SUPREME COURT OF QUEENSLAND

CITATION:	*R v McGrath* [2005] QCA 463
PARTIES:	**R** **v** **McGRATH, Christopher Arron** (applicant/appellant)
FILE NO/S:	CA No 239 of 2005 DC No 2572 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	9 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2005
JUDGES:	de Jersey CJ, Williams JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Leave to appeal against the sentences is granted** **2. On counts one and two, the appeal is allowed to the extent that the sentence of four months imprisonment is suspended after six days, with an operational period of 12 months** **3. It is declared that the six days in custody from 16 September 2005 to 21 September 2005, both inclusive, be treated as time already served** **4. On counts three to five, the appeal is allowed; the sentence in each instance of four months imprisonment is set aside and in lieu thereof it is ordered that the applicant be placed on probation for a period of 12 months, with a special condition that he submit to such psychiatric or psychological treatment as may be directed by a Community Corrections Officer**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – SEXUAL OFFENCES – where appellant convicted of two offences of using the internet with intent to procure a child under 16 to engage in a sexual act and three

offences of using the internet with intent to expose a child under 16 to indecent matter – where appellant sentenced to four months imprisonment – where offences involved the appellant making contact with two internet users whom he believed to be 13 year old girls – where appellant was actually communicating with police officers – where no positive arrangement was made to meet up with either person that the appellant was in contact with – where appellant has no prior criminal history – whether sentencing judge gave undue weight to deterrence – whether the sentence imposed was manifestly excessive

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – RULES OF CONSTRUCTION – GENERALLY – where s 9(5) of *Penalties and Sentences Act* 1992 (Qld) precludes the application of the principles in s 9(2)(a) in cases involving an "offence of a sexual nature committed in relation to a child under 16 years" – where appellant argued that the offences were not committed in relation to a child under 16 years because the recipients of the communication were in fact adults – whether the principles in s 9(2) apply in sentencing offenders convicted under s 218A of *Criminal Code* (1899) Qld, in particular the principle in s 9(2)(a) that imprisonment should be imposed as a last resort – alternatively, whether the commission of an offence under s 218A *Criminal Code* (1899) Qld satisfies the requirements of s 9(5) meaning that the principles in s 9(6) should be applied

Criminal Code 1899 (Qld), s 218A
Penalties and Sentences Act 1992 (Qld), s 9(2), s 9(5), s 9(6)

R v Burdon; ex parte A-G (Qld) [2005] QCA 147; (2005) 153 A Crim R 104, considered
R v Campbell [2004] QCA 342; CA No 287 of 2004, 20 September 2004, considered
R v Kennings [2004] QCA 162; CA No 35 of 2004, 14 May 2004, considered
PMT Partners Pty Ltd v Australian National Parks and Wildlife Service (1995) 184 CLR 301, cited
Ryan v The Queen [2001] HCA 21; (2001) 206 CLR 267, cited
Smith v Federal Commissioner of Taxation (1987) 164 CLR 513, cited

COUNSEL: P J Davis for the applicant/appellant
M J Copley for the respondent

SOLICITORS: Robert Bax & Associates for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **de JERSEY CJ**: I have had the advantage of reading the reasons for judgment of Mackenzie J. I agree with the orders proposed by His Honour, and with his reasons.

[2] **WILLIAMS JA**: I agree with the reasons of Mackenzie J and with the orders he proposes.

[3] **MACKENZIE J**: The applicant pleaded guilty to two offences under s 218A(1)(a) of using the internet with intent to procure a child under 16 to engage in a sexual act and three offences under s 218A(1)(b) of using the internet with intent to expose a child under 16 to indecent matter. Each of the offences has a maximum penalty of five years imprisonment. The offences involve the applicant making contact by means of a chat room with two other internet users whom he believed were girls named Bec and Tabitha, both aged 13. In reality they were police officers, one attached to the CMC and the other to Task Force Argos, who had assumed those identities for the purpose of identifying persons intending to engage in conduct prohibited by s 218A.

