SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mizner* [2019] QCA 198
PARTIES:	**R** **v** **MIZNER, Jason Daron** (applicant)
FILE NO/S:	CA No 309 of 2018 DC No 914 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 26 October 2018 (Clare SC DCJ)
DELIVERED ON:	27 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	24 July 2019
JUDGES:	Morrison and Philippides JJA and Applegarth J
ORDER:	**Application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – MAINTAINING SEXUAL RELATIONSHIP WITH CHILD AND PERSISTENT SEXUAL ABUSE OF CHILD – where the applicant raped and sexually abused the two year old daughter of a woman he was in a relationship with – where the applicant's conduct was only detected after the applicant had left to travel in Thailand – where the partner discovered amongst the applicant's belongings: child exploitation material, lists of websites and handwritten notes detailing the applicant's plans and thoughts for the targeting and kidnapping of children for the purposes of sexual exploitation – where the partner forwarded the material onto the police – where police seized computer hardware which contained child exploitation material and a camcorder and two camcorder tapes – where footage on the camcorder tapes depicted the applicant raping and sexually assaulting the partner's two year old daughter – where the applicant was imprisoned in Thailand for child sex offences – where the applicant filmed himself raping and sexually assaulting a two year old girl in Thailand – where the applicant was sentenced to 35 years imprisonment in Thailand but was released after serving 10 years and 11 months after receiving various commutations and finally a Royal Pardon – where the applicant was deported from Thailand and arrested upon

return to Australia for the offences relating to the current sentence – where the applicant was sentenced to 19 years imprisonment for maintaining an unlawful relationship – where the applicant appeals his sentence on the ground of manifest excess – where the applicant will have spent more than 26 years in continuous custody before becoming eligible for parole – whether the sentence imposed upon the applicant was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant spent around 11 years in custody in Thailand comprising of both a prison sentence and immigration detention – where the applicant was sentenced to 19 years imprisonment for maintaining an unlawful relationship – where the applicant appeals on the ground that the sentence imposed was manifestly excessive – where it is contended that there was a misapplication of the totality principle as the applicant will have effectively served a 30 year sentence when combining the current sentence with the 11 years served in Thailand – where it is contended that the sentence imposed upon the applicant has effectively delayed the applicant's parole eligibility 11 years longer than would apply to a life sentence – where the applicant will become eligible for parole after serving more than 26 years in custody – whether the time spent in custody in Thailand should have been taken into account when sentencing for the current sentence – whether the sentence imposed by the learned sentencing judge was manifestly excessive

Penalties and Sentences Act 1999 (Qld), Part 9A

R v C [1998] QCA 207, cited
R v SAG (2004) 147 A Crim R 301; [2004] QCA 286, cited

COUNSEL: C Reid for the applicant
C Heaton QC for the respondent

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

[1] **MORRISON JA:** The applicant was in a relationship with a woman for about 12 months. It ended when he left to travel to Thailand on an open-ended holiday. The applicant's partner was cleaning out some of his belongings after he had gone when she discovered:

(a) a black folder containing 24 pages of child exploitation material images, and a page with her own and her children's names highlighted; there were several printouts of a list of passwords for multiple "Lolita" webpages;

(b) a quantity of CDs and floppy disks, containing child exploitation material, in an envelope with the applicant's name on it;

(c) a diary containing a list of internet websites; and

(d) a notepad containing various handwritten notes detailing plans and thoughts on how the applicant would target children and kidnap them for the purpose of sexual exploitation; the notes detailed names, ages and locations of some children, and entries indicating that he was planning to use this material to gain entry to a child exploitation syndicate.

[2] The applicant's partner delivered the material to police, who attending the home and seized computer hardware which contained child exploitation material, a camcorder tape and a video camcorder with a tape inside.

[3] The two camcorder tapes depicted the partner's two year old daughter being raped and sexually abused by the applicant. The tapes revealed that they were made on six occasions over four separate days, those days spanning three months. The total recording time was one hour and 43 minutes with the individual recordings lasting five minutes 15 seconds, six minutes 30 seconds, 15 minutes 15 seconds, 24 minutes, 27 minutes and 25 minutes. Over the course of that time the tapes revealed the applicant's performing digital, penile rape, both vaginal and anal, on the two year old, a total of 36 times, and attempted rape 15 times. In addition many more sexual assaults were carried out.

[4] The applicant pleaded guilty to 65 sexual offences on 21 September 2018. He was then sentenced on 26 October 2018:

(a) Count 1 – maintain an unlawful relationship with a child – 19 years' imprisonment;

(b) Count 65 – possessing child exploitation material – 3 years' imprisonment; and

(c) Counts 2-64 – rape (36), attempted rape (15), making child exploitation material (6), and involving a child in making child exploitation material (6) – convicted and not further punished.

[5] Pre-sentence custody totalling 640 days (between 25 January 2017 and 26 October 2018) was declared as time served under the sentence.

[6] Whilst in Thailand the applicant was arrested for child sex offences. Those offences occurred when the applicant took a two year old girl from her mother and filmed himself sexually assaulting the girl, including vaginal and anal rape. On 26 July 2007 the applicant was convicted after a trial, and on 24 January 2008 he was sentenced to 35 years' imprisonment in Thailand. Between 2010 and 2016 he received various commutations of his sentence until he was granted a Royal Pardon in 2016. By then he had served a total of 10 years' and 11 months' imprisonment.

[7] On 30 December 2016 the applicant was discharged from his Thai sentence and remained in immigration detention. Deportation proceedings were commenced and he was deported to Australia, where he was arrested and remanded in custody in respect to the present offences.

[8] The applicant challenges the sentence imposed in respect of Count 1, 19 years for maintaining an unlawful relationship, on the sole ground that it is manifestly excessive. The underlying contention is that there was a misapplication of the totality principle because when one combines the non-parole period under his present sentence with the period of about 11 years served in Thailand, the applicant

will effectively have served a 30 year sentence becoming eligible for parole after spending more than 26 years in custody.[1]

Circumstances of the offending

[9] What follows is taken from the agreed schedule of facts.[2] I have given long consideration as to whether a brief summary should be given, with limited detail. However, the true nature of the offending, and its seriousness, can only be appreciated with a full account. In the summary below I will also identify those acts which resulted in rape and attempted rape charges.

[10] Tape one contained three recordings, the first of which was on 20 August and the second and third both on 2 September.[3]

Tape 1, session 1; five minutes, 15 seconds.

[11] This depicted the child lying naked from the waist down with her vagina exposed. The child appeared distressed and cried "mummy". The applicant caused the camera to zoom in close to her vagina, which he touched on the outside and on which he then rubbed lotion. He pushed his little finger inside her vagina,[4] and continued to rub around her vagina. He moved the camera and showed himself masturbating.

Tape 1, session 2; six minutes, 30 seconds.

