SUPREME COURT OF QUEENSLAND

CITATION:	*R v Edwards* [2019] QCA 15
PARTIES:	**R** **v** **EDWARDS, Gregory Paul** (applicant)
FILE NO/S:	CA No 269 of 2018 DC No 1920 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 19 October 2018 (Smith DCJ)
DELIVERED ON:	12 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2018
JUDGES:	Morrison and Philippides JJA and Boddice J
ORDER:	**The application is refused.**
CATCHWORDS:	APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to the offence of using a carriage service to access child pornography material – where he was sentenced to 15 months' imprisonment, to be released on a $500 recognizance after serving two months, on the condition that he be subject to probation for a period of two years – where defence counsel contended that the imposition of a period of actual custody is manifestly excessive – where the applicant was a serving federal police officer – where the majority of the child pornography material were graphic representations in the form of computer generated figures engaged in sexual activity or stories – where it was submitted the nature of the offending did not attract a period of actual custody – whether the sentence was manifestly excessive *Crimes Act* 1914 (Cth), s 17A *Criminal Code* (Cth), s 474.19(1) *Assheton v The Queen* (2002) 132 A Crim R 237; [2002] WASCA 209, cited *Director of Public Prosecutions (Cth) v D'Alessandro* (2010) 26 VR 477; [2010] VSCA 60, cited *Godfrey v The Queen* [2013] WASCA 247, cited *McEwen v Simmons* (2008) 73 NSWLR 10; [2008]

NSWSC 1292, cited
R v Gordon; Ex parte Commonwealth DPP [2011] 1 Qd R 429; [2009] QCA 209, distinguished
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited
R v Porte (2015) 252 A Crim R 294; [2015] NSWCCA 174, cited
R v Reid [2004] QCA 9, applied

COUNSEL: D A Holliday, with L M Dollar, for the applicant (pro bono)
B Power for the respondent

SOLICITORS: Robertson O'Gorman for the applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MORRISON JA:** On 19 October 2018 the applicant pleaded guilty to the offence of using a carriage service to access child pornography material contrary to s 474.19(1) of the *Criminal Code* (Cth). He was sentenced that day to 15 months' imprisonment, to be released on a $500 recognizance after serving two months, on the condition that he be subject to probation for a period of two years.

[2] Leave to appeal against the sentence is sought but only in respect of the imposition of the period of actual imprisonment.

[3] The essential contention advanced is that the imposition of a period of actual custody makes the sentence manifestly excessive.

Circumstances of the offence

[4] The particular circumstances of the offence were reduced to an agreed statement of facts, tendered to the learned sentencing judge.[1]

[5] The applicant was 46 years of age at the time of sentence, and 45 at the time of offending. He was a serving federal police officer. He was married with two daughters, aged nine and 12. He had no criminal history.

[6] On 29 January 2017 the applicant submitted an AFP internal integrity report in which he revealed an occasion when he unintentionally viewed child exploitation material:

> "About 10pm Thursday 26 January 2017 I was viewing adult pornography on the internet website ABC.com [sic] in public chat rooms that don't require any login or password. After a period of time I unintentionally viewed Child Exploitation Material suddenly being made available in many of these chat rooms. In addition to images, links to external image sites containing Child Exploitation Material was also provided. I didn't save or download any of the images. After establishing ABC.com was being used for the distribution of Child Exploitation Material I closed out of the website and haven't accessed it again."

[7] Eleven days later the AFP conducted a subscriber check on an IP address, which revealed the applicant's details. About four months later, on 2 June 2017, the AFP

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1 Appeal Book (**AB**) 88.

obtained warrants in relation to the applicant under the *Telecommunications (Interception and Access) Act* 1979 (**TIA**) and the *Surveillance Devices Act* 2004 (**SDA**). Analysis of information intercepted pursuant to those warrants revealed that the applicant had used the internet to access images and written stories that were child pornography material.

[8] The analysis revealed that between 15 June 2017 and 27 August 2017 the applicant had used the internet to access child pornography material on 31 separate dates. I pause to note that this was over four months subsequent to when the applicant made the disclosure in the AFP integrity report.

[9] The child pornography material involved 639 images. A large proportion of them were graphic representations in the form of computer generated, life-like figures or drawn figures engaged in sexual activity. Others were incest-themed cartoon images of child pornography.

[10] There was also two videos, depicting computer-generated children engaging in sexual intercourse and performing oral sex.

[11] A further substantial proportion of the child pornography material involved highly sexually explicit stories that described oral sex and sexual intercourse between adults and children, and some of which described conduct involving pain, bestiality, urination and excrement.

[12] An annexure to the statement of facts is that of the dates on which the applicant accessed child pornography material, and the number of files accessed on each date. Reference to that annexure shows that on many of the days the number of files accessed was relatively small, between one and six. However, on seven days the numbers of files accessed were large. On seven particular days a large number of files was accessed: 20, 60, 81, 85, 96, 113 and 122.

[13] Details of the child pornography were provided in the agreed statement of facts. The descriptions started part way through the period, at 13 July 2017. It is not necessary to repeat all of the details, but rather give a synopsis of the nature of the material accessed.

[14] A review of the material accessed by the applicant, even if confined to the stories, reveals the depraved and degrading nature of its content. The topics included:

(a) oral, vaginal and anal sexual intercourse with children as young as four; and offering children to a paedophile network;

(b) rape of children by individuals and groups of adults, the children being as young as nine;

(c) oral sex and masturbation by children on children;

(d) two stories about the rape of babies, one two months old, both orally and anally;[2]

(e) bestiality involving children as young as ten;

(f) urinating on children, and children drinking urine;

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[2] One of those stories was accompanied by a synopsis that referred to "the opportunity to train [the] new baby to become a slut".

(g) coprophilia, including eating faeces and smearing faeces on a child's face and hair;

(h) masturbation of children as young as six, including parents and grandparents masturbating their own children and grandchildren;

(i) fellatio of an infant;

(j) adult ejaculation onto children's faces; and

(k) violence; quite apart from the above, threats and beatings.

