SUPREME COURT OF QUEENSLAND

CITATION:	*R v Williams* [2017] QCA 307
PARTIES:	**R** **v** **WILLIAMS, Joshua** (appellant)
FILE NO/S:	CA No 198 of 2017 DC No 489 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 18 August 2017 (Martin SC DCJ)
DELIVERED ON:	15 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2017
JUDGES:	Holmes CJ and Fraser and Gotterson JJA
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of using a carriage service to cause child pornography material to be transmitted to himself; one count of using a carriage service to publish child pornography material; four counts of using a carriage service to make a threat to kill; one count of using a carriage service to transmit child pornography material; and nine counts of using a carriage service to menace, harass or offend – where the applicant was sentenced to three years imprisonment on the first count and lesser periods of imprisonment on the remaining counts, with an order under s 20(1)(b) of the *Crimes Act* 1914 (Cth) that the applicant be released on recognizance after serving seven months – where the applicant argues the period of actual custody required to be served under the sentence renders it more severe than is appropriate in all the circumstances of the offence – whether the sentence is manifestly excessive –whether leave to appeal against the sentence should be granted *R v Leask* (2013) 236 A Crim R 1; [2013] WASCA 243, cited *R v Lovi* [2012] QCA 24, cited
COUNSEL:	S M Ryan QC for the applicant

L K Crowley for the respondent

SOLICITORS: Fisher Dore Lawyers for the applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **HOLMES CJ:** The applicant pleaded guilty to one count of using a carriage service to cause child pornography material to be transmitted to himself; one count of using a carriage service to publish child pornography material; four counts of using a carriage service to make a threat to kill; one count of using a carriage service to transmit child pornography material; and nine counts of using a carriage service to menace, harass or offend. He was sentenced to three years imprisonment on the first of those counts and lesser periods of imprisonment on the remaining counts, with an order under s 20(1)(b) of the *Crimes Act* 1914 (Cth) that he be released on recognizance after serving seven months. He seeks leave to appeal against that sentence.

The offences

[2] According to a statement of facts tendered to the court without objection, the applicant was aged 17 and 18 at the times of the offences. He had contacted a young woman (to whom I will refer as "AB") through the internet, using what is described as a "mobile chatting app". AB was aged between 16 and 17 years at the time and was still at school; she lived in another state. The charges reflect a long process, over about 13 months, of the applicant's harassing and threatening, first AB, and later her sister and mother, in order to obtain indecent photographs and videos. The applicant assumed a number of false identities for the purpose: "Scott Williams", who professed to be in love with AB and to be working in her interests; Scott's malign friend, "Alex Johnson"; and another supposed friend, "Hannah", the name of a real person who had nothing to do with the applicant's actions, but whose identity AB could verify, because she had a genuine Facebook profile.

[3] The applicant first contacted AB as Scott, followed by Alex, in his role as Scott's friend. Those communications came to a temporary halt when Alex messaged AB telling her that she was fat, ugly and should kill herself. Scott next introduced AB to his friend, Hannah, and the applicant began to correspond with AB using that persona. Hannah sent AB a picture which was supposed to show her own breasts and asked her to send a similar photograph back. After persistent requests, AB provided a photograph of her naked breasts to Hannah's account. That photograph was then used as a means of blackmailing her.

[4] The applicant began by setting up a fake Facebook profile in AB's name, using the photograph as a profile picture available for public viewing. (This was, as it transpired, the only instance in which the images the applicant obtained of AB were publically displayed, despite many subsequent threats to distribute them widely.) On AB's reporting it to Facebook, the material was removed within about a quarter of an hour. Undeterred, the applicant continued, as Hannah, making threats to AB of releasing the photograph to everyone she knew unless she sent more explicit photographs of herself. The end result was that over a period of time and as a result of a number of demands, AB sent something in the order of 100 photographs of her breasts, genitals and bottom to Hannah.