[4] The applicant was 19 at the time of the offences. He had no previous convictions. He was in an apprenticeship, having disclosed the present charges prior to being employed and performed a trial period satisfactorily before being offered the apprenticeship. The matter proceeded by way of ex officio indictment. He was sentenced, for each offence, to four months imprisonment. He seeks leave to appeal against these sentences.

[5] Because the matter proceeded by ex officio indictment, a statement of facts was tendered as the basis of the prosecution's allegations. Although there was reference to chat logs of conversations being prepared and discussion about their admission in full, they were not tendered in evidence. Only extracts, essentially supplying evidence of the elements of intent to procure children to engage in sexual acts and to expose them to indecent matter, are reproduced in the schedule. They also show that the applicant asked on more than one occasion if the person with whom he was in contact was a police officer.

[6] The premise that s 218A permits detection of offences by subterfuge by police officers is inherent in s 218A(6) and s 218A(7). But where only extracts of conversations are provided, it is difficult to gauge the extent to which the police officer was a passive participant in the conversation or actively encouraged the offender to engage in explicit chat. It is conceivable that the contents of the whole conversation may be relevant to the issue of whether the offender should be regarded as one who intended to carry through with what was proposed or whether he was merely engaging in the obscene conversation for self-gratification. The situation probably can be rationalised on the basis that if no aspects of the complete conversation are raised by counsel in this regard the Court can reasonably assume that no inference favourable to the defence is to be drawn from the tone of the whole conversation.

[7] The learned sentencing judge said that her study of the transcript revealed that there was a pursuing of under-aged girls on the applicant's part, with little prompting from the women posing as them. It was not able to be clarified before us whether the learned sentencing judge was referring to the full transcripts of the chat logs, which had not been admitted in evidence, or only to the schedule of facts tendered as part of the prosecution case. If it was the latter, it is difficult to draw that conclusion from the schedule alone. However, that is not a crucial issue in resolving this application.

[8] With regard to Bec, the contact was relatively sporadic. There were conversations on 1 and 7 September 2004, on 6 and 9 October 2004 and on 2 November 2004. During the course of the conversations there were blatantly sexual propositions put to her as well as information about how to perform various sexual acts. Although there were questions about meeting, there is nothing in the schedule of facts suggesting that any firm arrangement was ever made.

[9] The conversations with Tabitha began on 19 October 2004. The statement of facts refers to four conversations in October and five in November. In one of these, on 4 November 2004, Tabitha tried to initiate conversation with the accused, but he said that he was not in the mood to chat as he had problems to sort out. On 9 November 2004, during a conversation where meeting was discussed, Tabitha suggested a place, but no meeting occurred. Also, on 13 November 2004 they spoke briefly in the chat room when the applicant asked Tabitha if she wanted to meet that day for sex. However, he stopped the conversation, saying "you're too young; don't worry about it". On 22 November 2004 they again spoke briefly when the accused told her he now had a girlfriend. On 23 November 2004 the applicant initiated a sexually related conversation. Tabitha asked about the girlfriend the applicant said he had. There was no further conversation.

[10] Therefore, it can be seen that the conversations with Bec were spread over a two month period with a suggestion, but as far as the evidence extends, no firm arrangement being made that they meet. Those with Tabitha had greater continuity over a little more than a month but there are signs in them that, at least in the latter part of the period, the applicant was disinclined to actually meet her.

[11] Mr Davis, who appeared below as well as in this application, submitted to the learned sentencing judge that the case was one where, on the basis of the psychological and psychiatric reports, the applicant was a somewhat immature 19 year old with none of the indicia of paedophilia and good prospects of rehabilitation, who was living away from his family and working long and odd hours in his job as an apprentice baker. Mr Davis also relied on a statement made to the investigating police officers that he was never going to go through with any meeting with the people to whom he had chatted over the internet. With regard to Tabitha, he said he initially wanted to meet her but then realised he could get into trouble and could not do it. Mr Davis submitted that a non-custodial sentence was not outside an appropriate range, given the circumstances of the case, and submitted that a fully suspended sentence on some counts might be mixed with community based orders on others. He submitted that the principles of rehabilitation would be served by a wholly suspended sentence.