[12] This tape depicted the applicant naked from the waist down in a bathroom. The child was in a nappy and placed on a set of drawers. He then removed her clothes, and took off his own clothes. He placed the child flat on the surface and moved his penis close to her face. On several occasions he grabbed her face forcibly and covered her mouth. He moved the child around into several different positions, and masturbated. He then brought the child close to the camera and exposed her vagina. The child was crying and distressed throughout.

Tape 1, session 3; 15 minutes, 15 seconds.

[13] This session followed nine minutes after session 2. The tape depicted the child lying naked on a bed, red-faced and distressed. The applicant moved the camera around to record her at different angles, spreading her legs and licking her vagina. He then rubbed lotion on her vagina and inserted his little finger into her vagina to the first knuckle, moving it in and out.[5] The child struggled and cried. The applicant inserted his little finger into her anus and moved it in and out.[6] He then masturbated close to her vagina, and rubbed his penis onto her vagina.

[14] The applicant pulled the child's legs up and together. He then exposed her anus and tried to stretch it. He then repositioned her and closed her legs, putting his penis in

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1 Applicant's outline, paragraph 10.
2 Appeal Book (**AB**) 125-135.
3 I will refer to the separate recordings on each tape by the term "session" and the length of time of that session. However, the term "session" should not be understood as necessarily being the limit of the applicant's conduct; rather, all that is known about the conduct is only from the recordings, as the applicant did not participate in an interview. He was, however, sentenced on the basis of what was shown in the recordings.
4 Rape.
5 Rape.
6 Rape.

between her thighs and vagina, thrusting back and forth while she lay flat. He rubbed his penis on her vagina, adding more lotion to her vagina, and continued thrusting. The applicant then attempted to push his penis into her anus.[7] The tape revealed him masturbating and again attempting to push his penis into her anus.[8] The child was crying at this time. The applicant tried again on three occasions.[9] He then moved his penis close to the child's face, and ejaculated on her vagina, legs and stomach. He continued to masturbate and moved the camera up close to the child.

Tape 2, session 4; 24 minutes.

[15] This was filmed over four weeks after the last tape. The child was lying naked from the waist down on a bed, her legs up and vagina exposed. The applicant then spread apart both her vagina and her anus. He was naked, with his penis exposed. The applicant removed her clothes, spread her legs and exposed her vagina. He then turned her over and spread her vagina. He then rubbed lotion onto her vagina and turned her back over onto her back. He continued to rub lotion on her vagina. He then inserted his index finger into her anus and moved it in and out, before doing the same thing with his index finger in her vagina, and then his little finger in her vagina.[10]

[16] The applicant masturbated close to the child's face, while he rubbed her vagina and anus. She appeared distressed and tried to cover her face and move away from him. He sat on her and put his testicles on her face, while she struggled. He then moved off her and put his hand on her face and mouth. At that point he inserted his index finger into her anus and forcibly moved it in and out.[11]

[17] The applicant then moved around and licked the child's vagina, she being visibly red and distressed at the time. He then sat her up. The applicant lay down with his penis and genitals exposed to the camera and put the child on top of him with her vagina exposed. He then masturbated while rubbing her vagina, and put his penis on her vagina. He then rubbed more lotion onto her vagina and inserted his little finger into the vagina again.[12]

[18] The applicant then turned the child over so she was lying face down on him, and continued to masturbate. He rubbed lotion on her anus and tried to insert his middle finger.[13] He then smacked the child's bottom and inserted his index finger into her anus, moving it in and out.[14] He continued to masturbate and thrust his penis into her vagina and anus area, trying to force it in.[15] The child was crying and distressed.

[19] The applicant got up and sat the child down in front of the camera. He tried to force his penis into her mouth, but she cried and moved her head away.[16] He attempted to

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7 Attempted rape.
8 Attempted rape.
9 Three counts of attempted rape.
10 Three counts of rape.
11 Rape.
12 Rape.
13 Attempted rape.
14 Rape.
15 Attempted rape.
16 Attempted rape.

do that again several times.[17] The child covered her face with her hand. The applicant grabbed her hands and moved them beside her, making her suck on the end of his penis.[18]

[20] The applicant then put the child's shirt on her arms so she could not move them, while she was crying and struggling for breath. He laid her down and rubbed his penis on her vagina, and masturbated while rubbing her body. The child was writhing around and struggling. He then stood her up and grabbed her mouth hard, to quieten her. He then forced her mouth back onto his penis.[19] He then laid her back down and thrust his penis onto her vagina area.[20]

[21] The applicant continued to rub his penis on or over her vagina, while kissing the child's face. He put her legs together and rubbed his penis in between her thighs and vagina, leaning in and kissing her on the tongue. The child continued to cry. He then attempted to push his penis inside her anus.[21] He then sat her back up again and tried to get her to suck his penis.[22] Then he laid her down and rubbed his penis on her vagina again, while she tried to roll away. He then sat her back up again and put the end of his penis in her mouth.[23] The applicant then ejaculated on her face and body, moving her close to the camera to show her face. He then turned her around and exposed her vagina to the camera, moving the camera in close to her vagina. Having laid her down again he twice inserted his index finger into her anus.[24]

Tape 2, session 5; 27 minutes.

[22] This was filmed five weeks after the last video. In this video the child was lying back on the bed, fully clothed. The applicant took her clothes off, leaving her underwear on, and played with her for a short while. The child grabbed and held her vagina as if to protect herself. The applicant zoomed the camera in on her vagina, and tried to move her hands. He then moved her underwear aside and spread her legs open, while she placed her hand on her vagina to protect it. He then rubbed lotion on her vagina, and she did the same. The applicant moved the camera to film her rubbing from different angles. He then rubbed her vagina, and spread it with his hands, zooming the camera in close. He then inserted his index finger into her anus.[25] He attempted to insert his index finger into her vagina.[26]

[23] The applicant turned the child over and positioned her on her knees. She was then crying and saying "mummy". The applicant filmed her bottom and vagina from different angles. He moved into the camera shot, naked. He then positioned her on her back and himself to one side, upright and with his penis close to her face. He got the child to hold his penis, and masturbated.

[24] The child grabbed her underwear and held it up as if asking the applicant to put it back on her, crying for "mummy". He moved in between her legs and rubbed his

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17 Attempted rape.
18 Rape.
19 Rape.
20 Attempted rape.
21 Attempted rape.
22 Attempted rape.
23 Rape.
24 Two counts of rape.
25 Rape.
26 Attempted rape.

penis on her vagina, as well as putting more lotion on her vagina. He then zoomed the camera in closer to his penis and her vagina, thrusting back and forth while holding her legs apart. He moved her vagina towards the camera and spread her legs.

