SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dundas* [2017] QCA 107
PARTIES:	**R** **v** **DUNDAS, Gary Keith** (applicant)
FILE NO/S:	CA No 17 of 2017 DC No 2254 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 27 January 2017
DELIVERED ON:	30 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	11 May 2017
JUDGES:	Morrison and Philippides and McMurdo JJA 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 – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – EFFECT OF SENTENCE OF IMPRISONMENT ON PRISONER – where the applicant was convicted on his guilty plea of one count of using a carriage service to access child pornography (count 1) and one count of possessing child exploitation material (count 3) – where the applicant was sentenced to two years imprisonment on each of counts 1 and 3 to be served concurrently, to be suspended after serving six months – where the applicant suffered from Asperger's disorder and a number of physical illnesses – where the applicant's application to adduce further evidence of the effect of the custodial sentence on him was refused – where the sentencing judge accepted that the applicant's medical conditions would make incarceration specifically onerous for the applicant – whether the sentencing judge gave adequate weight to the applicant's personal circumstances – whether the sentencing judge erred by finding that the applicant's medical conditions could be appropriately managed in custody – whether requiring the applicant to serve a term of actual imprisonment was manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE –

SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his guilty plea of one count of using a carriage service to access child pornography (count 1) and one count of possessing child exploitation material (count 3) – where the applicant was sentenced to two years imprisonment on each of counts 1 and 3 to be served concurrently, to be suspended after serving six months in custody – where the majority of the material possessed by the applicant was Category 1 material – where the applicant accessed only a proportion of the material he possessed – where the applicant entered a timely plea of guilty – where the applicant cooperated with police – where the applicant had no prior criminal history – where the applicant suffered from a hoarding disorder – whether the sentencing judge failed to give adequate regard to the comparable appellate authority of *R v Grehan* – whether the applicant's sentence was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 9

R v Crouch; R v Carlisle [2016] QCA 81, cited
R v Davis [2012] QCA 324, considered
R v Garget-Bennett [2013] 1 Qd R 547; [2010] QCA 231, considered
R v Grehan (2010) 199 A Crim R 408; [2010] QCA 42, distinguished
R v Pham (2015) 256 CLR 550; [2015] HCA 39, applied
R v Pope; Ex parte Attorney-General (Qld) [1996] QCA 318, considered
R v Verburgt [2009] QCA 33, cited

COUNSEL: D R Wilson for the applicant
S J Farnden for the respondent

SOLICITORS: Guest Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have read the reasons of Philippides JA and agree with those reasons and the order her Honour proposes.

[2] **PHILIPPIDES JA:** The applicant was convicted on his guilty plea to one count of using a carriage service to access child pornography material, contrary to s 474.19(1) of the *Criminal Code* 1995 (Cth) (the Cth Code) (count 1) and one count of possessing child exploitation material, contrary to s 228D of the *Criminal Code* 1899 (Qld) (the Qld Code) (count 3). The Crown elected not to proceed on count 2 of the indictment.

[3] The applicant was sentenced to two years imprisonment on each of counts 1 and 3, to be served concurrently. In relation to count 1, it was ordered that the applicant be released after serving six months upon entering into a recognizance conditioned on his being of good behaviour for three years. In relation to count 3, it was ordered that the term of imprisonment be suspended after the applicant served six months, with an operational period of three years. Accordingly, the applicant is subject to a total effective sentence of two years imprisonment, with release after he has served six months.

[4] The applicant seeks leave to appeal against his sentence on the sole ground that the sentence imposed was manifestly excessive. The applicant does not challenge the head sentence of two years imprisonment but submits that the requirement that he serve six months in actual custody was manifestly excessive in all of the circumstances.

Circumstances of the offending

[5] The applicant was sentenced on the basis of an agreed schedule of facts. Count 1 related to the applicant downloading three videos depicting child exploitation material or child pornography ("CEM") from the internet. Specifically, the applicant downloaded on three occasions the following videos:

- A three minute and three second clip accessed on 12 May 2014 depicting a pre-pubescent female child dancing whilst removing her clothing and spreading her labia for the camera.
- A two minute and 24 second clip also accessed on 12 May 2014 depicting the same child dancing and removing her clothes. She is shown using a vibrator on herself and the camera zooms in on her vagina and anus, showing her spreading her labia. It was a Category 2 video (child non-penetrative).
- A four minute and 14 second clip accessed on 17 July 2014 depicting a pre-pubescent girl wearing a g-string and a poncho whilst blindfolded. An adult hand is shown pulling the g-string aside to show the child's vagina. It is moved a second time to show the child's anus. The video shows a number of close ups of the child's anus and vagina and a number of camera flashes can be seen going off in the video. It was a Category 3 video.
- An analysis of the applicant's laptop shows the applicant had searched file-sharing websites and bookmarked search results.