[12] The learned sentencing judge reserved her decision and, in considered reasons, referred to a variety of matters relevant to sentence. She said she gave particular weight to the number and nature of conversations and the fact that he had been involved with more than one person. One subject that received detailed consideration was whether the applicant intended to meet the people with whom he was talking. Mr Davis had invited the learned sentencing judge to infer that he had no such intention. She addressed that submission by saying that on the material available to her it was not possible for her to make a finding of fact whether he would or would not have met them.

[13] With regard to the submission below by Mr Davis that his conduct should be regarded as "not predatory", merely inappropriate, the learned sentencing judge said she considered that the conversations revealed "an intention to sexually exploit underage girls". Later, in relation to the expert opinion that the applicant was not a paedophile, she said, correctly, that paedophilia is not an element of the offences. She said the issue was whether he "deliberately sexually exploited people who he believed to be underage". It was accepted by Mr Davis before us that the references to sexually exploiting underage girls was intended to mean that he used the conversations to achieve some sort of perverse pleasure, not that he had an intention to sexually exploit them in the sense of having physical contact with them. Since the learned sentencing judge found that it was not possible to make a finding of fact whether he would or would not have met the people to whom he had chatted, nothing more than that could properly be inferred. The matter fell to be determined on that basis. The Crown Prosecutor had produced an image of some kind, but its quality was so poor that it could not be determined that it was relevant. It was not admitted as evidence. The learned sentencing judge said that she would sentence on the basis that no explicit images were sent to the girls on the evidence before her.

[14] For my part, I would have thought that, having regard to the failure to make any positive arrangements to meet Bec over a two month period and the expressed disinclination to meet Tabitha, the most likely conclusion was that he would not have met them. At the very least, if no positive conclusion could be drawn that he would have tried to do so, the basis for sentence had to be that it had not been established that he would have done so.

[15] Against that background it is desirable to analyse the authorities at appellate level concerning sentencing of offenders of this kind. In *R v Kennings* [2004] QCA 162 the offender was 25 years of age. His conversations only extended over four days but he arranged a meeting place in the expectation that the person to whom he had been chatting would come, and went to that place. The contact involved a shorter period, with only one person. There was evidence of an intention to meet the person whom he had engaged in sexually charged conversation. Overall, the case is worse than the present case. Kennings was sentenced to 18 months imprisonment suspended upon the day of the Court of Appeal judgment, by which time he had served 90 days in custody.

[16] *R v Campbell* [2004] QCA 342 involved a 22 year old man, and is therefore closest, so far as age is concerned, to the present case. His conversations extended over almost three months and in the course of them he sent an explicit photograph to the person. There was also a finding that he was "desirous of arranging a meeting". Both of the last mentioned factors are absent from the present case. He was sentenced to 18 months imprisonment suspended after three months. It is a worse case than the present one.

[17] *R v Burdon; ex parte Attorney-General* (2005) 153 A Crim R 104 involved a 50 year old offender, prominent in his local community. His conversations extended over almost a month. He sent an explicit photograph to the person with whom he was chatting. He arranged a meeting and went to the arranged place. He was initially sentenced to 18 months fully suspended. On the Attorney-General's appeal, the Crown sought a sentence of 18 months suspended after three months which the court observed would not have been outside a proper range but for certain factors. A community service order had been made in respect of some of Burdon's

offences. By the time of the appeal, he had already performed the whole 240 hours. There was also discussion of the division of opinion in *Ryan v The Queen* (2001) 206 CLR 267 as to the relationship of shaming to punishment. The Court of Appeal left that debate unresolved but concluded that the learned sentencing judge had not placed undue weight upon it. That is not an issue in the present case. *Burdon* is plainly a worse case than the present. He was a middle aged man whose achievements in the community suggested that he must have been experienced in the ways of the world.