[15] Some of the stories encompass a number of different features, making it difficult to separate the child exploitation material into finite categories. And on occasions the appellant returned to the same story over a number of days. However, a fairly general analysis reveals that the dominating theme of the stories that the applicant read was of sexual intercourse (whether oral, vaginal or anal) with children between the ages of four and 14 years (28 stories fitted into that category). Next was children masturbating or being masturbated (accessed on seven occasions), followed by rape of children and babies (accessed on six occasions), and bestiality (accessed on six occasions). Of course, that form of analysis is at a level of some generality, not only because of the mixed themes in stories, but also because sexual intercourse with any child under a certain age should be more properly characterised as rape than simply sexual intercourse.

Other Relevant Material

[16] On 1 August 2017 the applicant accessed a website for "DEF", and viewed an entry in which a mother speaks about advocating for her eight year old daughter to have a "deep sexual relationship" with her 50 year old uncle. The applicant then watched a video about "DEF", regarding abolishing the age of consent and establishing paedosexual rights. The applicant then searched for the founder of "DEF", and read several blog posts about the size of little girls' vaginas and about infant children performing oral sex on adult men.

[17] On 2 August 2017 the applicant accessed the website for "DEF", and read blog posts about abolishing the age of consent, and talking about fetishes without being shamed. One of the blog posts used the analogy of teaching children to cook, and made the argument that cooking can be dangerous but with an adult teaching them, children can learn to cook safely. The argument was that the same applies to children having sex.

[18] The applicant later searched on a link from the "DEF" website, and accessed and read an American study about different paraphilias. One comment in relation to the study discussed how to have penetrative sex with a one year old child without causing damage. The applicant read a blog post about a woman who filmed herself engaging in sexual intercourse with her one year old son and who posted the video on Facebook. The applicant then searched for that woman on Facebook.

Classification

[19] All of the child pornography material related to the applicant was classified under the Child Exploitation Tracking System (CETS) scale. The categorisation of material under that scheme is as follows:

CATEGORY LEVEL	CETS/ C4P CATEGORY	GUIDE

1	CEM – No Sexual Activity	Depictions of Children with No Sexual Activity – Nudity, surreptitious images showing underwear nakedness, sexually suggestive posing, explicit emphasis on genital areas
2	CEM – Child Non-Penetrate	Non-Penetrative Sexual Activity Between Children Or Solo Masturbation By A Child
3	CEM – Adult Non-Penetrate	Non-Penetrative Sexual Activity between Child(ren) and Adult(s). Mutual masturbation and other non-penetrative sexual activity.
4	CEM – Child/Adult Penetrate	Penetrative Sexual Activity Between Child(ren) And Adult(s) – Including, but not limited to intercourse, cunnilingus and fellatio.
5	CEM – Sadism/Bestiality	Sadism, Bestiality or Humiliation (urination, defecation, vomit, bondage etc)
6	CEM – Animated or Virtual	Anime, cartoons, comics and drawings depicting children engaged in sexual poses or activity.

[20] According to the agreed schedule of facts, the intercepted material was categorised as follows:

CATEGORY	IMAGES	STORIES	VIDEOS	TOTAL
1	22	0	0	22
3	5	0	0	5
4	5	0	1	6
6	607	51	2	660
TOTAL	**639**	**51**	**3**	**693**

[21] Of the files accessed by the applicant, 40 of the images (all but one in Category 6) were duplicates. The total number of unique files of child pornography material accessed by the applicant was 653.

[22] On 7 September 2017 search warrants were executed at the applicant's residence. A forensic examination of his computer, being the device he used to access child pornography material, revealed that:

(a) the privacy settings on the internet browser had been modified so that it would not retain any information, including the browsing history; and

(b) references to a particular web page were found in the browser history; that website was a search engine that anonymised and forwarded a user search query to the Google search engine; as a result of using that webpage, the user's search terms will not be displayed in the internet's browser history.

[23] The applicant participated in an interview with police, and denied any knowledge of the child pornography material that was shown to him. During the interview the applicant told police:

(a) he had no information about anybody accessing child pornography from his IP address;

(b) he had never come across any child pornography material on any of the websites that he used to access adult pornography, and had never accessed any child pornography material online, other than what he had mentioned in his integrity report;

(c) when asked whether he had anything in place to clear his internet browser history so that others could not see it, he said he did not think so, and when asked whether he cleared the history manually, he said he did not think that he had;

(d) he denied any knowledge of images of child pornography when shown to him; these images had been intercepted under the warrants;

(e) he denied any knowledge of, or having accessed, the websites where the stories referred to above were accessed;

(f) he denied having read stories referred to above;

(g) he told police that he used the particular webpage which anonymised search queries, because he had been told it was better for identity protection, viruses and Trojans; and

(h) he said he was the only person who knew the password to his Facebook account, but denied using it to look up a Facebook page for "DEF".

The applicant's antecedents

[24] The applicant was 45 at the time of his offending, and 46 when sentenced. He had no criminal history. He was at the time of the offence a sworn member of the Australian Federal Police. His plea of guilty was at the earliest opportunity.

[25] A report from a psychologist, Mr Pershouse, was tendered.[3] The report was directed to the risk of reoffending, and was the product of about 17 sessions where the applicant attended upon Mr Pershouse. His attendance was described as committed and punctual, and the applicant cooperated with all assessments. The applicant's behaviours and specific responses during sessions did not suggest any pattern of excessive or overly defensive, evasive, dismissive, or rationalising attempts at avoidance of personal responsibility. During the course of the appointments the applicant provided an expanding, although essentially consistent narrative of his personal history.

[26] Having described the various tests utilised in preparation of the report Mr Pershouse noted his essential conclusions:

(a) the applicant's choices to act out in a sexually inappropriate manner in respect of his offences appeared to be related to maladaptive coping in respect of managing work-related stressors, but also from an underdeveloped sense of identity and personal value;

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3 AB 120.

(b) no psychosexual areas associated with significant sexual dysfunction or disorders were detected, and no paraphilias;

(c) the applicant had not evidenced any significantly pathological features of antisocial functioning; and

(d) he was a low risk of reoffending, though ongoing therapeutic monitoring and support was advised.[4]

[27] In a supplementary report,[5] Mr Pershouse said that the applicant may have been suffering subclinical levels of depressive functioning while working for the AFP, and that may have been a contributory factor to his offending. The applicant had indicated that he was frustrated and unhappy with his role and responsibilities working for the AFP.

