SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kennings* [2004] QCA 162
PARTIES:	**R** **v** **KENNINGS, Matthew William Ross** (applicant/appellant)
FILE NO/S:	CA No 35 of 2004 DC No 307 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	14 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	14 May 2004
JUDGES:	Williams JA, Muir and Mullins JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted;** **2. Appeal against sentence allowed;** **3. Set aside sentence imposed by the learned sentencing Judge on 13 February 2004 and, in lieu, sentence applicant to a term of imprisonment of 18 months to be suspended forthwith, for an operational period of 4 years;** **4. Declare that the 90 days spent in pre-sentence custody between 13 February 2004 and 14 May 2004, be deemed time already served under the sentence;** **5. Confirm the reporting order imposed by the learned sentencing Judge.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – JUDGMENT AND PUNISHMENT- APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSON – APPLICATION TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – SEXUAL OFFENCES – applicant convicted under s 218A *Criminal Code* (*Q*) for

	using the internet to procure a person whom he believed to be under 16 years to engage in a sexual act – applicant sought leave to appeal against sentence of 2 $^{1}/_{2}$ years suspended after 9 months for an operational period of 4 years – whether the sentence was manifestly excessive in all the circumstances, including the fact that no real child was the recipient of the applicant's communications, the applicant's remorse and cooperation with the authorities and his ongoing treatment and prognosis.
	Criminal Code 1899 (Qld), s218A *Penalties and Sentences Act* 1992 (Qld), s 9(5), s 9(6)
COUNSEL:	B G Devereaux for the applicant/appellant R G Martin for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant/appellant Director of Public Prosecutions (Queensland) for the respondent

WILLIAMS JA: I will ask Justice Mullins to deliver the first judgment.

MULLINS J: The applicant pleaded guilty to one count of using the internet to procure a person whom he believed to be under 16 years, to engage in a sexual act.

He was sentenced on 13 February 2004, to a term of imprisonment, of two and one half years, to be suspended after serving nine months' imprisonment, for an operational period of four years.

A reporting order was also made, pursuant to Section 19 of the Criminal Law Amendment Act, 1945, to last for a period of five years after his release from custody.

The applicant is the first person to be sentenced for an offence under Section 218A of the Criminal Code. That provision was inserted in the Code with effect from 1 May 2003.

The applicant was born on 27 November 1977. The offence was committed when the applicant was 25 years old. The applicant acquired false internet identities. He used the computer at his sister's home. He had been in the habit of accessing pornography through that computer.

He visited a mainstream chat room on 1 July 2003 and had a chat with "becky_boo 13" (“Becky Boo”). The conversation elicited that Becky Boo was a 13 year old girl who lived in Brisbane. She was not in fact an actual person, but an identity created by the police, for the purpose of catching sexual predators in internet chat rooms.

Section 218A expressly allows for the offence to be committed, even though the person to whom the communication is made by the predator is a fictitious person.

The transcript of the chat conversations and e-mails that passed between the applicant and Becky Boo on 1, 2 and 3 July 2003, were in evidence.

In the chat on 1 July, the applicant asked Becky Boo whether she was a virgin. She responded, "I never done sex". He then said, "I could show you some things that are nice and

pleasurable" and then went on to describe “a massage on neck and shoulders and move my way round to massage your breasts, while kissing you on neck then lips...sounds good so far?"

The applicant also talked about running his tongue down her chest and licking and caressing her breasts and nipples and running his hand under her dress and slowly up her inner thigh and over her undies. Becky Boo responded, "Sounds scary" and the applicant said, "It will be very pleasurable".
In the exchanges, the applicant used greetings such as "Cutie pie", "Groovy Baby", "Sexy" and "Sexy baby". The applicant e-mailed a photograph of himself, taken early in 2002, to Becky Boo, who e-mailed to him a photograph of a teen model, which was appropriately described in submissions as a provocative picture, with the message that her friends say, she looks like the picture.