[6] Count 3 covered a period of approximately nine years and eight months and related to photographs and videos, depicting CEM, which were found on nine devices (four external hard drives, three CDs and two laptop computers) in the applicant's possession. A complete table of the various categories of the material is contained in the schedule of agreed facts. In total, the applicant was in possession of 523 CEM movies (of which 475 were unique) and 36,711 images (of which 32,414 were unique). The videos ranged from Category 1-5 and the images from Category 1-6; however, the majority of the material falls into Category 1 (no sexual activity depicted). Category 4 material concerned child/adult penetration, Category 5 material concerned sadism/bestiality and Category 6 material concerned animated/virtual images.

[7] The applicant did not participate in a formal police interview. However, during the execution of the search warrant, he made admissions to police that he used the BitTorrent program and that he knew of the nature of the CEM on the hard drives. The search warrant had initially been exercised at the applicant's partner's house. After no relevant material was found at the applicant's partner's house, police asked the applicant to allow them to conduct a search of his premises on a voluntary basis, where the material subject of the charge was found. He cooperated with police and agreed to this request.

Sentencing remarks

[8] In imposing a sentence that required a period of actual imprisonment to be served, the sentencing judge observed that:

> "The offending is regarded as serious, and significant penalties have been applied and steadily increased by the legislature.
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> …
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> It seems to me that the sentencing process is bound to regard these are serious offences, in your case in particular, because of the length of time over which you gained possession of the child exploitation material and the vast number of files that were found on the computers and hard drives that were in your possession, and it seems to me it is the length of period over which you accumulated these images as well as the significant number of them that, in the end, leads me to the conclusion that a period of actual imprisonment is required in this case."

[9] His Honour noted, in the applicant's favour, that he had no prior criminal history. His Honour had regard to a number of matters of mitigation, including that the applicant entered timely pleas, he was to be given credit for his cooperation in the administration of justice, and the pleas and cooperation with the police were to be regarded as evidence of genuine remorse. His Honour noted that the applicant's work history demonstrated that he had, at times, been able to be a good worker. However, because of the applicant's medical conditions, he had been unable to work for the last five years or so and was on a disability support pension.

[10] His Honour had particular regard to the fact that the applicant suffered from a significant number of medical conditions, including an atrial flutter, hypertension, obesity, hyperlipidaemia and type 2 diabetes. The applicant also suffered from sleep apnoea, in particular obstructive sleep apnoea, and idiopathic hypersomnia. These conditions had the result that the applicant was liable to fall asleep with little or no warning and was more likely to sleep during the day than at night. He was prescribed a complex regime of medications for these conditions.

[11] His Honour also accepted that the applicant had been diagnosed by Dr Gills, his treating psychiatrist, as suffering from Asperger's disorder and a hoarding disorder. His Honour accepted the opinion of Dr Gills that incarceration was likely to be specifically onerous for the applicant because of his physical and psychiatric illnesses. His Honour stated that the applicant's hoarding disorder might explain, in part, why some of the CEM had been kept for so long seemingly without being regularly accessed.

[12] While concluding that the offending was serious to the point where the only available sentence was one of imprisonment, including some period of actual custody, his Honour ameliorated the term of imprisonment of two years by only requiring six months of that period to be served. In so doing, the sentencing judge commented:

> "Whilst I accept that some of the medical conditions you suffer can be appropriately managed in custody, it seems to me that there will nevertheless be some adverse consequence for you beyond what will be – what would be the norm for a person being sentenced to imprisonment, and, certainly, your psychological diagnosis is likely to be a significant impact on you beyond the norm. What that means is that it is … something that should be taken account of in the sentencing process, and there should be some mitigation of the penalty to reflect that that will be more onerous on you even though you will be sentenced to a period of actual imprisonment."