[28] Because the Crown did not accept that the applicant had no sexual interest in children, Mr Pershouse gave evidence. He said that the results of his testing with various psychometric test instruments produced "nothing … which raised concern for me",[6] and that he had not been able to detect an interest in children as part of an arousal cycle on the applicant's part.[7]

[29] Under cross-examination Mr Pershouse reaffirmed that he did not detect any aspect of arousal from the child pornography[8] and ascribed the behaviour to being a way to cope with work-related stressors. He did not consider that the applicant's viewing of that material indicated a level of sexual interest in children saying:[9]

> "I think it indicates … a lack of skills in coping, in this instance, with life and … not enough or well enough sense of personal identity and value systems to prevent a sufficient wall against those sorts of things happening."

[30] Mr Pershouse could not give a reason why the applicant had chosen to fill his fantasy world with material of that kind.[10] Mr Pershouse confirmed his opinion that the applicant was not a paedophile,[11] but then answered the learned sentencing judge in this way:[12]

> "But there may have been a paedophilic interest in this material; that's as I --- ? There may have been – maybe a part of … yes, there were concerns there that I don't know where that may have led. But it's certainly going to lead to what we'd understand clinically as a paedophile."

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4 AB 133-134.
5 AB 142.
6 AB 41 lines 1-17.
7 AB 43 line 19.
8 AB 45 lines 1-27.
9 AB 46 lines 20-24.
10 AB 46 lines 38-43.
11 AB 49 line 46.
12 AB 50 lines 1-4.

[31] Following the completion of Mr Pershouse's evidence the learned sentencing judge announced his preliminary view which was that whilst he thought it was improbable that there was no sexual interest in the material, but the applicant was not a paedophile.[13]

References and other material

[32] The applicant's wife produced a letter which was tendered on the hearing.[14] She described her relationship with the applicant and the fact that they had two children. She described his 15 years working for the AFP and some of the difficult cases he had to deal with. Those cases have led to an inability on the applicant's part to cope and over time he became tired, depressed, and difficult to live with. She described the effect upon the whole family of the applicant being charged. This included not only the family stress, but withdrawal from close social circles and friendships.

[33] The applicant produced his own letter directed to the learned sentencing judge.[15] In it he described his sense of remorse, guilt and shame. He said that whilst the majority of the material he accessed did not relate to actual children, nonetheless:[16]

> "I accept that by accessing some material which did I potentially encouraged others to publish child pornography. In doing so, children are further exploited by those who were meant to be protecting them."

[34] The applicant described some of his background. He was the eldest of two children, living in a strained family environment because of the father's employment with the Australian Air Force. The family moved frequently due to workplace postings. He described how his parents' marital relationship soured and behaviour involving verbal, physical and emotional abuse became commonplace. When the applicant was 16, his father abandoned the family. He continued to support his family financially well into adulthood. Notwithstanding the family environment, he attended private schooling, moving out of home at 18 to pursue university studies.

[35] The applicant described his employment history commencing as a forestry overseer for the government through to his employment by the Australian Federal Police. He described how the demands of that job, and his wife's ceasing work, placed strains upon the family, and caused him to become depressed. In his work for the AFP he was confronted by a number of difficult situations which, he said, led to him becoming hypervigilant and unable to relax when he came home. As a result he began accessing increasing amounts of adult pornography and through that followed links to sites which contained child pornography.

[36] The applicant continued to struggle with the demands of his work, as well as the financial difficulties imposed on his family. Eventually, he was dismissed from the AFP after the investigation into the offences. Since that time he had obtained employment as a meter reader.

[37] A proportion of the applicant's letter was devoted to his current physical and mental situation. That included his loss of weight, the development of a heart murmur and

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13 AB 50 lines 23-25.
14 AB 144.
15 AB 147.
16 AB 147.

has continuing consultation with the psychologist. He referred to his aspirations for the future, including plans should he avoid imprisonment.

Approach of the learned sentencing judge

[38] In the course of the sentencing remarks, the learned sentencing judge referred to s 17A of the *Crimes Act* (Cth), which provides that "[a] court shall not pass a sentence of imprisonment on any person for a federal offence … unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case." His Honour found that no other sentence was appropriate "in light of the seriousness of this charge."[17] Nonetheless, the early plea of guilty and the applicant's compliance with stringent bail conditions were matters that were taken into account.

[39] His Honour set out the nature of the offending, largely from the agreed schedule of facts. His Honour referred to the "DEF" material accessed on 1 and 2 August 2017, making it plain that those matters did not figure in the sentencing, except to put some context on the offences.[18] His Honour then referred to the images, acknowledging that 95 per cent of them were in Category 6, namely a story or cartoon. However, his Honour referred to the actual images, 33 of which fell into Category 1, as well as images in Category 3 and 4. His Honour held that though the images were few in number, they were serious. His Honour then noted the applicant's denials of any involvement.

[40] The learned sentencing judge looked at the seriousness of the offending by reference to the nature and content of the material, the number of items or images possessed and whether the material was for the purpose of sale or further distribution. His Honour acknowledged that it was not for sale or further distribution, nor was there any suggestion of profit.[19] His Honour also took into account the number of actual images, and the length of time of possession. His Honour then said:[20]

> "General deterrence is the primary sentencing consideration for this sort of offending. Less or limited weight is given to the offender's prior character. Offending involving child pornography occurs on an international level and it is becoming increasingly prevalent. It is difficult to detect. It creates a market for the continued corruption, exploitation of children and there is a paramount public interest in promoting the protection of children."

[41] The learned sentencing judge accepted a submission on behalf of the applicant, that the Category 6 images were to be regarded as in a different category to actual images, referring to *Godfrey v The Queen*.[21] The learned sentencing judge then said that, acknowledging that fact, he considered "that the nature of Category 6 offending here, in terms of detail and amount, is at the more serious end of such a category that one sees before the courts".[22]

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17 AB 71 line 22.
18 AB 74 lines 30-32.
19 AB 76.
20 AB 76 lines 22-27.
21 [2013] WASC 247 at 50. His Honour also referred to *R v MBM* (2011) 210 A Crim R 317; [2011] QCA 100, *R v Campbell* (2009) 195 A Crim R 374; [2009] QCA 128 and *R v De Leeuw* [2015] NSWCCA 183.
22 AB 77 lines 4-7.