[25] He then rubbed more lotion onto the child's vagina and anus, and inserted an index finger into her anus, moving it in and out.[27] The applicant then alternated using his index finger, middle finger and thumb to insert into her anus.[28] He then attempted to insert his little finger in her vagina, at which point the child struggled and tried to move away.[29]

[26] The child was distressed and red in the face. He rubbed his penis onto her vagina, repositioning her and moving her face towards his penis. The applicant then took her dummy out and placed the end of his penis in her mouth.[30] The applicant made her suck on his penis.[31] He then moved the camera so that he was filming her sucking his penis close-up from above.[32] The child was red in the face and distressed. He then stopped and moved away, and the child tried to put her underwear back on.

Tape 2, session 6; 25 minutes.

[27] This was filmed on the same day as the previous tape. The child was sitting on a chair, dressed in just her pink underwear. The applicant tried to take the underwear off, but the child tried to keep it on, attempting to resist. He sat her up and placed his penis in her mouth.[33] He then moved the camera to film that at a close angle, making her suck on the end of his penis.[34] The child was distressed, crying and red in the face. The applicant then forced his penis in and out of her mouth while holding her head,[35] made her hold his penis while moving it in and out of her mouth,[36] and moved the camera to film her sucking from above.[37]

[28] The applicant then moved the child back onto a bed, and laid her down, spreading her legs. He placed lotion on her vagina area and positioned himself over her, rubbing his penis on her vagina. He then put her legs together and thrust his penis in between her thighs and vagina. He then forced his penis into her mouth, thrusting in and out.[38] He then moved his penis back to her vagina and tried to force his penis into her anus several times.[39] The child was very distressed and crying.

[29] The applicant moved the camera closer and zoomed in on his penis and her vagina area. He forced the head of his penis into her anus, and moved it in and out.[40] The child's anus and vagina area appeared very red. The applicant moved the camera in

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27 Rape.
28 Three counts of rape.
29 Attempted rape.
30 Rape.
31 Rape.
32 Rape.
33 Rape.
34 Rape.
35 Rape.
36 Rape.
37 Rape.
38 Rape.
39 Attempted rape.
40 Rape.

to film it from different angles. He zoomed in close to her vagina, spreading it apart with his fingers. He then inserted his index finger in her anus.[41]

[30] The applicant rubbed more lotion on the child's vagina and anus area, rubbing his penis over her vaginal area. He then sat her on a pillow, putting his penis in her mouth and making her suck on it.[42] He then masturbated, making her suck on his penis again, repeating that several times.[43]

[31] The applicant moved the child onto her back and lifted her vagina in the air, moving the camera and zooming in to his penis and her vagina. He rubbed more lotion on her vagina and anus, forcing the heard of his penis into her anus, thrusting in and out.[44] This action forced the child to defecate. The applicant moved his penis away and put it in her mouth.[45] He then moved the child back onto a chair, making her suck on his penis.[46]

[32] The applicant masturbated close to her face while intermittently moving his penis onto her mouth. He ejaculated on her face, at which point the child was crying. He moved the camera around to film her face from different angles with semen on her face. He then laid her down on the bed and filmed her whole body, showing semen from her face to her vagina and legs.

Child exploitation material

[33] The applicant's child exploitation material fell into two general classes: 24 pages containing images; and images and movies stored on computer hard drives and external discs.[47]

[34] The 24 pages contained the child exploitation material amassed by the applicant. One page contained three images noting stolen passwords to "Lolita Pay Sites". The pages may be summarised as containing multiple images of young and pre-pubescent naked girls, aged between five and 16: some posing; some with their vaginas or crotches exposed, and one such showing a male ejaculating; some engaged in sexual intercourse with an adult male; engaged in fellatio; using a sex toy on her vagina.

[35] The applicant's computer equipment revealed he had 1,275 files of child exploitation material, of which 1,271 were unique images and three unique movies. The apparent age of the children depicted was between babies and 14 year olds, mostly female. Of that 44 per cent were in the worst categories for child exploitation material, namely Categories 3, 4 and 5.

[36] The category 5 movie depicted bestiality where a dog was sexually penetrating a young girls' vagina, while an adult male was penetrating the dog.

[37] Examples of the category 3 images were of young girls and adult males, with semen over the girls' faces, and often with erect penises touching the face or genitals.

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41 Rape.
42 Rape.
43 Two counts of rape.
44 Rape.
45 Rape.
46 Rape.
47 AB 136-137.

[38] Examples of the category 4 images included babies and young girls being sexually penetrated by adult penises, as well as objects such as a baby bottle teat, and with semen on the baby's genital area.

[39] Examples of the category 5 images was a six year old girl with words written on her body in red ink, "Slut, hurt me", and a young girl kneeling on a bed with a ball gag in her mouth and a whip across her bottom.

[40] The applicant's child exploitation material was on 30 floppy disks, seven CD's, and hard drives. The breakdown by category was:

(a) Category 1 (no sexual activity) – two movies; 646 images;

(b) Category 2 (child non-penetrate) – 68 images;

(c) Category 3 (adult non-penetrate) – 265 images;

(d) Category 4 (child/adult penetrate) – 261 images;

(e) Category 5 (sadism bestiality) – two movies; 31 images.

Pre-sentence psychological report

[41] The learned sentencing judge was presented with a presentencing report from a psychologist, Dr Palk.[48] The report included matters of the applicant's history, as well as a psychological assessment.

[42] The applicant told Dr Palk that he began collecting child pornography when he was about 28 or 29; he was about 30 to 31 at the time of the current offending. He described having periods of "porn binges". That caused one of his early relationships to break down and that, together with other family problems, caused him to become isolated. At that point, according to the applicant, he began to consider the possibility of having sex with a child.[49] The applicant described himself as being "deeply troubled by what he described as shifts between feeling normal and bouts of perversion".[50]

[43] The applicant described having a close bond with the mother of the victim child. He said that he hated himself for abusing the child, fearing being caught and knowing it was wrong. He said that after the abuse he experienced desires to kill himself due to feelings of crushing guilt.[51]

[44] The applicant described a troubled upbringing, with his parents separating when he was young and difficulties that his mother experienced while she had custody of him. She eventually found a new partner but he was a violent drunkard. The applicant reported that man had bashed himself and his mother, and that as a young child he had witnessed a person being shot in the chest in the living room.[52] The applicant said he was regularly bashed by his mother's partner, as were his mother and his brother. He also recited a history of sexual abuse at the hands of one of his mother's friends. When his mother re-partnered, the applicant said he was raped by

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48 AB 141.
49 Report, paragraph 4.3, AB 146.
50 Report, paragraph 4.4, AB 146.
51 Report, paragraph 4.7, AB 146.
52 Report, paragraphs 6.1 and 6.2, AB 147-148.

the new partner who also abused the applicant's younger brother.[53] When the applicant's mother re-partnered once again, the new partner physically abused the applicant and his brother, so that at about the age of 13 or 14 the applicant reported that he felt isolated and withdrew from people.