The applicant's submissions

[13] The applicant submitted that the following errors relating to the matter of the applicant's medical conditions resulted in a manifestly excessive sentence:

(1) the sentencing judge failed to give adequate weight to the applicant's difficulties;

(2) the applicant would suffer in custody as a result of his Asperger's disorder and medical conditions;

(3) the sentencing judge erred by finding that the applicant's medical conditions could be appropriately managed in custody; and

(4) the sentencing judge failed to give adequate regard to comparable appellant cases, specifically the decision in *R v Grehan*.[1]

[14] The applicant submitted that these errors, individually or in combination, resulted in the sentencing discretion miscarrying by requiring the applicant to serve six months in custody. It was submitted that the appropriate sentence, taking into account the applicant's conditions, was one which allowed for the applicant to be released immediately or after a shorter period of incarceration.

[15] On the hearing of the application for leave to appeal against sentence, the applicant sought, but was refused, leave to adduce further evidence in the form of an affidavit by the applicant addressing the issue that difficulties, which were subject of submissions at the sentence, had indeed manifested during his incarceration.

Grounds 1 to 3 - The applicant's medical conditions

[16] Whilst it was accepted by the applicant that custodial sentences are ordinarily called for in matters such as those of which the applicant was convicted, it was submitted, relying on *R v Verburgt*,[2] that there was no absolute requirement that a defendant serve a period of actual custody. In that regard, the applicant submitted that, in the present case, there were a number of subjective features which mitigated his offending such that a custodial term was not required. In addition to his medical conditions, these factors included:

(1) the majority of the material possessed was categorised as Category 1 material (the least serious category);

(2) the access charge covers a relatively short period of time;

(3) notwithstanding the volume of files possessed, the applicant only accessed 1,500 of them;

(4) the applicant entered a timely guilty plea;

(5) the applicant made admissions to police whilst the search was being conducted and consented to the search of his premises; and

(6) the applicant had no prior criminal history.

[17] The applicant submitted that these factors combined with the unique difficulties a custodial environment posed to him, should have resulted in a sentence which did not include any custodial component. A fully suspended sentence was a sufficiently

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1 [2010] QCA 42.

2 [2009] QCA 33 at [7].

condign punishment which would have served to punish the applicant adequately and denounce his offending. By requiring the applicant to serve six months of his sentence in custody, the sentencing judge failed to have adequate regard to the applicant's conditions. While it was accepted by the applicant that prisons regularly deal with inmates with diverse health issues, it was submitted that the overwhelming and unique nature of the applicant's conditions created difficulties for his management in the custodial environment and his Honour erred in finding that the conditions could be appropriately managed. In advancing those submissions, reliance was placed on the following statements in *R v Pope*:[3]

> "The existence of serious medical conditions are of course not necessarily an answer to the question of imprisonment, and not uncommonly the need for adequate response calls for a custodial sentence notwithstanding. It is recognised however that the ill-health of an offender is a factor tending to mitigate punishment when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on his health."

[18] The applicant placed emphasis on the evidence of Dr Gills, which was accepted by the sentencing judge, that the applicant's Asperger's disorder would cause "a custodial service to be specifically onerous" for him. The applicant also submitted that, while the evidence regarding the impact of the applicant's physical conditions was not as clear, the seriousness of the conditions and the volume of medication the applicant required was apparent on the material. In those circumstances, it was open to the Court to infer that the sleep condition suffered by the applicant would be particularly onerous on him in the structured prison environment. It was submitted that, notwithstanding "the lack of specificity in some of the evidence", the sentencing judge's remarks indicated acceptance that the applicant's physical health conditions would make his time in custody harder than it would be for someone without those conditions and, although his Honour had regard to these factors in his sentencing remarks, it was submitted that his Honour did not address how those considerations were balanced against the ultimate sentence imposed. Furthermore, whilst his Honour was mindful of the medical conditions, the applicant submitted that there was in error in finding that some of the conditions could be appropriately managed.

Consideration

[19] Section 9(7) of the *Penalties and Sentences Act* 1992 (Qld) (the PSA) requires a court in sentencing a person for an offence of possession of CEM to have regard primarily to the following:

(a) the nature of any image of a child that the offence involved, including the apparent age of the child and the activity shown; and

(b) the need to deter similar behaviour by other offenders to protect children; and

(c) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community; and

(d) the offender's antecedents, age and character; and

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[3] [1996] QCA 318 at [8].