[42] The learned sentencing judge then set out a series of factors taken into account including:

(a) it was relevant that the applicant was a sworn AFP officer, that was an aggravating feature, though not overwhelming;

(b) that actual time in custody might be more difficult for the applicant, given his history, than an ordinary prisoner;

(c) it was relevant that some information had been volunteered in the integrity report, but it was not co-operation of the kind in *AB v The Queen*;[23]

(d) the clear inference was that the applicant had a sexual interest in the material he looked at, but he was not a diagnosed paedophile, and there was clear evidence of rehabilitation;

(e) there was a need for general deterrence, because the material was depraved and had a tendency to corrupt; particular reference was made to the material discussing babies and infants being sexually abused;

(f) by way of mitigation there was the early guilty plea and remorse, as well as the lack of criminal history;

(g) the applicant was a low risk of reoffending, and the context of the offending was a period of extreme stress in his life; as well, there was the psychologist's evidence that the applicant may have been suffering subclinical levels of depressive functioning while working for the AFP;

(h) the applicant's history, both personal and in employment, and the latest struggles both financial and mentally.

[43] The learned sentencing judge, having examined all of those matters and the submissions on the applicant's behalf, expressed his view on the issue of whether there should be a period of actual custody:[24]

> "I have found the case to be a difficult one. In the end I think it is too serious not to impose actual custody, but because of the nature of the images, because of the very early plea of guilty and the very good rehabilitation, I propose to significantly reduce the time in custody to two months imprisonment."

Submissions

[44] Before this Court Ms Holliday of counsel appeared with Mr Dollar of counsel, both on a pro bono basis, for the applicant. They submitted that the period of actual imprisonment made the sentence manifestly excessive when consideration was given to:

(i) the nature and circumstances of the offending;

(ii) the actions of the applicant post-offending, including his meaningful engagement with a psychologist;

(iii) the low risk of re-offending; and

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23 *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46 at [113].

24 AB 82 lines 23-26.

(iv) the limited relevance of the applicant being a member of the AFP at the time of the offence.

[45] That submission accepted that, pursuant to s 17A of the *Crimes Act*, imprisonment was the only appropriate sentence. Further, it was accepted that 15 months' imprisonment was within range, as was the order for two years' probation.

[46] A central feature of the submission was that 95 per cent of the material was classified as Category 6, and it was contended that Category 6 material is a "victimless crime".[25] It was submitted that the highest one could put a statement of principle in relation to Category 6 material was that reflected in *McEwen v Simmons*,[26] namely that the legislation was calculated to deter production of cartoon material because it could fuel demand for material that does involve the abuse of real children.

[47] Reliance was placed on *Godfrey v The Queen*[27] where it was said that the fact that no children had been exploited in relation to stories put the offending into "a lower category of seriousness".

[48] Reference was also made to *R v De Leeuw*.[28]

[49] It was submitted that reliance was also placed on *R v Porte*[29] which adopted, as a relevant factor, that in assessing objective seriousness of such offences one matter was "whether actual children were used in the creation of the material".

[50] It was submitted that it was no answer that there was material in other categories. There were only 33 images and one video, of which 22 images fell into Category 1, the lowest category classification level.

[51] It was submitted that the applicant's actions post-offending, including his engagement with the psychologist, and his low risk of reoffending all suggested a period of actual custody was excessive. It was also submitted that there was limited relevance to the fact that the applicant was a member of the Australian Federal Police at the time of the offence. The contention was that it was not a true aggravating factor, and certainly not one which could be determinative.

[52] It was said that the applicant was technically an AFP officer, and had sworn an oath to uphold the law, but it was in circumstances where his employment had been in an airport in protective services and he had become a constable of the AFP only because of a restructuring that was carried out. Further, reference was made in the submission to the fact that it was his very employment as an AFP officer that caused the stressors which led to his offending. In addition, he had since lost his position because of the offending.

[53] By way of comparative cases, reference was made to: *R v Sykes*,[30] *R v Jones*,[31] *R v Gordon; Ex parte Cth DPP*,[32] *R v Smith*.[33]

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25 Applicant's Outline, para 25.
26 (2008) 73 NSWLR 10; [2008] NSWSC 1292.
27 [2013] WASCA 247.
28 [2015] NSWCCA 183.
29 (2015) 252 A Crim R 294; [2015] NSWCCA 174 at [63].
30 [2009] QCA 267.
31 [2011] QCA 147.

[54] For the Crown Mr Power of counsel submitted that notwithstanding the lower objective seriousness because of the fact that Category 6 material was involved, general deterrence was still an important factor. Reference was made to *Godfrey v The Queen* where it was said that such material was not harmless, but had the tendency to "normalise" exploitative sexual activity involving children and may stimulate a susceptible recipient to engage in sexual activity involving children. The submission noted that the learned sentencing judge had found that the nature of the Category 6 material was at the more serious end of such material.

[55] Mr Power submitted that it was relevant that the applicant was an AFP officer. In that regard he relied on *R v Reid*.[34] The significance was because a police officer had a duty to uphold the law and the public were entitled to rely on their integrity. Reference was also made, in this respect, to *R v RAZ; Ex parte Attorney-General (Qld)*.[35]

[56] It was submitted that the steps taken by the applicant to anonymise his internet searches and to automatically delete traces of his accessing child pornography material were matters from which one could infer that the applicant's training as an AFP officer had some role to play in the steps he took to avoid detection.

[57] By way of comparable decisions, the Crown referred to *R v Sykes*, *R v Smith* and *R v Jones*, and noted the maximum penalty in those cases was 10 years' imprisonment, rather than the 15 years' imprisonment applicable in the applicant's case. In that respect reference was made to *R v G; Ex parte Attorney-General (Qld)*.[36]

Discussion

[58] A sentence is not established to be manifestly excessive merely if the sentence is markedly different from other sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle or that the sentence is "unreasonable or plainly unjust".[37] In *R v Pham*[38] the High Court said:

> "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."[39]

[59] It must also be borne in mind that there is no single correct sentence in any particular case.[40]

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32 [2009] QCA 209.
33 [2010] QCA 220.
34 [2004] QCA 9.
35 [2018] QCA 178 at [22]-[24].
36 [1999] QCA 477 at [23].
37 *Hilli v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [58] and [59]. See also *R v Tout* [2012] QCA 296 at [8].
38 (2015) 256 CLR 550; [2015] HCA 39.
39 *R v Pham* at [28]; citations omitted; referring to *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64 at [58] and *Barbaro v The Queen* (2014) 253 CLR 38; [2014] HCA 2 at [61].
40 *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [27].