The applicant made out that he was 24 years' old. The applicant used language designed for conversation with a 13 year old girl, set out the sexual acts he was proposing and was insistent and aggressive about pursuing a meeting with her, putting up a number of proposed meeting places.

They eventually arranged to meet at the Eternal Flame, in Anzac Square in the City. On 4 July 2003, the applicant arrived at Anzac Square at the Eternal Flame, looked around, then left and was intercepted in Adelaide Street.

The police then took him to his sister's home, where they located the computer that he had used to communicate with Becky Boo. The applicant's back pack was searched and some handwritten notes were found, which contained the names of numerous pornographic internet sites, some of which featured young girls.

The applicant took part in an interview with police and made admissions. He told the police that he did not want to do anything to harm the girl and that when he was chatting, he got a bit carried away. He said that he may have suggested that they go to Roma Street Parklands, but he was not going to force her to go anywhere and he did not think he would do anything sexual, despite what he had said in an e-mail or a chat.

In September 2003, the applicant indicated to the Director of Public Prosecutions, that he would plead guilty and sought an ex officio indictment. As the brief had been prepared, the matter proceeded to a full hand up committal.

In the course of sentencing, the learned sentencing Judge rejected the applicant's claim that he did not intend to follow through with the meeting and described the offence as one not committed on the spur of the moment, “but a planned exercise, persisted in over four days, to procure a 13 year old girl for sexual exploitation”.

The learned sentencing Judge referred to the purpose of the legislation being to protect children from internet sexual exploitation. The learned sentencing Judge stated:

> "It can be said that no child actually suffered as a consequence of this offence. That should not be regarded as a mitigating factor on sentence, as had a child actually suffered, you would have been facing an additional sexual offence, which would carry a maximum sentence in excess of the maximum of five years' imprisonment provided for the present offence. The extent of sexual exploitation you intended in respect of the child you believed you were in contact with, cannot be known. Whilst you cannot be punished on the basis of the worst that you might have done to a child, it must be recognised that this type of conduct is abhorrent and there is at the present time real concern in the community as to the disastrous consequences that could follow from this type of conduct, if an actual child was involved".

The applicant had no previous convictions. Prior to the offence, he was in a stable relationship with his girlfriend. That has continued. He has the support of his girlfriend, her family and his family.

He graduated from university with an Arts degree in media studies and production in 2001, but had been unable to obtain full-time employment. As a result, he suffered from a degree

of isolation and depression. It provided him with the opportunity to spend long periods of time viewing pornography on the internet.

After being charged, the applicant voluntarily obtained a referral to psychiatrist, Dr Apel, who commenced to treat him. Dr Apel diagnosed that the applicant developed a major depressive disorder, in the context of chronic isolation and unemployment, but also suffered from avoidant personality disorder and because of the limitations imposed by his incapacity to go out and obtain work, he became further isolated and despondent. Dr Apel did not consider that the applicant was a paedophile, although the applicant had related to Dr Apel of having some sexual interest in young girls from 10 to 13 years of age, but Dr Apel considered that was mainly in a fantasy environment.

At the time of sentencing, Dr Apel was still treating the applicant. Dr Apel considered that the applicant's major depressive disorder had responded well to standard anti-depressant treatment and that the prognosis was good.

Dr Apel considered that the applicant's personality issues, were more long standing and Dr Apel was encouraging him to express himself in a more clear and direct emotional fashion.

Dr Apel considered that the applicant's inappropriate sexual interest in young females, had been able to be contained with

regular contact with Dr Apel and clear awareness and supervision from those around the applicant.

He therefore considered that the likelihood of the applicant re-offending was low, as with more therapeutic contact with Dr Apel and greater maturity and capacity to express himself, there would not be the same need for the applicant to live in a fantasy life.

At the time that Section 218A was enacted, subsections 5 and 6 were added to Section 9 of the Penalties and Sentences Act 1992. Those provisions effect changes to the sentencing of an offence of a sexual nature, committed in relation to a child under 16 years.