(e) any remorse or lack of remorse of the offender; and

(f) any medical, psychiatric, prison or other relevant report relating to the offender; and

(g) anything else about the safety of children under 16 the sentencing court considers relevant.

[20] It was not disputed that the principles as amended in s 9 of the PSA applied in this case, although some of the offending was committed prior to the commencement dates of those amendments.[4] Section 9 of the PSA has removed the principle that imprisonment should be imposed as a last resort for these type of offences and placed primary weight, inter alia, on the nature of the image, general deterrence and the availability of medical and psychiatric treatment to cause the offender to behave in a way acceptable to the community.

[21] As the respondent submitted, the following facts in relation to the quantity and nature of the material were relevant to the sentencing process:

- There was a very significant quantity of still images located, totalling 36,711.
- While the majority of the still images were in category 1 (29,714), there were 2,817 category 4 images and 133 category 5 images. These included examples given of a child being urinated on by an adult male and a needle inserted through the top of the labia of a toddler.
- In addition to the still images a large quantity of videos (523 movies) were also located 100 of which were in the categories involving actual sexual activity taking place.

[22] Further, as the sentencing judge recognised, the offending was committed over a very long period of time, with the conduct the subject of count 3 covering a period of nine years and eight months. Moreover, the applicant had saved the material across multiple devices.

[23] As to the applicant's submission that the evidence suggested that he did not regularly access all the items, it was open to his Honour to conclude that the hoarding disorder only partially explained the retention of the material for such a long period of time. However, it did not explain the viewing and downloading of the material in the first place. The medical evidence did not indicate that the downloading of the material was done out of a compulsion such as was explained by an obsessive compulsive disorder in *R v Grehan*.[5]

[24] As has been frequently observed, it is not uncommon for mitigating circumstances, including timely pleas, to be recognised by the setting of a parole eligibility or a parole release date after one third rather than the statutory one half.[6] Adopting that course, the pleas in this case would have been reflected in a parole eligibility date or suspension being fixed at a point about eight months after the commencement of a two year head sentence. However, in addition to according recognition to the pleas, his Honour accepted there was a need to further ameliorate the sentence to take into account that the applicant's health issues meant that prison would be harder for him

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4 *R v Carlton* [2010] 2 Qd R 340 per Chesterman JA at [49]-[93].
5 (2010) 199 A Crim R 408 at [22].
6 *R v Crouch; R v Carlisle* [2016] QCA 81 at [29].

than for someone without his issues. (There was no evidence before the sentencing judge that his conditions could *not* be appropriately managed while in custody.) The sentence imposed on the applicant was thus significantly moderated by the judge fashioning a sentence that required the applicant to serve less than one third of the head sentence before his release (that is six rather than eight months). In addition, the applicant received the benefit of his Honour suspending the remaining term of imprisonment on count 3 rather than fixing a parole eligibility date. There was thus a further significant recognition of the factors in mitigation in allowing for a fixed release date.

[25] The applicant has failed to demonstrate that the exercise of the sentencing discretion miscarried because the sentencing judge failed to have regard to all of the relevant mitigating features.

Ground 4 - Comparable decisions

[26] It was submitted that, by arriving at the sentence he imposed, his Honour could not have had appropriate regard to the comparative cases, specifically Grehan.

[27] Grehan concerned the same offences for which the applicant was sentenced except that, in addition to the Commonwealth offence, Grehan was convicted of two counts of possession in breach of s 228D of the Qld Code. On appeal, he was resentenced to similar sentences as imposed on the applicant (two years imprisonment suspended after six months for an operational period of two years for each of the State offences and two years imprisonment with release upon recognizance after six months for the Commonwealth offence). His offending in accessing CEM took place over a three year period and related to over 40,000 images of child pornography. Grehan suffered from chronic obsessive compulsive disorder. The enormous number of images in his possession was found to be explicable by his psychiatric illness.[7] The images were not looked at after their initial collection and storage. Given his mental disorder, the case was not one where general deterrence featured largely. In resentencing Grehan, the Court of Appeal observed that the number of images collected and stored was vast and the period of offending (three years) showed some persistence but also took into account those matters and the fact that they would make his time in custody considerably more difficult.

[28] In resentencing Grehan, the Court of Appeal stated that no separate consideration was given to the Commonwealth offence and that, although it carried a longer maximum penalty, the Court was not asked on appeal to differentiate between the State and Commonwealth offences with regard to penalty. Grehan had already made a commitment to psychiatric treatment and psychological counselling meaning that the need for parole supervision was not obvious. He had formed a stable and supportive relationship which appeared to be a positive aspect of his rehabilitation, given his past isolation.