[18] In *Campbell* and *Kennings* the actual imprisonment was three months but each of them remained liable to 15 months more imprisonment if they breached the terms and conditions of their suspended sentences. The sentences imposed on them were significantly more onerous than that imposed upon the applicant. The actual outcome in *Burdon* was a fully suspended sentence of 18 months, but had the Crown been successful the sentence would probably have been similar to those in *Campbell* and *Kennings*. The applicant had no suspended portion to be concerned about. The overall effect of his sentence is therefore less onerous than in *Campbell* and *Kennings*.

[19] Mr Davis made his submissions on two bases. One was that the sentence was manifestly excessive because the learned sentencing Judge had given too much weight to deterrence and not enough to the prospects of rehabilitation. The other involves a question not raised below and not obviously a factor in the learned sentencing Judge's reasons. It is whether s 9(5) and s 9(6) of the *Penalties and Sentences Act* 1992 (Qld) apply in this case. In *Kennings*, Mullins J recorded that the applicant did not seek to argue that they did not apply. She proceeded expressly on the basis that s 9(5) had removed the principle that a sentence of imprisonment should be imposed as a sentence of last resort, in a case where no actual girl under 16 was involved. Mr Davis challenged this.

[20] The focus of the submission was whether the offence was one of a "sexual nature committed in relation to a child under 16". Mr Davis submitted that it was not, since, on the facts, the offence was not committed in relation to a child under 16 at all because the recipients of the communications were adults. If that submission is correct, the principle in s 9(2)(a) that a sentence of imprisonment should only be imposed as a last resort and that a sentence that allows the offender to stay in the community is preferable was not displaced by s 9(5).

[21] The essence of his submissions was that the fiction in s 218A(7) that allows an offence against s 218A(1) to be committed even though the offender has been communicating with a person pretending to be a child under 16 cannot be employed to make an offence committed in those circumstances an "offence of a sexual nature committed in relation to a child under 16". He relied on the terms of s 9(6) requiring the court to have regard to factors in s 9(6)(a) to 9(6)(c) which, he submitted cannot sensibly operate where there is not a real child involved.

[22] He also drew on the Explanatory Notes to the *Sexual Offences (Protection of Children) Amendment Act* 2003 (Qld) as the basis for a submission that s 218A was intended largely to be utilised for the detection of offenders. He submitted that s 9(5) was intended to have operation where an offence of a sexual nature had actually been committed against a child. He relied on a statement at page 16 of the Explanatory Notes that the intended effect of s 9(5) was to remove the benefits of s

9(2) from an offender and focus on the damage to the child. He submitted that the premise was that there was actually a child who was the victim of the offending.

[23] He submitted the approach adopted in *Kennings* was wrong. Rather than treat the absence of an actual child victim as relevant to the penalty because there was no damage to a child, the proper approach was to disregard s 9(5) and s 9(6) and apply the principles in s 9(2) to such a case.

[24] Mr Copley submitted that the context in which s 9(5) and s 9(6) were introduced into the *Penalties and Sentences Act* assisted in understanding the ambit of s 9(5). There were three groups of things to be "primarily" considered under s 9(6). They are, firstly, those concerning the effect of the offending on the particular child (s 9(6)(a) to s 9(6)(c)). Secondly, there are those concerning the protection of children generally from the offender and persons of similar disposition (s 9(6)(d) to s9(6)(f) and s9(6)(j)). Thirdly, there are those concerning rehabilitation of the offender (s 9(6)(f) to s 9(6)(i)).

[25] He submitted that, for the purpose of sentencing, it did not follow that communication by computer with one of the intents required by s 218A ceased to be an offence of a sexual nature with respect to a child under 16 years merely because the offender erroneously believed, because of the other person's subterfuge that he was communicating with a child under 16.