[5] At that point, Alex stepped back into the picture, saying that Hannah had been acting on his behalf and he was now in possession of the photographs. He made regular contact with AB, demanding photographs and videos and threating to rape and kill her and her mother if she did not comply. AB provided at his demand videos of herself urinating and sexually touching herself. Alex threatened to send her photographs to her friends and acquaintances, whose names he listed, and told her that he knew where she lived and went to school and that he would come there to hurt her. She, not surprisingly, suffered depression and anxiety as a result.

[6] The Scott character, meanwhile, was playing Dr Jekyll to Alex's Hyde, expressing his affection and concern for AB, and in the process garnering more personal information about her. He assured AB that he would do something about Alex's behaviour, later telling her that Alex had been detained by the police. Scott and AB had long text message exchanges about Alex's likely punishment, with Scott expressing the hope that he would be jailed, and ultimately telling AB that he had to wear a tracking device and do community service. Two days after that message, Alex texted AB saying that he had Scott's phone; he had cut off his tracking device. He knew where she lived, where she went to school and where she worked; if she did not reply, he would rape and kill her and her mother. He ordered her to send five new videos to him. There was a long series of texts negotiating this demand; eventually AB agreed to send three videos of her talking, not nude videos.

[7] About a week later, Alex demanded money, threatening again to show others the nude pictures. The following day, Scott texted AB, saying that he had retrieved his phone and Alex was now locked up again. About three weeks later, on 29 October 2015, Alex demanded more photographs; eventually AB sent him a nude photograph.

[8] That same night, however, Alex contacted AB's older sister, telling her that he had 100 pictures and 300 videos of her sister and would send them to all of her family and friends unless the sister provided a photograph of her breasts. On her refusal, he sent her various pornographic images of AB, with messages such as this:

> "You just ruined her life. She's going to want to kill herself and you could have easily stopped it. Too late. She's going to forever be known as the slutiest (sic) bitch on the face of the planet".

He insisted that until he got the sister's photograph he would not leave AB alone and would continue to harass her until she killed herself. In total, he sent AB's sister 10 images and five screenshots from videos of AB, which included her breasts, her vagina and anus; one screenshot showed her finger inserted in her anus and another, her finger touching her vagina.

[9] That night, Alex also contacted AB's mother, telling her that AB had sent revealing photographs to him. Throughout the night he continued to contact her by Facebook Messenger, telephone calls and messages. He made demands via the internet to be allowed to speak to AB. When AB's mother refused, he sent a message saying that he would be sending out everything he had to her family and friends and that she was ruining her daughter's life. Subsequently he offered to leave both her daughters alone if she showed him her breasts. The following day, the applicant created a new account in the name "Aj Appleballs" to contact AB's mother and sister with threats to rape AB. After that, the applicant as Scott contacted AB's mother repeatedly, saying that he was in love with AB and that he hated Alex for what he had done.

He also sent AB messages telling her that Alex had gone back to New Zealand and that he (Scott) missed her and needed her to reply.

[10] AB's mother reported the matter to police, who executed a search warrant and seized the applicant's iPhone. Interviewed, the applicant admitted inventing the fake profiles and using the "Alex" and "Hannah" identities to blackmail AB into providing pictures. He similarly admitted sending the offending messages to AB's sister and mother.

Victim impact statements

[11] AB provided a victim impact statement, saying that she had an overwhelming sense of shame and guilt as a result of what had happened. She suffered from anxiety and depression, sleeplessness and anger at herself for not having stopped contact much earlier. While the communications were occurring, she was in what she described as a "never-ending spiral of fear and anxiety", had a strong sense of having a dreadful secret and became isolated from her friends. She blamed herself for the effects on her family. She was still apprehensive at the thought of the pictures making their way into public view. She no longer used social media, which was isolating for her, and she did not feel able to be involved in any sort of intimate relationship.

[12] AB's sister said that she was terrified at the time of the contact by Alex; she feared for her sister's life. Having seen the photographs and videos of her sister, it was difficult for her to relate to her in the same way. AB's mother spoke of the pain and anxiety she had experienced as a result of the applicant's actions. By the time of her victim impact statement, AB had moved overseas to get away from the place where the events had happened. AB's mother felt that the family had been fractured and that she herself had failed her daughter.