[45] When he was about 15 years old the applicant said that he went to live with his father for a period, but was then sent back to his mother. At about that time he moved to live with a friend in Melbourne, where he was sexually assaulted by one of the flatmates.[54]

[46] The applicant's account to Dr Palk was that he had attended at least 30 public schools, missing a lot of school due to illnesses including hepatitis. Since leaving school he had worked in various positions, including as a chef.

[47] Dr Palk summarised the position as being that the applicant had experienced a very dysfunctional and disruptive childhood in which he was subject to sexual abuse, and verbal and physical violence. He had missed many school days and attended numerous schools. During his teenage years he engaged in substance misuse and low level offences. He had also experienced a number of failed relationships.[55] Dr Palk offered his opinion concerning the circumstances surrounding the current offences. It was that the applicant had developed "a strong sexual preference for very young females which has led to an entrenched deviant sexual arousal and he acted on this deviant arousal when the opportunity arose".[56] In Dr Palk's opinion the applicant met the criteria for paedophilia.

[48] Dr Palk also formed the opinion that the applicant suffered from posttraumatic stress disorder due to his experience of childhood sexual abuse, and that included a long history of mood swings and adjustment difficulties.[57]

[49] Dr Palk considered that in light of the applicant's "very serious sexual offences and entrenched deviant sexual arousal pattern" the applicant requires intensive psychotherapy, and various therapies, to assist him to extinguish his deviant sexual interests.[58] This would include, at a point prior to his eventual release, an assessment by a psychiatrist to assess his suitability for anti-androgen treatment that may be required to curb his strong deviant sexual arousal to children.

[50] Dr Palk was asked for an opinion on the likelihood of reoffending and being a danger to the community. The report states:[59]

> "The clinical, historical and psychometric testing indicates [the applicant's] underlying deviant sexual preference has not been adequately treated and he remains a danger and high risk of reoffending if he comes into contact with children. His risk of reoffending can be substantially reduced through psychotherapy, satiation, arousal control and habituation therapy coupled with implementing relapse prevention strategies. In the writer's opinion, due to his very poor

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53 Report, paragraph 6.5, AB 148.
54 Report, paragraph 6.12, AB 149-150.
55 Report, paragraph 10.4, AB 164.
56 Report, paragraph 11.8, AB 168.
57 Report, paragraph 12.8, AB 169.
58 Report, paragraph 12.12, AB 170.
59 Report, paragraph 12.23, AB 174.

> impulse control in relation to sexual regulation it would be wise at some time in the future that his need for anti androgen therapy is assessed by a psychiatrist."

Approach of the learned sentencing judge

[51] The learned sentencing judge gave a short summary of the nature of the offending and noted that the court's obligation was to give an objective assessment of the level of the sexual assaults, the context, the consequences for the victim and the mitigation, notwithstanding the horror of witnessing the commission of the offences. Her Honour noted that she had seen some of the videos. Her Honour characterised the position as being that "It goes without saying that any rape is abhorrent and that the rape of a child is particularly vile".[60] Her Honour regarded the aggravating feature as being that the applicant had chosen to record his offences, thus memorialising the degradation and suffering of the child. That, her Honour said added "another dimension of calculation and perversion".[61]

[52] The learned sentencing judge characterised the offending in this way:[62]

> "The aggravating feature here is that you chose to record these things. You chose to memorialise the degradation and suffering of your victim. That adds another dimension of calculation and perversion. You staged positions and angles. You emphasised graphic details. The recording on the last day was over 50 minutes long. You did not abduct a random victim from the street. You did not rip her apart or violently beat her. This was a different kind of evil. You maintained a relationship with a woman to whom you were not attracted so that you could rape her child. You effected penetration without noticeable injury. You left no physical signs to raise the mother's suspicions."
>
> You were able to maintain a course of conduct involving rape for three months without discovery. You set up your camera and you filmed it. The absence of apparent physical damage does not mean that you showed any form of compassion. Your objective clearly was to avoid detection. That is what saved [the baby] from grievous injury. It did not protect her from the psychological trauma. Your recording shows her crying for her mother. It shows her fear. When you could not calm her, you muzzled her. You placed your hand down on her mouth while her tiny arms and legs flailed helplessly. Your film captured the panic grieving in the rise and fall of her chest. That was the state that she was in when you raped her and ejaculated all over her."

[53] The learned sentencing judge noted other aspects of the offending, including that in Thailand, and the nature of the child exploitation material. Her Honour then noted the "immeasurable" psychological consequences for the child and her mother. Her Honour detailed the evident trauma still suffered by the child, afraid to sleep because of nightmares.

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60 AB 84 line 15.
61 AB 84 line 21.
62 AB 84 lines 20-39.

[54] The learned sentencing judge then noted the period of custody served in Thailand, and the days of presentence custody in Queensland. Her Honour also noted that the custody in Thailand followed a trial where the applicant had made some admissions, but then attempted to retract them.

[55] Her Honour rejected the suggestion that there was "some form of extra-curial punishment in Thailand for the Queensland offences via mistreatment and torture through the whole 11 years".[63] However, her Honour accepted that the conditions in the Thai prison would have been harsher than those in Queensland.

[56] Her Honour then noted the applicant's prior criminal history and the dysfunctional upbringing involving abuse at the hands of various people. Her Honour then rejected the suggestion of any true remorse:[64]

> "You told [the psychologist] that you had experienced a crushing sense of guilt. Whatever that means, it did not stop you. You continued in the face of the child's pitiful struggles and obvious distress. The violence was protracted and the episodes were repeated. The relationship maintained until you flew to Thailand to start again. [The psychologist] opined that you were remorseful. Meaningful remorse on sentence is usually demonstrated by the cessation of further offending and the facilitation of the administration of justice through a confession and guilty pleas.
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> You did not stop until you were locked up. You have never told the police what you did to [the child]. You did plead guilty but that was in the face of compelling evidence. You have offered no further details. What is known is known because it is on the disks (sic)."

[57] The learned sentencing judge found that the offences were not caused by a loss of self-control, but rather the contrary.[65] Her Honour then characterised the applicant's offending in this way:[66]

> "You are a predator. The Queensland offending was calculated. You targeted a victim. You created and maintained the opportunity to abuse her by manipulating her mother. You induced the mother to trust you with what was most precious to her. It was then a devious … and devastating betrayal of that trust. You acted only in secret. Those things took organisation, planning and patience. The abuse was depraved and callous."