[60] It is true to say that the bulk of the images, stories and videos fall into Category 6, namely animated cartoons or drawings. The central feature of the applicant's contentions was that the viewing or accessing of the Category 6 material was essentially a "victimless crime", because no real children were used in depicting them. Whilst it is true that no real children may have been involved in the production of the Category 6 material in this case, it is, in my view, wrong to categorise it as a victimless crime. The way in which one must assess such material is reflected in *Godfrey v The Queen*:[41]

> "This offence involved a number of written stories that were downloaded from the internet. That is a significant factor in assessing the seriousness of the offending conduct. In *Ponniah v The Queen* [2011] WASCA 105 Mazza JA said:
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> > 'The criminality involved in the material that does not depict real children is of a different nature to that involving real children: *Dodge v The Queen* [2002] WASCA 286; (2002) 134 A Crim R 435 [24]; and *Hutchins v The State of Western Australia* [2006] WASCA 258 [8]. This is not to say that material of this type is harmless; it has the tendency to 'normalise' exploitative sexual activity involving children and may stimulate a susceptible recipient to engage in sexual activity involving real children [38].'"

[61] The capacity of child exploitation material, even that which does not depict real children, to affect the community goes beyond the tendency to normalise exploitive sexual activity involving children or even to stimulate potential participants in it. In my view, it serves to fuel the demand for such material, whether or not it involves real children. Further, such material has the capacity to groom not only the recipients of it, but those who may be affected by recipients of it. That is to say, its impact may well be that reflected in *Godfrey*, namely to normalise it with the recipients or to encourage the recipients to take a step further, moving from the cartoon world or anime world to that of the real world in the sense of involving real children. Something to similar effect was recognised by Adams J in *McEwen v Simmons*:[42]

> "As with literary works, it is notorious that drawings and other pictorial representations may be and often are of fictional or imaginary characters. Although the primary purpose of the legislation is to combat the direct sexual exploitation and abuse of children that occurs where offensive images of real children in various sexual or sexually suggestive situations are made, it also is calculated to deter production of other material – including cartoons – that, as the explanatory memorandum puts it, can fuel demand for material that does involve the abuse of children."

[62] Adams J was not involved in the sentencing of anyone for an offence. He was considering an appeal from a conviction by a magistrate, for the offence of possessing child pornography. The alleged pornography comprised a series of cartoons depicting figures modelled on members of the television animated series "The Simpsons". The question before Adams J was a legal one, namely whether a

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41 [2013] WASCA 247.

42 (2008) 73 NSWLR 10; [2008] NSWSC 1292 at [26].

fictional cartoon character was a "person" within the meaning of the *Crimes Act* 1900 (NSW) or the *Criminal Code Act* 1995 (Cth).

[63] In relation to the sentencing principles applicable in respect of child pornography offences, assistance can be gained from the decision in *R v Porte*.[43] In issue in that case were offences against the *Crimes Act* 1900 (NSW) in respect of possession of child abuse material, covering categories 1 through to 6 under the CETS scale, as well as offences under the *Commonwealth Criminal Code* for using a carriage service to access child pornography, again in categories 1-4 of the CETS scale. The court recognised that the comity principle had been applied in establishing sentencing principles with respect to child pornography offences, adopting what was said in *Director of Public Prosecutions (Cth) v D'Alessandro*:[44]

> "When construing and applying Commonwealth legislation, this court follows principles of comity in according respect to the decisions of intermediate appellate courts of other jurisdictions concerning the same legislation. It is therefore worth recording that there seems to be unanimous support across the jurisdictions for a number of propositions. First, that the problem of child pornography is an international one. Secondly, that the prevalence and ready availability of pornographic material involving children, particularly on the internet, demands that general deterrence must be a paramount consideration. Thirdly, that those inclined to exploit children by involving them in the production of child pornography are encouraged by the fact that there is a market for it. Fourthly, that those who make up that market cannot escape responsibility for such exploitation. Fifthly, that limited weight must be given to an offender's prior good character. Sixthly, that a range of factors bear upon the objective seriousness of the offences to which the respondent in this case pleaded guilty. They include:
>
> (a) the nature and content of the pornographic material – including the age of the children and the gravity of the sexual activity portrayed;
>
> (b) the number of images or items of material possessed by the offender;
>
> (c) whether the possession or importation is for the purpose of sale or further distribution;
>
> (d) whether the offender will profit from the offence."

[64] Still dealing with accepted sentencing principles for child pornography cases, *Porte* adopted what was said in *Minehan v The Queen*:[45]

> "[94] Drawing primarily from the authorities to which I have referred, the following matters may be relevant to an assessment of the objective seriousness of offences involving the possession or dissemination/transmission of child pornography:

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43 [2015] NSWCCA 174.

44 (2010) 26 VR 477; [2010] VSCA 60 at 483-484 [21] (citations omitted).

45 (2010) 201 A Crim R 243; [2010] NSWCCA 140 at 260-261 [94]-[95].

1. Whether actual children were used in the creation of the material.

2. The nature and content of the material, including the age of the children and the gravity of the sexual activity portrayed.

3. The extent of any cruelty or physical harm occasioned to the children that may be discernible from the material.

4. The number of images or items of material – in a case of possession, the significance lying more in the number of different children depicted.

5. In a case of possession, the offender's purpose, whether for his/her own use or for sale or dissemination. …

6. In a case of dissemination/transmission, the number of persons to whom the material was disseminated/transmitted.

7. Whether any payment or other material benefit (including the exchange of child pornographic material) was made, provided or received for the acquisition or dissemination/transmission.

8. The proximity of the offender's activities to those responsible for bringing the material into existence.

9. The degree of planning, organisation or sophistication employed by the offender in acquiring, storing, disseminating or transmitting the material.

10. Whether the offender acted alone or in a collaborative network of like-minded persons.

11. Any risk of the material being seen or acquired by vulnerable persons, particularly children.

12. Any risk of the material being seen or acquired by persons susceptible to act in the manner described or depicted.

13. Any other matter in s 21A(2) or (3) *Crimes (Sentencing Procedure) Act* (for State offences) or s 16A *Crimes Act* 1914 (for Commonwealth offences) bearing upon the objective seriousness of the offence.