[26] He further submitted that "in relation to" were words of wide import, conveying that there was some connection between two relevant subject matters; or that there was some sufficient nexus between them (*Smith v FCT* (1987) 164 CLR 513 at 533; *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 330). Whether there is a relevant or appropriate association is a question of degree, with regard also to the statutory context in which the phrase appears (*PMT* at 331).

[27] It was submitted that the offender's belief that he was communicating with a child under 16 with the necessary intent provided sufficient nexus or connection between the sexual offence and a child under 16 to allow it to fit the description of an offence of a sexual nature committed in relation to a child under 16 and to render s 9(5) operative.

[28] The legislative history of s 9(5) and subsequent subsections of s 9 is that they were introduced in the *Sexual Offences (Protection of Children) Amendment Act* 2003 (Qld) as part of a package of amendments to a variety of Acts relating to the criminal law. Apart from an unrelated amendment to the *Bail Act* 1980 (Qld), all are connected with the protection of children. The *Criminal Code* was amended by inserting s 218A along with amendments relating to other offences of a sexual nature relating to children.

[29] Whichever interpretation is applied, there will be some incongruities. If, as Mr Davis contends, the application of s 9(5) depends on the facts of the case, the sentence proceeds under one set of criteria where the person contacts a person actually under 16 and a different set where a person contacts an adult impersonating a child, (who is not necessarily a police officer). In the first case, s 9(2)(a) would not apply; the principal focus would be the matters in s 9(6). In the second case, s 9(2)(a) would apply.

[30] On the other hand, if Mr Copley's submissions are correct, the sentencing principles which refer, in s 9(6)(a), s 9(6)(b), s9(6)(c) and s 9(6)(d) to "*the* child" would be a primary focus, even in a case where contact was made only with a person impersonating a child. However, as well, those which focus specifically on the protection of children more generally (s 9(6)(d), s 9(6)(e) and s 9(6)(j)) could appropriately be taken into account.

[31] The conduct is no less morally reprehensible if, by chance, a person mistakenly believes he or she is talking to a child under 16. It seems unlikely that, in that situation, the legislature would have intended a more beneficial outcome merely because offences under the same section fell to be sentenced under different criteria, and only because the offender mistakenly believed he was in contact with a child under 16. That is the consequence of Mr Davis' argument. However mere incongruity is not decisive. It is not unknown for unexpected interpretations to be necessarily applied to legislation because of the intractability of the drafting.

[32] The question to be resolved is what is the proper construction of the phrase "sexual offence committed in relation to a child under 16". The two provisions, s 218A of the Code, and s 9(5) of the *Penalties and Sentences Act* and its related subsections were introduced contemporaneously in amending legislation. The expressed purpose of s 218A is to permit proactive detection of paedophiles who are using the internet to procure children to engage in sexual acts (Explanatory Notes page 3). The evident intent of s 9(5) is to establish that the matters which are to be primarily regarded in sentencing are not only the effects on an actual child under 16 who has been subjected to explicit conversation or material, but also protection of other children and deterrence from further similar activity.

[33] Leaving aside the legislative history and other extrinsic material, it is, in my view, significant that s 218A is an unusual section in that it is an intention to procure a child under 16 to engage in a sexual act or to expose a child under 16 to indecent matter and using the internet with one of those intents that are central to the offence. The elements of the offence are that a person uses the internet and that at the time of using it, he has either an intent to procure a child under 16 to engage in a sexual act, or to expose a child under 16 to indecent matter. Viewed in that way, as a matter of construction, the fact that the offender actually communicates with a child under 16 or believes that he is doing so is really only part of the evidence to prove that one of the necessary intents existed. It is the fact that he communicates by means of the internet with someone who is or is believed to be under 16 that demonstrates one or both of the intentions that are elements of the offence.

