing judge as a truthful account of that period of the respondent's life. On the hearing of this appeal the learned Crown prosecutor took no issue about the accuracy of the statement.

[24] In summary, the respondent described the sexual abuse by his stepfather which initially involved the fondling and sucking of the respondent's penis and digital penetration of his anus. Acts of this kind occurred with a frequency of about three times per week. These activities took place at the respondent's home or at the stepfather's workplace or at another residence also occupied by the stepfather. Thereafter there was an escalation of the abuse of the respondent. He was introduced to a man named Rod who had oral sex with the respondent and sodomized him on approximately 10 occasions. He was also sodomized by his

stepfather and on some occasions by both men in turns. When the respondent was 13 years of age he was introduced to a man named Peter who, like his stepfather, was employed as a bus driver. The stepfather arranged for Peter to engage in indecent acts with the respondent. The respondent continued to be sodomized by his stepfather until he was approximately 15 years of age when he left his home to live in the house of his sister. Despite this, the stepfather maintained contact and over the next few months both assaulted and forced himself upon the respondent. After a short time at the home of his sister, his brother forcibly made the respondent return to his mother's home. He was then beaten by his mother for having run away.

[25] Throughout this period it seems that the respondent had no personal or emotional support and certainly no treatment or care. Not surprisingly then he turned to alcohol and the use of illicit drugs.

[26] The details of the abuse and its consequences were the subject of a report by a psychologist, Mr Luke Hatzipetrou. From this report comes the information that the respondent has suffered serious psychological harm as a consequence of that abuse. He suffers from an affective disorder viz. depression, he has suicidal ideations and suffers from the effects of substance abuse. He initially used cannabis but this caused psychotic symptoms so he turned to amphetamines and heroin. He is a person who is in need of intensive counselling and medical care.

[27] At the time of these offences the respondent had been drinking. The extent to which he may have been affected by alcohol is not known and consequently as Mr Hatzipetrou stated □it is difficult to evaluate causes or precipitants of this behaviour and whether there have been other incidents of this nature□. The disinhibiting effects of alcohol may have played a part in his undertaking the action in question and of course it gives rise to a risk of committing similar offences whilst □under the deleterious and disinhibiting effects of substance abuse□.

[28] In his report Mr Hatzipetrou stated -

> "Even though [the respondent] could not recall his actions he had demonstrated empathy towards the victim and remorse for his actions. Similarly [the respondent] appeared to have an understanding of the consequences of his actions and the possible impact on his nephews and himself. [the respondent] denied any motivation or planned intentions to commit such an offence. Moreover he denied having any deviant fantasies relating to his nephews or others. Whilst [the respondent] presents with social skill deficits, history of dysfunctional relationships and poor coping mechanisms he did not demonstrate any sexual deviancy or cognitive distortions, often observed in sexual offenders."

In a balanced report Mr Hatzipetrou draws attention to the risk that the respondent might re-offend particularly under the influence of illicit substances or alcohol. That risk would be reduced with the respondent's participation in structured rehabilitation and close supervision.

[29] Whilst the respondent has a criminal record it does not contain features particularly relevant to these offences. The first recorded offence occurred when the respondent was 17 years of age and involved a series of breaking, entering and stealing for which he was placed on probation. This was followed by offences relating to drugs and stealing for which he was fined or placed on probation. He served one period of

imprisonment of three months related to stealing offences. Importantly the criminal record does not include any offences which involve sexual deviation.

[30] Both before the sentencing judge and before this Court, the appellant argued that the penalty should be in line with the decision of *R v L; Attorney General*, CA No 373 of 1998. The learned sentencing judge noted that if *L* had to be applied he would not hesitate in adopting that course. He felt however that he was able to distinguish that decision.

[31] L was convicted of two counts of indecent dealing of a boy who was 10 years of age. L was 38 years of age at the time and was employed as the station master at Capella in Central Queensland. He had no previous convictions, a good work record and had engaged in substantial voluntary community work. As a partial explanation for his aberrant behaviour the court was told that his marriage had broken down; that he had had difficulties associated with this fact in the isolated community of Capella.

[32] L's conduct on the first count consisted of his inviting the complainant boy into his bed whilst he accompanied the complainant's family on a camping trip. He put his hand down the front of the boy's shorts and rubbed the boy's penis on the outside of the underpants. The second offence occurred a couple of months later when the complainant and the offender were on a fishing trip when he again touched the boy's penis on the outside of his pants causing it to become erect.

[33] On the first count L was sentenced to 15 months imprisonment wholly suspended and on the second count, three years' probation. On appeal by the Attorney-General the sentence in each case was altered to a term of imprisonment for 12 months to be suspended after serving three months.

[34] In deciding *L* the Court of Appeal reviewed a number of cases and referred particularly to *R v Wain* (CA No 178 of 1998). In that case the Court of Appeal endorsed a nine month term of imprisonment as being ordinarily appropriate in circumstances of the kind with which the Court is concerned here. The court observed that that nine month sentence was imposed at the time when the maximum penalty for this offence was five years' imprisonment. Now the maximum penalty has been increased to 10 years' imprisonment. In his judgment in *L*, de Jersey CJ said -

> "But with this sort of conduct, deliberative, occurring more than once, arousing the child sexually for the offender's own gratification, leaving a victim emotionally affected in a not insubstantial way, betraying the trust of the child and his family, with this substantial discrepancy in ages and particularly the complainant's tender years, I am confident that reasonably minded members of the community would expect the offender to have to serve a term of imprisonment notwithstanding the other features which operate in mitigation."