[58] The learned sentencing judge then observed that the risk of reoffending was a very important consideration in the sentence.[67] Her Honour then referred to s 9(6) of the *Penalties and Sentences Act* 1999 (Qld) which provided that the court's primary considerations must include the gravity of the offending, the harm caused, the risk to other children, the need for deterrence, antecedence and character, mental issues and the prospect of rehabilitation. Her Honour then referred to each of those factors, most by reference to the psychologist's report. Her Honour found that the facts of the offending and the psychologist's report "leave no doubt that you remain

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63 AB 85 lines 43-46.
64 AB 86 lines 8-17.
65 AB 86, line 19.
66 AB 86, lines 26-31.
67 AB 86, line 35.

a danger to children".[68] Her Honour noted that the applicant's urges towards infants was strong, and he had demonstrated not just a capacity to access children within the community, but a facility to conceal the offending. Her Honour also found that whether the applicant would cease to be a significant risk at some time in the future was "no more than speculation".[69]

[59] Her Honour then turned expressly to the principle of totality, noting these features:[70]

(a) the sentence "will in its practical effect be cumulative on the eleven years served in Thailand"; such a lengthy period preceding continuous custody was a relevant consideration of a just and appropriate sentence;

(b) whilst both parties assumed that the principle of totality would apply, no authority was cited;

(c) the principle of totality calls for an assessment of the aggregate punishment against the totality of the criminality involved in all offending;

(d) the principle as set out in *Mill v The Queen* was in relation to interstate offending; the application of that principle "does not translate easily to sentences imposed under a foreign sentencing regime … within a different legal system", and particularly is that so where the full facts of the other offending are not known;

(e) s 9(2)(k) of the *Penalties and Sentences Act* does not extend to sentences imposed outside Australia; however, the Court of Appeal had applied the totality principle in *R v Vizzard*,[71] a case concerning prior custody having been served in Mexico;

(f) the court in *Vizzard* was not confronted by the implications of a local sentence in excess of 10 years' imprisonment, which would attract the provisions in s 9A of the *Penalties and Sentences Act*, requiring the offender to serve 80 per cent;

(g) authorities such as *R v Daphney*[72] and *R v Booth*[73] confirm that it is not permissible to frustrate the legislative intention to defer parole by reducing the head sentence beyond what would otherwise be appropriate, or to use the totality principle to override the intent in s 9A of the Act; as her Honour put it "it is therefore not permissible to so reduce the protective head sentence to an inadequate point, simply to lower the parole eligibility date to a more acceptable level"; there being no mandatory sentence in this situation, the discretion belonged to the court; her Honour held that "the only way to meaningfully recognise mitigation is through a reduction in the head sentence, subject to the caveats in *Daphney* and *Booth*".

[60] The learned sentencing judge then observed that the maximum penalty for the offences the applicant was facing was life imprisonment. Her Honour found that the applicant's offending was[74] "within the worst category of rape and sexual

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68 AB 87, line 26.
69 AB 87, line 31.
70 AB 87, line 34 to AB 88, line 40.
71 [2015] QCA 47.
72 [1999] QCA 69.
73 [2001] 1 Qd R 393.
74 AB 89 line 3.

offending, having regard to the extreme nature of it. That is, the seriousness and repetition of the acts, the predatory nature, the vulnerability of the victim, the gross betrayal of trust, the level of psychological harm, and the level of present danger".

[61] The learned sentencing judge then gave her reasons for imposing a sentence of 19 years' imprisonment:[75]

> "Although the imposition of a discretionary life sentence is exceptional, it would not be outside the range for … this level of offending. In such an extreme case the ultimate priority must be the protection of children. If the court had to sentence for both the Queensland and the Thai offences, a life sentence would be a just and appropriate reflection of the overall criminality. There are then those matters for which … the court is asked to reduce the sentence. The plea of guilty, having regard to the matter in [the psychologist's] report, the weight … that can be given to the pleas of guilty, and the preceding 11 years in a Thai prison, I have concluded that the appropriate sentence today is one of 19 years' imprisonment. That will mean a minimum of 26 years in continuous custody before you … will be eligible to apply for parole. That is, 11 years longer than the parole eligibility … would ordinarily be for a life sentence … however, the real difference in terms of your actual release is likely to be less marked.
>
> In any event, the combined sentence of thirty years represents a significant reduction in the head sentence. …"

Applicant's contentions

[62] The applicant did not dispute that a lengthy sentence was required for his offending. It was accepted that the offending was serious and aggravated by the deliberate recording of it. However, the submission was that the practical effect of the sentence imposed meant that the applicant will be in continuous custody for a period exceeding 26 years.[76] It was contended that whilst the concept of the totality principle was discussed "it has had no apparent effect on the Applicant's Sentence".[77] The applicant will have effectively served a 30 year sentence, becoming eligible for parole after spending more than 26 years in custody.

[63] It was submitted that the sentence effectively delayed the applicant's parole eligibility for 11 years longer than would normally apply to a life sentence. The imposition of a life sentence was neither within range nor appropriate in a case where the applicant had already served 11 years in custody. Thus, it was said that the application of the totality principle had miscarried.

Discussion

[64] I will endeavour to state, as briefly as I may, the reasons why I consider the application should be refused.

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75 AB 89 lines 5-21.
76 Applicant's outline, para 6.
77 Applicant's outline, para 10.

[65] First, the applicant's approach is that a life sentence was not open given that the applicant had already served 11 years in Thailand. However, in my view, that cannot be accepted. The maximum sentence for count 1 (maintaining) was life imprisonment. It may be accepted that life imprisonment is therefore reserved for the most extreme or most serious forms of offending within that category. However, her Honour was correct to find that this case was in the most serious category. Her Honour took into account "the extreme nature of it, the seriousness and repetition of the acts, the predatory nature, the vulnerability of the victim, the gross betrayal of trust, the level of psychological harm, and the level of present danger".[78] I respectfully agree, but would add the fact that the taped offences were not just for the applicant's personal sexual gratification, as "he was planning to use this material to gain entry to a child exploitation syndicate".[79] That plan meant the offending material was to be disseminated to others of a like perversion. The extreme depravity displayed by the applicant in not only sexually assaulting a baby, but doing so in a way that involved 36 admitted counts of rape for his personal gratification and that of others by ultimate dissemination, all the while plotting how to kidnap children for similar purposes, is difficult to define otherwise than at the uppermost level of offending. And that leaves out of account the offences concerning child exploitation material.

[66] The circumstances of the offending show that most of the factors listed in *R v SAG*,[80] as aggravating factors in a maintaining case, are met here. In *SAG* such factors were accepted to warrant a substantial increase in the sentence.[81] Also present here, and disturbing in terms of the applicant's conduct, is the use of force to prevent the child's complaints and resistance.