[95] This list of factors is, of course, not closed. Individual cases may always produce further matters relevant to the assessment of their objective seriousness."[46]

[65] It has long been accepted that the possession of child pornography material creates a market for the continued corruption and exploitation of children.[47]

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46 *Porte* at [63].

47 *R v Coffey* (2003) 6 VR 543; [2003] VSCA 155 at 552 [30].

[66] The courts have long accepted and stressed that possession of child pornography is not a victimless crime.[48]

[67] The classification of material in accordance with the CETS scale provides the court with assistance in the process of assessing the objective seriousness of an offence. The categories on the CETS scale involve escalating gravity of the conduct depicted in the images. However, that does not mean that Category 1 material is mild in content. In *Porte* a passage from *Director of Public Prosecutions (Cth) v Zarb*[49] was adopted. In *Zarb* the court referred to the CETS level 1 in these terms:

> "Although level 1 covers images which are not as depraved and abusive as the images allocated to higher levels, some of the images we viewed involved dreadful examples of the abuse of the child victims, who were arranged in sexualised poses displaying their genitalia. The images at the higher end of the CETS Scale depicted horrifying degradation and exploitation of young children."

[68] Adopting that passage, *Porte* held that despite being the lower classification, Category 1 of the CETS scale referred to material which was, itself, capable of possessing significant gravity. I respectfully agree with that analysis.

[69] As I will endeavour to explain, whilst Category 6 material is different from the material in the other CETS categories, in the sense that it is cartoon, animated or drawings whereas the other categories involve real persons, it is not victimless nor harmless.

[70] A moment's reflection on the state of advancement in technology over the last, say, 20 years, reveals the inappropriateness of assuming that a Category 6 image, cartoon or video is somehow distinctly different from the other categories. Where once such material was restricted to a series of drawings which, when moved sequentially and quickly, produced moving images, now there is sophisticated Computer Generated Imagery (**CGI**) technology, which produces life-like images and completely realistic movement. That is the case here. The images accessed on 23 June 2017 were CGI images and the video accessed on 24 July 2017 was a CGI video.[50]

[71] Child Exploitation Material has at least six categories of participant who are at risk of exploitation in all forms:

(a) the people appearing in the images, videos or audio files, that is:

  (i) the children involved as "performers"; and

  (ii) the adults involved as "performers";

(b) those that see and hear the material;

(c) those that make the material, e.g. the photographer, the editor, the soundtrack performers and producers, and others who produce the material;

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48 *R v Jones* (1999) 108 A Crim R 50; [1999] WASCA 24 at 52 [9]; *R v Gent* (2005) 162 A Crim R 29; [2005] NSWCCA 370 at 38 [33]; *Director of Public Proseuctions (Cth) v D'Alessandro* (2010) 26 VR 477; [2010] VSCA 60 at 484 [33]; *R v Martin* [2014] NSWCCA 283 at [43]; *R v Porte* [2015] NSWCCA 174 at 68.

49 (2014) 46 VR 832; [2014] VSCA 347 at [30].

50 AB 90 and 97.

(d) those who are affected, in the sense of preyed upon or groomed, by the persons who actually look at the material;

(e) those who are affected, in the sense of preyed upon or groomed, by the persons who make the material (whether as performers or producers); and

(f) those who accidentally see the material.[51]

[72] I say "at least" six because I do not intend that list as an exhaustive list. For example, because cartoons or anime will likely be accompanied by a soundtrack, whether in the form of sound effects, words, or scripted lines, those who hear, even if they cannot see, the cartoon or anime are within scope.

[73] There is another consideration. Whilst the Category 6 material does not involve the use of real children, the interest of those who view that material may be encouraged by what they see. In that way viewing such material is a form of grooming of the watchers themselves.

[74] It is evident, then, that images, videos and stories which are Category 6 (cartoons, anime, drawings or word pictures) avoid the involvement of only one category of those listed at paragraph [71] above, that is, those live persons performing in the images or videos. The material still has the capacity to affect all the others.

[75] The potential of material consisting only of stories to deprave and corrupt was adverted to in *Assheton v The Queen*,[52] a case involving books which contained pornographic descriptions of encounters between adult males and young boys:

> "It needs to be borne in mind that the importation of child pornography, whether in the form of literature or photographs, is not a victimless crime. The capacity of child pornography to deprave and corrupt individuals is an accepted result of such importation as is demonstrated in this case."

[76] In my view, that means that Category 6, whilst having the feature of not involving (at least directly) real persons in it, is not to be treated as substantially different from the other categories. It is simply different from them, just as they are different from one another.

[77] Further, whilst the CETS categories demonstrate escalating degrees of sexual abuse, degradation and depravity, being higher on the scale does not mean that those lower are any less abhorrent, as all categories necessarily involve sexual exploitation of children. The descriptions in the CETS categories are general descriptions, each of which covers a multitude of different acts or forms of conduct.

[78] All of the considerations above serve to demonstrate that it is an error to consider that cartoons, animations, or stories constitute a victimless offence. To do so is to place an unwarranted gloss on the task the court has to address, namely an assessment of the objective seriousness of the offending conduct. Category 6 material is not harmless just because it is anime, cartoons or stories. It is not harmless just because it does not involve real children.

[79] And it must be borne in mind that the CETS scales are non-legislated scales, which are adopted because they are a useful tool, but which should not serve to alter the

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51 The risk of this category is recognised in the sentencing principles referred to in *Porte* at [63].

52 (2002) 132 A Crim R 237; [2002] WASCA 209 at [36].

meaning of statutory text. Material is either Child Exploitation Material, or it is not. Once it is found to be Child Exploitation Material and an offence is committed, the court must sentence according to established sentencing principles. The scales assist but cannot overwhelm the assessment of the nature of the material as part of assessing the objective seriousness of the conduct.

[80] In any event, the material accessed by the applicant was not restricted to Category 6. True it is that 95 per cent of the material fell into that Category, but in addition there were images and videos all of which involved real children being sexually abused: see paragraph [20] above. They were:

(a) 22 images in Category 1;[53]

(b) five images in Category 3;[54]

(c) five images in Category 4;[55] and

(d) one video in Category 4.