[34] In that respect, the offence is different from those where the offence is constituted by a particular act, without any discrimination between whether an adult or a child is the victim, for example s 349, and cases where it is a circumstance of aggravation to commit it if the victim is a child under a specified age, for example s 209. Presumably the use of the word "committed" in s 9(5) is intended to remove the availability of s 9(2)(a) in cases where one of those kinds of offences is committed in respect of a child as opposed to an adult. Some offences, principally in Ch 22, have an essential element defined by reference to the age of the victim. Section 9(6) would plainly apply to them.

[35] The essential purpose of s 218A is to criminalise conduct where people use the internet with one of the required intents in relation to a child under 16. The notion

that the punishment regime may depend on whether a person actually communicates with a child under 16 or is misled into believing he is doing so, is, in the circumstances, based on an analysis of s 218A that confuses what is required to prove the offence. There is, on proper analysis, no reason to conclude that for punishment purposes there is any basis to subdivide offenders into different regimes, by reference to whether or not contact was made with an actual child under 16. All offenders fall under the same sentencing regime, with assessment of the impact of individual factors within that regime providing for differentiation between their punishments.

[36] For the reasons given, the meaning of the phrase "offence of a sexual nature committed in relation to a child under 16" in s 9(5) includes offences under s 218A irrespective of whether or not an actual child under 16 is the recipient of the offender's communication. Since the essence of the offence is using the internet with one of the two intentions, and what is done by the offender to demonstrate his intention is done, so far as he is subjectively concerned, in relation to a child under 16, the offence is properly described as one committed in relation to a child under 16 for the purposes of s 9(5).

[37] It should be noted that s 9(5) does not make s 9(2) wholly irrelevant to sentencing in relation to offences of a sexual nature. That is one thing made clear in the Explanatory Notes (page 17). It only renders s 9(2)(a) inapplicable. There is overlap between many of the provisions of s 9(2) and those in s 9(6). For that reason there may be fewer practical problems than meet the eye.

[38] Section 9(2)(a) expresses a principle that was well understood and applied long before sentencing principles were legislated. Young offenders with no criminal history and good prospects of rehabilitation were not to be sent to prison without serious consideration of non-custodial options. But the principle has always been understood to have limits to its operation. Some offences are so serious that imprisonment is the only realistic outcome. In the end, even where the usual sentencing criteria are rearranged in the way s 9(5) and s 9(6) achieve, the question is whether, taking all relevant factors into account, a sentence of actual imprisonment is necessary to achieve an appropriate disposition of the case.

[39] Self evidently, s 9(6)(a) and s 9(6)(b), and s 9(6)(c) and s 9(6)(d) in so far as they focus on a particular child victim, have no operation in this case. The notion that the fact that no real child was the recipient of communications from the offender in a particular case is a relevant consideration to penalty is a reflection of this (*Kennings* per Mullins J at 10; *Burdon* per McMurdo P at 108).

[40] Apart from matters personal to the offender referred to in s 9(6)(f) to s 9(6)(i), the focus is on the need to protect children from the risk of the offender re-offending (s 9(6)(d)), and the need to deter similar behaviour by other offenders (s 9(6)(e)), or anything else about the safety of children under 16 the sentencing court considers relevant (s 9(6)(j)). The risk of the offender re-offending is likely, in most cases, to be bound up with the assessment by the sentencing Judge of matters in s 9(2)(f) to s 9(2)(i) and any relevant matters in s 9(6)(b) to s 9(6)(j).

[41] The learned sentencing Judge had reports from a psychologist, Ms Bryant and a psychiatrist, Dr Young. Ms Bryant saw the applicant for four therapeutic sessions in which she explored the precipitants and motivations that led to the incidents,

developing more appropriate stress and isolation coping strategies, and more appropriate strategies for developing relationships with young adult women. She recommended further treatment for four to six months. She said that there was no indication of serious psychopathology but there were indications of emotional immaturity such as egocentricity, impulsivity and recklessness.