The applicant's antecedents

[13] The applicant was 20 years old by the time of sentence, and had no previous criminal history. He had left school part way through grade 12 and had been employed in unskilled jobs; at the time of sentencing he was working for a window-making firm. He lived at home with his parents. A citizen of New Zealand, he faced the prospect of deportation on completing his sentence.

[14] The applicant had been assessed by a psychologist, Dr Hatzipetrou, whose report was tendered. The applicant reported an unremarkable upbringing; his parents were very supportive and he was close to his older sister. He said that he had difficulties socialising and making friends since he left school. Since being charged, he had experienced suicidal ideas. Dr Hatzipetrou considered that the applicant showed signs of a persistent depressive disorder. Adjustment to a custodial environment would be difficult for him. He estimated the applicant's level of intelligence in the low average to average range. In his interviews with the psychologist, the applicant had seemed distraught and apologetic; reportedly, he regretted his involvement and he acknowledged a failure to consider the consequences of his actions upon AB and her family.

[15] Dr Hatzipetrou regarded the applicant's risk of reoffending in a similar way as low to moderate, given the family support available to him and his attachment to his

family, as well as protective factors, such as his full time employment, absence of previous violence and generally prosocial behaviours. His actions had lacked judgement and social reasoning; he appeared to have a poorly developed understanding of social relationships and boundaries; but he did have some capacity for empathy. His detachment in dealing with AB could be attributed in part to his emotional immaturity and insecurity, which had made it difficult for him to form intimate relationships.

[16] Also tendered on behalf of the applicant at sentence were: a letter from a different psychologist, confirming that he had attended five sessions with her; two letters from the applicant himself; a letter from the applicant's parents; and a letter from his older sister. The applicant's letters were an apology to AB and her family and a letter to the court asking for a "second chance" rather than imprisonment. His parents' letter said that he had always gone out of his way to help others and was well liked by family friends and everyone who met him. They confirmed their continuing support for him and expressed their concern at the possibility of his deportation to New Zealand where he would be alone. His sister mentioned in her letter that her brother and she had socialised with many of the same friends and that he had adopted a role of responsibility for others.

The sentencing judge's remarks

[17] The sentencing judge remarked that he found Dr Hatzipetrou's report largely unhelpful; particularly, the suggestion that the applicant's emotional detachment in dealing with AB was the result of his social awkwardness, and the assessment of his intelligence as low to average intelligence. The first was at odds with the references from the applicant's family members, who indicated that he was well liked and had many friends, while the estimate of intelligence was made without formal testing and ignored the creativity that he displayed in the offending conduct. The applicant had displayed insight into the seriousness of his conduct, acknowledging in the guise of Scott that the behaviour of Alex warranted imprisonment. The conduct in respect of AB amounted to relentless emotional torture. The applicant fully appreciated the distress he was causing, as was evidenced by his messages to AB's sister about the torment that he had put AB through.

[18] The sentencing judge adverted to the sentencing considerations set out in s 16A of the *Crimes Act*. He said that he took into account the applicant's early pleas of guilty and expressions of remorse but had reservations about accepting them as genuine, in light of the protracted period of offending and the calculated and callous behaviour involved. The guilty pleas were, however, relevant, as was the co-operation of the applicant with the authorities. His Honour distinguished the decision of *R v Lovi*,[1] to which defence counsel had referred him, as involving less serious conduct by an applicant who was aged between 16 and 17 during most of the offending period. Nonetheless, he said, the fact that the applicant was a youthful offender without criminal history was an ameliorating feature.

[19] Dr Hatzipetrou had been relatively guarded as to the applicant's prospects of rehabilitation, and the fact that the offending conduct was protracted, lasting more than a year, suggested that rehabilitation would be difficult. The applicant, and his family, faced the hardship of his deportation. His Honour also took into account the applicant's depression and anxiety, including suicidal ideation after his arrest, and

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1 [2012] QCA 24.

the fact that he had been subjected to some degree of punishment in the stringent bail conditions that he had to observe since his arrest.