[67] Secondly, whilst acknowledging that life imprisonment was open, the learned sentencing judge did not impose that sentence. Instead the sentence imposed was for a finite term, albeit that the effect of Part 9A of the *Penalties and Sentences Act* is to require 80 per cent of that sentence to be served before parole eligibility. Her Honour's reasons reflect the way in which the sentence was ameliorated:

(a) her Honour also found that if the court had to sentence for **both** the Queensland and Thai offences, a life sentence was appropriate to reflect "the overall criminality";[82] the "overall criminality" is a reference to the criminality in both sets of offences; the applicant does not challenge that finding, limiting the contention to the inapplicability of a life sentence where 11 years had already been served in Thailand;[83]

(b) her Honour then turned to the factors that would reduce such a notional sentence; they included: (i) the pleas of guilty and the weight that could be given to them; (ii) the matters in the psychologist's report (the prejudicial upbringing, mental health issue and prospects of rehabilitation); and (iii) the 11 years served in Thailand;[84]

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78 AB 88 line 45 to AB 89 line 3.
79 AB 125.
80 (2004) 147 A Crim R 301; [2004] QCA 286, at [19].
81 *SAG* at [19], [35].
82 AB 89 lines 7-9.
83 Applicant's outline, paragraph 14.
84 AB 89 lines 9-12 and 21-23.

(c) by weighing the 11 years served in Thailand into the balance the learned sentencing judge was applying the totality principle;

(d) that is how her Honour reduced what would have been appropriate for both sets of offending (a life sentence) to 19 years; and

(e) it is evident that her Honour's approach took into account the fact that Part 9A of the *Penalties and Sentences Act* and s 182(1) of the *Corrective Services Act* 2006 (Qld) had the effect that the applicant would not be eligible for parole until having served 80 per cent of the 19 years, or 15 years;[85] however, her Honour specifically adverted to the restraint need under *R v Daphney*[86] and *R v Booth*,[87] namely that it was not permissible to reduce the head sentence to an inadequate point simply to lower the parole eligibility date to a more acceptable level.

[68] I pause to note that before this Court the contentions of each party proceeded on the assumption that the totality principle applied to foreign sentences as well as those interstate. For my part I would reserve that question for another occasion, and nothing in these reasons should be taken as an acceptance of that proposition.

[69] Thirdly, in my view, the sentence proposed by the applicant would be an affront to community standards, and offend against the principles recognised in *Daphney* and *Booth*. The applicant proposes nine years' imprisonment with a parole eligibility date set between 1 February 2021 (when the applicant would have been in custody a total of 15 years) and 1 February 2022 (80 per cent of a 20 year sentence).[88] That approach assumes absolute equivalence of the time served for the Thai offences and the time to be served for the Queensland offences. Nothing in the totality principle mandates that approach. Further, the Thai sentences were imposed for offences beyond those in Queensland. The sentence was 20 years' imprisonment for the sexual assaults on a child under 13, and (cumulatively) 15 years for the offence of taking a child under 15 from her parent.[89] The latter was not an offence with which the applicant was charged in Queensland.

[70] The transcript of the Thai sentencing remarks,[90] and the uncontested matters advanced by the Crown in the Queensland sentencing,[91] reveal several matters of importance concerning the Thai offences:

(a) the Thai offences occurred two months after the applicant ended his relationship in Queensland and left for Thailand;[92]

(b) the applicant went to trial, contesting part of the charges; he admitted sexually abusing the girl but denied that he had taken her to assault or rape her, nor did he rape her;[93] he also denied, contrary to the video and photographs, that he had vaginally raped her otherwise than with his finger;[94]

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85 AB 88 lines 19-30. In fact 80 per cent of 19 years is 15 years and two and a-half months, but s 182(2) of the *Corrective Services Act* limits the time to 15 years.
86 [1999] QCA 69.
87 [2001] 1 Qd R 393.
88 Applicant's outline, paragraph 15.
89 AB 110.
90 AB 100-110.
91 AB 93.
92 He left on 28 November 2005 and the offences occurred on 30 January 2006.
93 AB 100, 102.

(c) the offences there were of the same kind as here: (i) a baby girl aged two years; (ii) sexual abuse including vaginal and anal rape (digital and penile);[95] (iii) the use of a lubricant; and (iv) masturbation while the assaults took place;

(d) the applicant again took videos and photographs of the assaults; those videos showed the applicant carrying out the assaults;

(e) the offending included biting the victim;[96]

(f) the applicant said he "could not stop himself" and "could not control himself"; however, a lack of self-control was rejected by the court;[97]

(g) the victim had tears in her hymen and anus, and was hospitalized for more than three weeks;[98]

(h) the applicant denied that he had carried out the offences in Queensland, which he now admits; the Australian Federal Police had sent a document[99] showing the applicant's "history of offences in Australia"; the transcript in Thailand records: "The Defendant said that this document was no (sic) the truth …";[100] and

(i) the sentence was 20 years' imprisonment for the sexual assaults on a child under 13, and (cumulatively) 15 years for the offence of taking a child under 15 from her parent.[101]

[71] The Thai offending therefore had distinctly different elements notwithstanding the overall similarity. Her Honour held that the overall criminality of the Thai and Queensland offending had to be recognised.

[72] Further, the applicant's contentions advance the proposition that only 15 or 16 years in actual custody should be served before the applicant becomes eligible for parole in Queensland. That adds merely four years to the time served in Thailand, and thus wrongly proceeds on the basis that the Queensland offending warrants only that extra custodial element.

[73] Fourthly, the applicant's contentions had the tendency to wrongly equate a life sentence to a sentence of 15 years' actual imprisonment. The period of 15 years is merely the statutory date by which an offender sentenced to life imprisonment becomes eligible to be considered for parole.[102] By sentencing an offender to life imprisonment the court does not determine that 15 years' imprisonment is the appropriate time to serve in actual custody before being eligible for parole.

[74] Where, as here, the offender has not demonstrated any real prospect of rehabilitation, and remains a serious danger if released, there is even less reason to equate a life sentence to a 15 year sentence. Dr Palk's report was that the applicant had "developed a strong sexual preference for very young females which has led to

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94 AB 108.

95 The applicant's account (paragraph 8 of the outline at AB 93) limited the vaginal rape to digital, but the findings of the Thai court were that penile penetration had occurred: AB 106-107.