[29] The applicant submitted, as points of distinction in his favour, that Grehan possessed more images than the applicant but fewer videos. Grehan admitted to paying to download some of the material,[8] which was not a feature present in the applicant's case. In relation to the Commonwealth access offence, Grehan's access occurred over a longer period (nearly three years) and included downloading some 32 videos, as

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7 (2010) 199 A Crim R 408 at [22].
8 (2010) 199 A Crim R 408 at [13].

opposed to the three videos accessed by the applicant. Further, the combination of medical conditions present in the applicant's case were not present in Grehan. In all of the circumstances and taking into account the subjective mitigating factors, it was submitted that a proper view of the facts in each case should have resulted in the applicant receiving a sentence lower than that ordered in Grehan, notwithstanding the increase in maximum penalty for the possession offences since Grehan. In sentencing the applicant to the same penalty as in Grehan, his Honour failed to have regard to the significant mitigating factors in the applicant's favour which positively distinguished his case from that of Grehan. The sentence imposed was thus manifestly excessive and the applicant should be resentenced with immediate release given the time already served in custody.

Consideration

[30] Although *Grehan* has features that are comparable to the present case, a significant point of distinction is that the conduct of accessing child pornography occurred over a lesser time period. Secondly, while it was recognised in this case, as it was in *Grehan*, that the offender's mental disorder was a significant mitigating factor affecting his moral culpability, the applicability of general deterrence, as well as making a custodial sentence more onerous on him, there was no finding in the present case, as there was in *Grehan*, that the applicant's level of offending was explicable by his mental disorder. In both cases, it was accepted that the mental condition might in part explain why some of the material was kept for so long without regular access. However, unlike in *Grehan* where the material was not looked at again, in the present case the applicant accessed 1,500 images. Thirdly, it is significant, as the sentencing judge rightly observed that the maximum sentence for the possession offence has increased since *Grehan* from five years imprisonment to 14 years.

[31] *Grehan* was considered in *R v Garget-Bennett*[9] and *R v Davis*.[10]

[32] In *Garget-Bennett*, the offender was convicted on his pleas to one count of using a carriage service to access child pornography material and one count of possessing CEM. On appeal he was resentenced to 12 months imprisonment with release after 10 months on recognizance for the accessing count and to two and a half years imprisonment suspended after serving 10 months with an operational period of two years on the possession count. The offender had possession of 44,197 images and 89 videos. He pleaded guilty and had no criminal history but there were no other significant mitigating factors. However, unlike the present case, the offending in that case took place over a much lesser period of three and a half years.

[33] In *Davis*, Fryberg J reiterated his view, expressed in *Garget-Bennett*, that *Grehan* was a case of little utility in considering an appropriate sentence where the Commonwealth charges were also engaged. Davis pleaded guilty to one count of using a carriage service to access child pornography material and one count of knowingly possessing CEM. He was in possession of 49,817 images and 305 videos containing CEM. The applicant was sentenced to four years imprisonment with a non-parole period of 16 months for the accessing count and for two and a half years imprisonment suspended after 16 months for the possession count. The application for leave to appeal against a head sentence of four years with a non-parole period of 16 months was refused. There

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9 [2010] QCA 231.
10 [2012] QCA 324.

were no mitigating factors beyond his plea of guilty and lack of relevant prior criminal history. Although he had possession of a comparable amount of material, the offending occurred over a period of four years. He cooperated with police and admitted to what he was doing and that it was for sexual gratification. A period of two years and four months between the applicant's arrest and the date of his sentence was not considered a mitigatory factor.

[34] As was stated by French CJ, Keane and Nettle JJ in *R v Pham*[11] in relation to the approach to be taken to applications for leave to appeal against sentence:

> "Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle."

[35] The applicant has not demonstrated that the sentences imposed were manifestly excessive when regard is had to *Grehan* or other authorities. *Grehan* merely provided a yard stick but it cannot be viewed as setting the top of the permissible range for the exercise of the sentencing discretion.

[36] I would refuse the application for leave to appeal against sentence.

[37] **McMURDO JA:** I agree with Philippides JA.

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[11] (2015) 256 CLR 550; [2015] HCA 39 at [28].