[20] Against the mitigating factors, his Honour weighed the serious nature of the offending and its lengthy duration. Both general and personal deterrence were important factors. The offending had caused great emotional distress to each of the victims, particularly AB. Comparable decisions which had been relied on by counsel were of little assistance. He was obliged to impose a sentence of a severity appropriate to the circumstances of the case. Courts were, rightly, reluctant to imprison youthful first offenders, but there came a point at which the gravity of the offence was such that actual imprisonment was necessary in order to protect the community by achieving personal and general deterrence. This was such a case, but the applicant's youth and favourable antecedents attracted moderation in penalty.

The submissions on the sentence application

[21] There was no complaint about the head sentence. Rather, the applicant submitted that the sentence imposed was manifestly excessive in requiring him to serve seven months of actual custody. The appropriate sentence here was one that incorporated the shortest period of actual custody necessary to punish and deter the applicant and others like him; a period of three or four months was proposed. It was contended in the applicant's written submissions that the court should adopt the approach of "parsimony", regarding the appropriate sentence of imprisonment as one incorporating the shortest possible period of actual custody necessary for deterrent purposes. It was suggested that s 17A(1) of the *Crimes Act* recognised parsimony in this sense as a sentencing principle; that provision requires the court not to pass a sentence of imprisonment unless satisfied that no other sentence is appropriate in all the circumstances of the case.

[22] I doubt, in fact, that there is any place for such a principle of parsimony in considering sentencing, which as the exercise of a discretion necessarily admits of more than one result, or that s 17A does anything other than establish that imprisonment is a penalty of last resort. At any rate, counsel did not seem wedded to the proposition in her oral submissions and adverted instead to s 16A(1) of the *Crimes Act*, which requires a sentencing judge to impose a sentence of a severity appropriate in all the circumstances of the offence. The submission, then, was that appropriate severity would be reflected by a sentence involving only three or four months actual custody, meeting the purposes of punishment and general deterrence while having regard to other factors: the applicant's accepted fear of custody, his youth, his lack of criminal history, his remorse, his prospects of rehabilitation and his anticipated deportation.

[23] As to the last, it was submitted, although his Honour had taken into account the likelihood of deportation, he had not considered the impact of the applicant's expectation of that result and the greater onerousness of imprisonment resulting from his realisation that he would be deported at the end of it. There were other matters, it was submitted, which the sentencing judge had failed to take into account or to accord sufficient weight, resulting in a manifestly excessive sentence. The psychologist's report and the letters from the family indicated his remorse. His Honour had failed to consider the rehabilitative aspect of the sentence: it was to be expected that as a youthful offender without any sign of psychopathy or antisocial traits, the applicant would respond well to intervention. The risk of corruption

involved in his imprisonment as a youthful offender was not factored into the sentence. The applicant's counsel at the sentence hearing had drawn the sentencing judge's attention to *R v Lovi*, in which Muir JA, with the agreement of the other members of the court, observed that imprisonment of young offenders for short periods was generally regarded as potentially harmful to their rehabilitation, as likely to expose them to corrupting influences.[2] It was also relevant, it was submitted, to consider the duration of imprisonment in that regard: the longer the period, the greater the risk of corruption.

[24] Counsel relied on a decision of the Western Australian Court of Appeal in *R v Leask*[3] as supporting the submission that a lighter sentence ought to have been imposed here. In that case, the respondent, who was aged between 19 and 21 years, had engaged in similar conduct to the applicant's; although on the one hand, it involved more and younger victims, but on the other, does not appear to have involved the use of fake personas. The respondent in *Leask* took advantage of five victims, aged between 13 and 15 years, whom he encouraged to expose themselves and perform sexual acts via video link, some of which he recorded. He threatened some of the girls with exposure if they did not continue to perform similar acts. That offender was sentenced to three years and six months imprisonment with immediate release on recognizance, with a requirement that he perform 100 hours community service and with an 18 month intensive supervision order. The court dismissed a Crown appeal against the inadequacy of the sentencing.