96 AB 101, 105.

97 AB 102, 108, 109.

98 AB 105-106, 107.

99 Annexure J.13 in the Thai sentencing: AB 104, 108-109.

100 AB 108-109.

101 AB 110.

102 Section 181(2) of the *Corrective Services Act*.

an entrenched deviant sexual arousal" which he acted upon when he could.[103] He was found to have paedophilia with an interest in very young girls, and he displayed a "substantive predatory sexual interest".[104] The applicant himself told Dr Palk that he had "poor sexual impulse control and … he was prepared to undergo physical or chemical castration to prevent further offences".[105] Dr Palk assessed the applicant as "a medium to high risk for committing similar offences in the future".[106]

[75] It was Dr Palk's opinion that the applicant risk of reoffending could be described as follows:

(a) the clinical, historical and psychometric testing indicates his underlying deviant sexual preference had not been adequately treated and "he remains a danger and high risk of reoffending if he comes into contact with children";

(b) he had reasonable prospects, in the long term, of self-regulating his deviant sexual arousal, but only if he cooperated with treatment, implemented a comprehensive relapse prevention plan that included not coming into contact with or being alone with children, and was assessed for anti-androgen treatment (chemical castration).[107]

[76] In the light of those matters, whether the applicant would cease to be a serious risk in the future is a matter of speculation. The doubts of the learned sentencing judge were expressed when her Honour was dealing with the fact that the total period in custody prior to parole eligibility was 26 years, a period "11 years longer than the parole eligibility … would ordinarily be for a life sentence". Her Honour then observed that "the real difference in terms of your **actual release** is likely to be less marked".[108]

[77] Fifthly, the effect of imposing a 19 year sentence rather than a life sentence is that the sentence is for a finite term rather than an indefinite term. Let it be assumed that the applicant never persuades the Parole Board to release him on parole. On the 19 year sentence he has a final release date, whereas on a life sentence there is no final release date. That is the reason her Honour observed that "the combined sentence of 30 years represents a significant reduction in the head sentence".[109]

[78] Sixthly, in so far as comparable cases are concerned, at the sentencing hearing *R v C*[110] was submitted to support a life sentence. It involved a 25 year old offender and his two year old female relation as the victim. The offender pleaded guilty to carnal knowledge by anal intercourse and was sentenced to life imprisonment. The Court described the offending as involving "unimaginable brutality" because of the savage anal rape, the victim's substantial injuries (including a torn rupture to the external sphincter), and the serious residual physical injuries. It was impossible to assess what psychological harm the victim may have suffered. The offender had a history of convictions for violence. A psychiatrist expressed a pessimistic view of his prognosis. The offender showed no remorse.

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103 Report paragraph 11.8, AB 168.
104 Report paragraphs 11.8 and 12.7, AB 168, 169.
105 Report paragraph 7.4, AB 156.
106 Report paragraphs 10.7, 10.12; AB 165, 166.
107 Report paragraphs 12.22, 12.23; AB 172, 173.
108 AB 89 line 17; emphasis added.
109 AB 89 line 20.
110 [1998] QCA 207.

[79] As to the sentence imposed Davies JA said:[111]

> "It was submitted that by virtue of its indeterminate nature it would not afford him a goal to aim at or to plan or hope for the future. No doubt that is correct and though one may understand that submission one must bear in mind that in imposing the life sentence the learned sentencing Judge said that, in his view, this case was one of the worst examples of the offence for which he was sentencing. In my view, his Honour was justified in reaching that conclusion. When one has regard to his previous violent conduct and the almost unbelievable brutality of this offence I cannot disagree with the conclusion which his Honour reached in imposing the sentence which he did."

[80] In my view, *R v C* supports the imposition of a life sentence for the applicant's offending. He does not have the extensive criminal history of that offender but his offending was as bad or worse because: (i) there were 36 rapes, and multiple other degrading assaults; (ii) the sexual attacks occurred on four separate days and over a span of three months; (iii) the physical injuries were not severe but force was used, distress caused, and the assaults were themselves a perpetration of violence; (iv) the psychological harm is manifest from the victim impact statement; (v) the offences were filmed and photographed, not just for the applicant's personal gratification, but for dissemination to others; and (vi) the applicant's offending was premeditated, planned, and carefully hidden.

[81] Other cases referred to, including *R v Robinson*,[112] *R v Daphney*,[113] *R v TK*[114] and *R v Mahoney and Shenfield*,[115] support the 19 year sentence. The offending in them was different in that some involved less serious offending, or the victims were older,[116] or the assaults more limited,[117] or there was no child exploitation material, and there was no aspect of the filming for distribution. Direct comparison with the level of injuries is of limited use, in my view, because whilst the physical injuries in the applicant's case were absent, that was as much due to his evident attempt to keep the assaults secret. The cases of substantial physical injury are ones where, by and large, the assault was opportunistic and not repeated over time.

[82] *Mahoney and Shenfield* involved 13 counts of rape, torture involving degrading acts, and other counts involving child exploitation material. That offender had a life sentence reduced to 18 years on appeal. He and his partner tortured and raped a 13 year old girl over a 15 hour period. She was subjected to "unimaginable horrors", including being forced to masturbate him and perform oral sex on the partner; multiple digital, oral, vaginal and anal rapes; forcing chilli into her vagina; pouring nail polish over her genitals; insertion of objects into her vagina; burning of the vaginal area; forcing of fists into her vagina; urination onto her and in her mouth; and photographs and videos were taken of her.

[83] The reasons for reducing the sentence to 18 years included Shenfield's intervention that prevented his partner's attempt to murder the girl, his disclosure of an

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111 *R v C* at page 4.
112 [2007] QCA 99.
113 [1999] QCA 69.
114 [2004] QCA 394.
115 [2012] QCA 366.
116 *Robinson*, five to seven years; *Daphney*, four years; *Shenfield*, 13 years.
117 *Robinson*, two counts of rape; *Daphney*, one count of rape; *TK*, two counts of rape.

additional torture weapon, and the fact that he stopped participating after the attempted murder.

[84] *TK* involved a 21 month old victim, and one count of torture and two counts of rape. The torture consisted of cigarette burns to her arm. The rapes were vaginal and anal. There were internal injuries to the vagina and anus. The offender was a heavy drug user at the time. He was also a schizophrenic. The Court considered *TK* to be comparable to *R v C*. The 16 year sentence was not interfered with. The Court referred to other decisions, *R v Luke*[118] and *R v Eather*,[119] in which 16 and 18 year sentences had been given for rape of young victims.

Conclusion

[85] For the reasons above it cannot be demonstrated that a life sentence was beyond the available discretion, nor can it be said that the ultimate sentence of 19 years was manifestly excessive.

[86] I would refuse the application for leave to appeal.

[87] **PHILIPPIDES JA:** I agree with Morrison JA.

[88] **APPLEGARTH J:** I have had the considerable advantage of reading the comprehensive reasons of Morrison JA, with which I agree. I would add the following.

[89] Before the learned sentencing judge the applicant sought a determinate sentence, rather than one of life imprisonment. The consequence was that a head sentence of 10 years or more would automatically attract a requirement to serve 80 per cent of that sentence before being eligible for parole.

[90] Before this Court, the applicant notes that the practical effect of the sentence he received means that he will be in continuous custody for a period exceeding 26 years before becoming eligible for parole, and, if not granted parole, he will have to serve a total period of 30 years' imprisonment. These points were well-appreciated by the learned sentencing judge. The applicant accepts that the sentencing judge took account of the "totality principle", but submits, in effect, that her Honour did not give enough weight to it.