[35] There is a reasonably clear tariff range for offences of this kind committed by a mature man with deliberation and repetition against a young boy even without physical violence.

[36] The case before us however has unusual features which in my view calls for an additional consideration. The respondent, though of mature years, suffers from psychological deficits which one might reasonably assume have some of their

origin in his traumatized teenage years. He is susceptible to disinhibiting effects of alcohol which may provide some explanation, though no excuse, for his conduct on this occasion.

[37] The important consideration in the sentencing process was the rehabilitation of the respondent and through that the reduction of the risk of his further offending. The learned sentencing judge whilst not overlooking other aspects of sentencing, eg deterrence, clearly approached the case as one which required close attention to the personal circumstances of the offender.

[38] In so doing, His Honour's decision was in accord with the requirements referred to in *R v B ex parte Attorney-General* [1]that □personal circumstances need to be very weighty□ to warrant a deviation from the normal range. I agree with the learned sentencing judge that the personal circumstances of the respondent warranted the approach that he took.

[39] An issue however arises as to whether the sentence of 12 months' imprisonment, to be served by way of an intensive correction order, and the probation order, for three years, can be reconciled.

[40] It is clear enough from the terms of s 92 of the *Penalties and Sentences Act* 1992 and a number of authorities that it is □neither permissible nor proper to make a probation order to operate concurrently with a sentence of imprisonment□.[2] Counsel for the respondent argued that an intensive correction order in practical terms is essentially an intensive form of probation order and that in reality there is no inconsistency in compliance with the two orders. Such a submission however ignores the express terms of the legislation. Pursuant to s 113 of the *Penalties and Sentences Act* the effect of the intensive correction order is □that the offender is to serve the sentence of imprisonment ... in the community and not in a prison□. The very term allows one to conclude only that it is a term of imprisonment. Additionally, the order gives power to an authorized officer to detain an offender by requiring residence at residential facilities for periods not longer than seven days at a time (s 114(1)(f)), and further the court may revoke the order and commit the offender to prison immediately for the balance of the term of the order (s 127).

[41] Whatever may be the practical effects of the way in which an intensive correction order and a probation order are implemented and administered, there remains always the potential for a conflict to arise in the operation of two such orders. The legislation specifically permits a probation order to follow imprisonment for a period not exceeding six months but precludes its being ordered in conjunction with any longer period of imprisonment.

[42] Having come to the view that the sentences are inconsistent in this case it is necessary now for this Court to exercise its sentencing discretion anew.

[43] The penalty to be imposed on the respondent must in this case have particular regard to the personal circumstances of the respondent. The interests of the community are best served by choosing a course which gives the respondent the

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1 [1997] 1 Qd R 523 per Pincus JA and Ambrose J with McPherson JA concurring – at p 524.

2 *R v Hughes* [1999] 1 QdR 389, 392; *R v Evans* [1958] 3 AllER 673; *Lihou ex parte Attorney-General* [1975] Qd R 44.

best chance of rehabilitation by the end of the sentence period. This is most likely to be achieved in an environment where the respondent will have to undergo medical, psychological and psychiatric treatment in an orderly and structured way. This is most likely to be achieved in the prison setting. If he were to remain in the community there is a likelihood of a repetition of the situation which occurred at the respondent's first interview with Mr Hatzipetrou when he arrived dishevelled, unshaven and was unresponsive to questions having self-administered heroin prior to the appointment. Such conduct would be likely to provoke a revocation of any community based order.

[44] The appropriate duration of the respondent's detention in prison, with a view to establishing a treatment regime, is difficult to assess. I would expect that a six months' term would be sufficient though there is no way of being sure about this. It is this uncertainty which dictates the choice between sentencing options that follow namely whether to make a probation order to follow the six months' imprisonment or whether to order a longer term of imprisonment with a recommendation to the Parole Board for release after six months.

[45] Whether the respondent is on probation or on parole, his supervision in the community will be handled by the same officers who would have the same powers to compel the undertaking of counselling and therapy and testing for drugs abuse.

[46] The advantage of selecting the option of a longer term of imprisonment with a recommendation for early consideration of parole means that the Parole Board would have first- hand information as to the success of the respondent's initial treatment and his willingness to pursue that treatment after release.

[47] But for the problem of the inconsistency of the orders made by the learned sentencing judge I would not, having due regard to the respondent's personal circumstances, have regarded the sentences imposed as being manifestly inadequate. The fact that new orders must be made allows the opportunity to consider afresh the best course for the respondent's rehabilitation.

[48] For the reasons that I have expressed I would allow the appeal and set aside the orders made in the District Court. In respect of each offence the respondent should be sentenced to imprisonment for 18 months with a recommendation that he be considered eligible for parole after six months. Both sentences to be served concurrently. I would further recommend that the Corrective Services officers take all necessary steps to facilitate appropriate medical, psychological and psychiatric testing and treatment for the respondent.