[25] There are, however, a number of features of *Leask* which render it of very little assistance to the applicant's argument. In that case, the respondent had himself experienced cyberbullying, which had led to depression and excessive alcohol consumption. The sentencing judge had accepted that his understanding of his conduct was very much reduced by his immaturity and mental state. There were grave concerns for his wellbeing if he were imprisoned. He had excellent prospects of rehabilitation and was unlikely to reoffend. The Court of Appeal was not persuaded that the decision was erroneous, having regard to the respondent's age, immaturity, naivety and mental state at the time of committing the offences which, it was said, very much reduced his appreciation of the inappropriateness of what he had done and diminished his culpability. It was also relevant in considering whether intervention was warranted that the appellant required an extension of time to appeal and that seven months had already elapsed since the respondent had commenced serving the sentence.

[26] Notably, the court in declining to set the sentence aside made the uncontroversial observation that it was not entitled to intervene simply because it would have imposed a different sentence or because the sentence differed markedly from that imposed in other cases. In fact, Mazza JA, delivering the leading judgment in which the other members of the court agreed, observed that if he had been sentencing the respondent he would probably have ordered him to serve some of the sentence in prison.

Conclusions

[27] *Leask* represents one possible outcome in the circumstances of that case; but as the decision makes clear, other dispositions would also have been within a proper

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2 [2012] QCA 24 at [38].
3 [2013] WASCA 243.

exercise of discretion. It does not serve to identify any error in the present case. It was not suggested that other cases cited at the sentence hearing served as any yardstick which should have led the sentencing judge to a different conclusion.

[28] The propositions advanced on behalf of the applicant as to his prospects of rehabilitation and his level of remorse are at odds with the findings which the sentencing judge made, expressing reservations about both. There is something unreal in the submission that his Honour took into account the hardship to the applicant of the risk of deportation, but did not have regard to his anxiety at that particular prospect. His Honour had specific regard to the applicant's anxiety and depression; there was no reason to try to divide up the causes of that state of mind as between the prospect of imprisonment and the prospect of deportation.

[29] It was not argued, unsurprisingly, that the sentencing judge erred in concluding that the gravity of the offence was such as to make no other sentence than imprisonment appropriate. His Honour was aware of *Lovi*, which was concerned with the corrupting effect of imprisonment of any duration on a youthful first-time offender, and expressly recognised the reticence of courts to send such offenders to jail, while explaining why that result was unavoidable. It was not incumbent on his Honour to try to calculate and articulate whether a sentence of seven months as opposed to four would produce an appreciably different result in terms of corrupting effect. The implicit suggestion that some such distinction should be drawn, like that about the risk of deportation as opposed to anxiety about it, smacks, with respect, of the artificial.

[30] What the trial judge clearly did undertake was a balancing of the competing considerations, including the adverse consequences of jailing a youthful first offender, in arriving at the sentence. There can be no serious contention that his Honour failed to take into account any relevant factor on sentencing. He correctly identified the seriousness of the behaviour, which was calculated and callous, and caused serious harm to three victims, likely to be lasting in its effect. His Honour appropriately reflected the mitigating factors, particularly the applicant's youth and lack of criminal history, and achieved the rehabilitative function of the sentence by requiring him to serve less than 20 per cent of it. There is no error manifest in approach or result. The argument that a sentence involving seven months' actual imprisonment, as opposed to one involving three or four months' custody, was outside a proper exercise of discretion cannot be accepted.

[31] The sentence imposed was not manifestly excessive.

Order

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

[33] **FRASER JA:** I agree with the reasons for judgment of Holmes CJ and the order proposed by her Honour.

[34] **GOTTERSON JA:** I agree with the order proposed by Holmes CJ and with the reasons given by her Honour.