[91] There is no suggestion that the learned sentencing judge did not have regard to what the applicant's parole eligibility date would have been had a life sentence been imposed. Her Honour did so. However, that was simply one consideration in arriving at a head sentence, and consequential parole eligibility date, which was just in all the circumstances. The most appropriate sentence was not to be divined by comparing:

(a) a life sentence which carried the potential to serve one's whole life in custody, but carried a parole eligibility date after 15 years; and

(b) a sentence with a certain end date, which carried a parole eligibility date fixed by statute.

That comparison had some utility, and was undertaken by the sentencing judge. However, the ultimate and demanding task was to arrive at the most appropriate sentence. Such a sentence needed to take account of the horrific nature of the applicant's crimes, committed over a period of months, against a vulnerable two year old, his further crimes of a similar nature in Thailand, his antecedents, his

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118 [1987] CCA 9.

119 (1994) 71 A Crim R 305.

guilty plea and the community's need for protection against his reoffending. In addition, the learned sentencing judge had to take account of the fact that:

(a) any sentence of more than 10 years would require the applicant to serve 80 per cent of it before being eligible for parole; and

(b) the applicant had spent 11 years in prison in Thailand for similar offences.

The learned sentencing judge did all of those things.

[92] The "totality principle" means different things in different contexts. It is unnecessary to explore that matter because the applicant accepts that the learned sentencing judge took account of the "totality principle".

[93] I note that s 9(2)(k) of the *Penalties and Sentences Act* 1992 (Qld) requires a court to have regard to:

> "sentences imposed on, and served by, the offender in *another State or a Territory* for an offence committed at, or about the same time, as the offence with which the court is dealing" (emphasis added).

This is not to say that sentences imposed on, and served by, the offender in a foreign jurisdiction for an offence committed at, or about the same time, as the offence for which the Court is dealing should not be taken into account. One would think that they should be, and, as noted, the sentencing judge did so. However, I agree with Morrison JA that the respects in which the "totality principle" applies to foreign sentences need not be debated in these reasons, since each party proceeded on the assumption that it applied in this case. I would reserve for another occasion the proposition accepted by the Crown in *R v Vizzard*[120] that *Mill v The Queen*[121] requires the sentencing judge "to have regard to the effective sentence as if the defendant had committed all the offending in one jurisdiction and been sentenced at the one time." Such an approach may pose problems in a case in which a foreign jurisdiction defines crimes or punishes them in markedly different ways to our laws. It is unnecessary to explore those complexities.

[94] The sentencing judge in this case is not alleged to have failed to "explicitly consider the aggregate sentence in order to determine whether the total sentence was just and appropriate".[122]

[95] The sentencing judge took account of the fact that the applicant had spent 11 years in a Thai prison. It was, and is, important not to treat that period of imprisonment as the period of imprisonment that the applicant would have received had he committed the Thai offences in Queensland. The horrendous offences he committed in Thailand, against an infant, would have been deserving of very substantial sentences if committed in Queensland. Also, although, in a sense, the applicant had "served out" his Thai prison sentence, it is important to recall that the 11 year period was the result of commutations and a Royal Pardon. His criminal offending in Thailand resulted in a total sentence of 35 years, not 11 years. The record did not disclose whether his release after 11 years was something in the nature of an executive indulgence or privilege, something done on humanitarian grounds or something done by the Thai authorities in the knowledge that upon his release from a Thai jail he would return to Australia to face charges. Even if one adopted the questionable assumption that his release from prison in Thailand after

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120 [2015] QCA 47 at [8].
121 (1988) 166 CLR 59 at 66.
122 *R v Baker* [2011] QCA 104 at [47].

serving 11 years was the functional equivalent of being released on parole after serving about one third of a sentence,[123] the fact remains that his criminal offending in Thailand was extremely serious, involved a repetition of similar offending to that he had recently committed in Queensland and was thought deserving of a total period of 35 years' imprisonment in Thailand.

[96] Because the sentencing judge was not being asked to impose a sentence to begin upon the expiry of a 35 year Thai sentence, the sentencing exercise did not involve the adoption of a notional sentence for the Queensland offending of, say, 25 years or life, to begin upon the expiry of his 35 year sentence, which was then reduced in accordance with the "totality principle" by considering the aggregate sentence. Instead, regard was had to what an appropriate sentence should be in circumstances in which, in practical terms, the sentence being imposed commenced at the end of the period of 11 years of actual custody served in Thailand. The sentence of 11 years in custody in Thailand and a further 19 years imposed for the Queensland offences amounted to an aggregate sentence of 30 years. Having regard to the applicant's brazen and disgusting violation of two infants in two different countries, coupled with the aggravating circumstances of other offences noted by Morrison JA, an aggregate period of imprisonment of 30 years is not manifestly excessive after appropriate account is taken of matters in mitigation, including the applicant's plea of guilt (which was virtually compelled by the video evidence against him), his prejudiced upbringing and his psychological problems, as referred to in Dr Palk's report.

[97] The fact that the sentence may be said to have "effectively delayed" the applicant's eligibility for parole to a date much later than the date which would apply to a life sentence (which took account of the 11 years already served in custody) does not render the sentence manifestly excessive.

[98] The applicant's submissions sought a sentence of nine years' imprisonment on Count 1 with a parole eligibility date no earlier than 1 February 2021 (by which date he would have been in custody for 15 years) and no later than 1 February 2022 (80 per cent of a 20 year sentence which included the 11 years served in Thailand). There are at least two obstacles to arriving at such a result. The first is that the sentence imposed has not been shown to be manifestly excessive. The second is that the sentence urged tends to focus upon the period of actual custody to be served before being eligible for parole (a suggested 15 or 16 years which brings into account the 11 years served in Thailand). Whilst the proper exercise of the sentencing discretion required the sentencing judge to have regard to the date at which the applicant would be eligible for parole, it did not require the sentencing judge to select, in effect, a non-parole period of 15 or 16 years for all of his crimes, in both Australia and Thailand, and then arrive at a head sentence which would yield such a parole eligibility date.

[99] In any case, I would regard a non-parole period of 15 or 16 years as not adequately reflecting the gravity of the applicant's crimes against infants in two countries, not to mention his offending in relation to child exploitation material, and the need for community protection.

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123 Something which would not have been possible under Queensland law for a serious violent offence that attracted a sentence of more than 10 years.

[100] In my view, the sentence imposed by the learned sentencing judge of 19 years' imprisonment, with a consequential maximum total period in custody of 30 years was not manifestly excessive. The additional period that the applicant was required to serve before being eligible for parole was not manifestly excessive. The sentencing discretion has not been shown to have miscarried. The possibility that another judge may have given greater weight to the totality principle does not establish manifest excess.

[101] For these additional reasons, I agree with the order proposed by Morrison JA.