[81] The question here is whether the learned sentencing judge erred in exercising the sentencing discretion to impose a period of actual imprisonment. It is not suggested that his Honour missed any relevant factor, or took into account any irrelevant factor. In essence the applicant's case is that there are four factors which point to the discretion miscarrying in relation to the imposition of a period of actual imprisonment: (i) the bulk of the material was Category 6, a victimless offence; (ii) the applicant's post offence conduct, especially his work with the psychologist; (iii) the low risk of reoffending; and (iv) the limited relevance of the applicant's being a member of the AFP.

[82] The learned sentencing judge considered the offending too serious not to impose a period of actual custody, but gave three reasons for imposing only a short period: (i) the nature of the images; (ii) the early guilty plea; and (iii) the "very good rehabilitation".[56]

[83] As is evident the learned sentencing judge took into account that the bulk of the images were Category 1, not as a reason for not imposing a period of actual custody, but as a reason for reducing what it would otherwise be. That was because that category is the least serious of all the CETS categories in that it does not involve sexual activity by or involving actual children. I am unable to find error in that approach.

[84] As I have endeavoured to state above, the fact that a large proportion of the material was Category 6 does not affect the objective seriousness of the conduct in such a way that a period of actual imprisonment was beyond the discretion. The applicant conceded that a sentence of imprisonment was appropriate and did not challenge the imposition of 15 months. Once it is conceded that imprisonment was an appropriate sentence, it is in my view very difficult to demonstrate that a period of actual custody was beyond the sentencing discretion. The content of the Category 6 material was abhorrent: see paragraph [14] above. In particular the stories of raping babies, when seen in the context of an exploration of how to have sexual intercourse with a baby without damage, are of great concern: see paragraphs [14](d) and [18]

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53 Children nude and posing in sexually explicit ways, but not sexual activity.

54 Non-penetrative sexual activity between children and adults.

55 Penetrative sexual activity between adults and children.

56 AB 82 line 24.

above. That was the sort of conduct that cries out for general deterrence, and amply justifies the imposition of a period of actual custody.

[85] When one adds in the 33 images and videos that did involve real children being sexually abused, in penetrative and non-penetrative ways, the applicant's contention faces an even greater hurdle.

[86] I am unpersuaded that the applicant's conduct post-offence, particularly with the psychologist, means that a period of actual imprisonment was unable to be imposed. That factor was addressed in detail by the learned sentencing judge, who had heard the evidence of the psychologist. Further, that evidence caused the applicant to withdraw the suggestion that he had no sexual interest in the material. The psychologist's opinions had to be seen in light of that being a factor motivating the access to the material in the first place. And, the applicant ceased because he was discovered, not voluntarily. As the courts have recognised, one of the paramount factors in sentencing for this sort of offence is the need for general deterrence. It was to the applicant's credit that he had embarked upon rehabilitation in the way he did, but the learned sentencing judge gave credit for that in the sentence, by reducing the period of actual custody from what it might have been. Given this was a Commonwealth offence for which the sentence was imposed, a head sentence of 15 months' imprisonment could have attracted a period of actual custody well in excess of six months. Seen in that light the period of two months was favourable to the applicant. The learned sentencing judge evidently had those considerations in mind as his Honour imposed two months, which he said was a significant reduction.[57]

[87] The third factor, the low risk of offending, was accepted by the learned sentencing judge,[58] and taken into account as part of the "very good rehabilitation" which reduced the period of actual custody to two months from what it would otherwise have been. Given the importance of general deterrence in cases of this kind, I am unable to conclude that this factor, either alone or in conjunction with the others, demonstrates that the sentencing discretion miscarried.

[88] The fourth factor was the limited relevance of the applicant's being an officer of the AFP at the time. The submission focussed on two aspects. First, that the applicant was almost an accidental AFP officer because he had been a protective services officer at the airport and became a Constable when the AFP restructured. Despite the restructure he continued in the same role. Secondly, that it was his employment that caused the state of affairs (stressors with which he had difficulty coping) in which he offended.

[89] The learned sentencing judge accepted that the fact that the applicant was an AFP officer was an aggravating factor, but said it did not overwhelm his consideration of the case.[59]

[90] In my respectful view, the learned sentencing judge was correct to consider the applicant's employment as an AFP officer as an aggravating factor. First, as a policeman the applicant swore he would uphold laws, not break them. The community, and the vulnerable in the community including children, had the right to expect he would do so. Secondly, shortly before the offending occurred the applicant recognised that accessing Child Exploitation Material was wrong. He put in his own integrity report disclosing that he had accidentally accessed some, and said he was no longer doing so. Thirdly, he evidently knew what he was doing was

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57 AB 82 line 25.
58 AB 77 lines 24-29, AB 78 line 15.
59 AB 77 lines 24-29.

wrong as he took steps to anonymise his access to the websites, and to hide the history of internet searches. Fourthly, when discovered he lied to the police about having had access to such material, and about taking steps to hide it. In doing all those things the applicant was in a different position from others because of his role as a federal policeman.

[91] The relevance of such employment as an aggravating factor was made plain in *R v Reid*,[60] a case where a police officer supplied dangerous drugs. It was urged on the court that the fact that the offender was a serving police officer was of little effect. To counter that submission the court was referred to *R v Fingelton*.[61] Referring to *Fingelton* this Court said:[62]

> "The offence in that case was one of threatening harm to a witness because of his giving evidence in a judicial proceeding. This Court said that that offence was more serious because it was committed by a judicial officer whose duty it was to uphold the law and to protect witnesses against conduct of that kind. The Court said that the public must be entitled to rely on the integrity of its judicial officers.
>
> Very much the same can be said about police officers. It is their duty to uphold the law and the public must be entitled to rely on their integrity. For a police officer sworn to uphold the law to himself engage in such serious criminal conduct as supplying the drug amphetamine makes the conduct more serious than if committed by some person other than one in such a position of public trust."