The applicant did not seek to argue that these provisions did not apply to the offence to which he pleaded guilty. The principle that a sentence of imprisonment should be imposed as a sentence of last resort, when sentencing an offender for an offence of a sexual nature, is removed by subsection 5 of Section 9.

In sentencing such an offender, subsection 6 of Section 9 requires the Court to have regard primarily to the factors set out in paragraphs (a) to (j) of that subsection, including the effect of the offence on the child, the age of the child, any physical harm or the threat of physical harm to the child or another, the need to protect the child from the risk of the offender re-offending, deterrence, prospects of

rehabilitation, the offender's antecedents, age and character, remorse or lack of remorse, any medical, psychiatric, prison or other relevant report relating to the offender and anything else about the safety of children under 16, that the sentencing Court considers relevant.

It is submitted on behalf of the applicant, that the sentence imposed was manifestly excessive and that the applicant's offence occupies the lower end of seriousness of that type of offence.

The applicant relies on it being an isolated incident, with the communication being over three days. Although the applicant mis-stated his age to Becky Boo by one year, he did send an actual photograph of himself. The conduct which the applicant described that he would do to Becky Boo did not expressly involve penetration. The applicant was able to continue with the exchanges with Becky Boo as Becky Boo kept responding to what he said, even though it may have been in a passive manner. It was Becky Boo who prompted their exchange of e-mail addresses. There was an element of enticement by the police, in the representation of the appearance of Becky Boo, as like the picture of the provocative teenager. The communications did not result in the corruption of an unworldly child. The meeting was ultimately arranged at a busy public place. When the applicant arrived at Anzac Square, there was no teenage girl there. The applicant therefore relies on the fact that he did not stop, but left.

Because Section 218A facilitates the police using entrapment of an offender, technically no child has to be the subject of the procurement by the offender for the offence to be committed, as long as the offender believed the person with whom he was communicating, was a child under the age of 16 years.

The fact, however, that no real child was the recipient of the communications from the applicant, must be a relevant consideration to penalty. This is reflected by the factors to which primary regard must be given under Section 9, subsection 6, of the Penalties and Sentences Act, 1992.

As general and specific deterrence is an important consideration in sentencing for this type of offence, it cannot be said that a sentence requiring actual imprisonment, was outside the range of appropriate sentences for the applicant.

As Mr Martin of counsel, on behalf of the respondent pointed out, the applicant demonstrated a persistence in his communications, did not seek to withdraw from the communications, despite the opportunity to do so over the period of three days, and actually turned up for the meeting.

Having regard, however, to the personal circumstances of the applicant, that no real child was the recipient of his communications, his obvious remorse and cooperation with the authorities and his ongoing psychiatric treatment and

prognosis, the sentence imposed by the learned sentencing Judge, was manifestly excessive.

The applicant has been in custody since being sentenced on 13 February 2004, which is just over three months. I would reduce the head sentence to a term of 18 months and order suspension forthwith. The operational period of four years should remain. The applicant did not seek to vary the reporting order. The formal orders which I propose are:

1. Grant leave to appeal against the sentence;

2. Allow the appeal;

3. Set aside the sentence imposed by the learned sentencing Judge on 13 February 2004 and in lieu, sentence the applicant to a term of imprisonment, of 18 months, to be suspended forthwith, for an operational period of four years;

4. Declare that the 90 days spent in pre-sentence custody between 13 February 2004 and 14 May 2004, be deemed time already served under the sentence;

5. Confirm the reporting order imposed by the learned sentencing Judge.

WILLIAMS JA: I agree.

MUIR J: Despite Mr Martin's careful, lucid and forceful submissions, I am persuaded that the sentence is manifestly excessive. I agree with the reasons given by Justice Mullins and with the orders proposed.

WILLIAMS JA: The orders of the Court will therefore be as indicated by Justice Mullins.