[92] In my view, the proposition in *Reid* is applicable here. I am unpersuaded that the applicant should be treated as a "technical"[63] AFP officer just because his oath was taken when he was a protective services officer, and prior to the restructure. To take that approach is to demean the oath and make the community's reliance upon sworn officers of the law dependent upon their individual foibles. And the applicant himself recognised the connection between his role as an AFP officer and what he had done, saying that he had sworn to protect children and he had "betrayed the office of Constable bestowed upon me by the community".[64]

[93] In any event the history described by the applicant does not really warrant that approach.[65] In 2002 he joined the Anti-Terrorism First Response Unit of the Australian Protective Service, and was posted at Brisbane Airport. In that role addressing matters of domestic violence, international custom matters, drug related offences, airline disputes with customers, mental health and homeless persons was an expected part of the job. The applicant performed well and was promoted. The restructure occurred in 2004. In 2010 the applicant was given the choice of retraining or leaving the AFP. He stayed out of loyalty to the AFP and qualified as a Constable in 2012, a job with greater responsibility but less pay. At the same time his wife ceased work and commenced study to be a teacher, as a result of which there was financial strain. The applicant did not cope with his work as well as before, partly because of the stress of changes to equipment (ballistic vests, body cameras, tasers and rifles), and the aftermath of situations he dealt with. He felt he

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60 [2004] QCA 9.
61 [2003] QCA 266.
62 *Reid* at page 5. See also *R v RAZ; Ex parte Attorney-General) Qld)* [2018] QCA 178 at [22]-[24].
63 Applicant's outline on appeal, paragraph 39.
64 AB 147, 2nd and 3rd paragraphs of Ex 8.
65 AB 148-150.

could not switch off and was loath to seek assistance from the AFP. He started accessing child pornography at that time. By 2014 his wife was relief teaching but did not have a full-time job, so their financial position became worse. Then, in 2016 health issues with his parents put a greater strain on him, leading to his feeling emotionally and physically exhausted.

[94] None of that history suggests, nor was it suggested by the psychologist, that the applicant did not understand the importance of his oath, his duty to uphold the law or the unlawfulness of accessing child pornography. Notwithstanding that, he began to access child pornography long before the offending conduct in 2017.[66] Further, as is often the case, there were a number of factors leading to his mental state in 2017, only one of which was his ability to cope with the changing demands of his work.

[95] Given that state of affairs the learned sentencing judge was correct, in my respectful view, to consider the AFP employment as an aggravating but not overwhelming factor.

[96] Various comparative cases were referred to on this application. Given the very narrow scope of the applicant's challenge to the sentence, only a few are of assistance. I shall only refer to four. They were all before the increase in the maximum penalty for this offence, from 10 to 15 years. That increase must be factored into considerations of the appropriate sentence.[67]

[97] In *R v Sykes*[68] a 28 year old offender with no criminal history was sentenced (on a plea of guilty) to 15 months' imprisonment, to serve six months of actual custody. He accessed 120 images in Categories 1-4, and another 20 images. He cooperated fully with police. The sentence was not disturbed. Sykes had mitigating factors very similar to those of the applicant, but he cooperated whereas the applicant did not, lying to the police as he did.

[98] In *R v Smith*[69] a 24 year old offender pleaded guilty and was sentenced to 18 months' imprisonment, to serve three months actual custody. Over 17 months he accessed about 1,449 images some of which were duplicated on his laptop (1,086 Category 1; six Category 2; nine Category 3; 72 Category 4; two Category 5). He had severe psychological problems from a disrupted childhood, a childhood head injury and abuse as a child. He cooperated with police after first denying involvement. The sentence was not disturbed.

[99] In *R v Jones*[70] a 47 year old pleaded guilty to accessing 17 movies on one day (one Category 1; one Category 3; eight Category 4), and possessing 17 movies and 44 images across Categories 1-5. He was a low risk of re-offending and suffered depression at the time of offending. Because of an error in sentencing the initial sentence of 15 months to serve three months was reduced on appeal to 15 months with immediate release. By then he had served two and a-half months in custody.

[100] Whilst it is true that none of *Sykes*, *Smith* or *Jones* involved Category 6 material, the numbers of images were greater in each case and the period involved was greater. Those cases are of utility in demonstrating that this sort of offence does not usually

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66 AB 150 lines 1-5.
67 *R v G; Ex parte Attorney-General (Qld)* [1999] QCA 477 at [23]. See also *R v CBI* [2013] QCA 186 at [19].
68 [2009] QCA 267.
69 [2010] QCA 220.
70 [2011] QCA 147.

attract non-custodial sentences. That is essentially what the applicant contends should have been imposed. I am not persuaded that is so.

[101] *R v Gordon; Ex parte Commonwealth DPP*[71] concerned offences of accessing and possessing 3,290 images; they were accessed over about eight and a-half months. The sentence, on plea of guilty, was of 12 months' imprisonment with immediate release. The images consisted of: 2,957 Category 1; 87 Category 2; 73 Category 3; 161 Category 4; and two in Category 5. The offender was a 57 year old pharmacist, 59 when sentenced. He cooperated with authorities. The sentencing judge found the offender would not re-offend again, and had suffered a very real punishment by public shaming. His Honour considered that the sentence he imposed would serve to make clear society's denunciation. This Court refused an extension of time in which to appeal against the sentence, finding that there was no sufficient explanation by the Crown for its delay. In the course of doing so the Court said:[72]

> "[43] It may be accepted that the "paramount" need for deterrence requires that a sentence of imprisonment be imposed for offending of the present kind, and even that such a sentence would usually involve a period of actual custody. Reference may be made here to the decision of the Court of Criminal Appeal of the Supreme Court of New South Wales in *James v The Queen*. But this Court has recognised that strong mitigating factors of the kind which are present in this case may warrant the immediate release of an offender on his own recognisance. …"

[102] *Gordon* does not establish that the applicant's sentence was manifestly excessive because it did not impose a period of actual custody whereas the applicant's sentence did. That simply means that one sentence was different from the other.[73] That case had distinguishing features from the current one: there the offender cooperated and suffered a real punishment from public shaming. And the disposal of the matter on the basis of refusal of an extension of time meant that this Court did not determine whether the sentence was manifestly inadequate.

[103] The sentence imposed on the applicant cannot be demonstrated to be manifestly excessive. I would refuse the application.

[104] **PHILIPPIDES JA:** I agree that leave to appeal should be refused for the reasons given by Morrison JA.

[105] **BODDICE J:** I agree with Morrison JA that the sentence is not manifestly excessive. I agree leave to appeal should be refused.

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71 [2009] QCA 209.

72 *Gordon* at [43] per Keane JA, de Jersey CJ and Wilson J concurring; internal citations omitted.

73 *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [27].