[42] She concluded that he was remorseful and said that there was no indication that he had sexual interests for young adolescents or children generally. It was unlikely he would re-offend, especially given the apparent extent of his remorse, realisation of the foolishness of his actions and his preference for young adult women. It was likely that his emotional and sexual immaturity compounded by his social, family, and emotional isolation at the time had resulted in him not fully appreciating the seriousness of his actions and sexual preoccupations at the time.

[43] Dr Young said the applicant did not meet the diagnostic criteria for paedophilia. He believed that rather than the applicant being a paedophile or even a person seeking underage females, he was an immature and somewhat lonely young man who needed counselling to help him have real relationships where inappropriate age factors were obvious and easily eliminated. He said that counselling would help him move into real life social interactions instead of getting involved in confusing fantasy chat room interactions. He also said the applicant was distressed and contrite about his offences, the seriousness of which he had not appreciated. He did not believe he would re-offend, but cognitive behavioural therapy with a psychologist would reinforce that outcome.

[44] Having regard to those conclusions, the need to protect children from the risk of the applicant re-offending is not likely to be as great as it will be in other cases. Nor are there any obvious matters falling under s 9(6)(j). The remaining issue is therefore general deterrence, since the need for personal deterrence is less weighty than in many cases because of the applicant's apparent realisation of the consequences of re-offending.

[45] In the learned sentencing Judge's reasons, she accepted that it was unlikely that the applicant would re-offend. She referred to passages from *Burdon* at 108-109. Although the passage appears in the form of a single quotation in her reasons, there is actually some paraphrasing with the essential sense of the passages in the judgment of McMurdo P reproduced below, being retained. The passages are the following:

> "… The widespread use of the internet in Australia, especially amongst young people, gives those … disposed to corrupting and sexually exploiting children unprecedented access to vast numbers of potential victims….
>
> … denunciation, just punishment and special and general deterrence are important factors in determining sentences in cases like this. ….
>
> … people who are considering using the internet … with a view to corrupting or sexually exploiting them must now be on notice that such behaviour will be likely to result in a salutary penalty generally involving a term of actual imprisonment … ."

[46] The last paragraph of the quotation immediately follows a recitation of the reasons why the Attorney-General's appeal against inadequacy of Burdon's fully suspended sentence did not succeed. Those reasons included an early plea of guilty, cooperation with the authorities, the applicant's previous good history and character, his efforts at rehabilitation, his low risk of re-offending and the fact that he had already performed 240 hours of community service.

[47] It can be inferred from the learned sentencing Judge's concluding remarks in her reasons that the penalty she imposed was what she considered a salutary penalty in the applicant's case. The factors in his favour included all of those in *Burdon* except having performed community service, and in addition to those, youth, not coming to a prearranged place to meet the persons with whom he was chatting and not sending explicit images to them. By the end of the period of his activities, he was showing signs consistent with disengagement. Burdon was in business; the applicant had a job that did not seem to be in jeopardy notwithstanding his offences. In my view, notwithstanding the intrinsic seriousness of offences of this nature because of the potential for harm if an immature person is actually the recipient of communications, the sentencing process miscarried in this rather difficult case by overemphasising general deterrence and underestimating factors in the applicant's favour.

[48] It was, realistically, not seriously submitted by Mr Davis that a sentence of four months imprisonment was inappropriate, but it was submitted that it should be fully suspended. It was also submitted that probation might be imposed on some counts to facilitate the ongoing rehabilitative measures.

[49] In light of the psychological and psychiatric reports, it is desirable to ensure that the applicant's rehabilitation be a continuing process. A probation order in respect of counts three to five with a special condition that the applicant receive such psychological and psychiatric counselling as a community corrections officer directs is appropriate for that purpose. With respect to counts one and two, I would effectively suspend the sentence of imprisonment immediately. An operational period of 12 months will require the applicant to remain of good behaviour for that period to avoid the risk of having the suspended portion of the sentence activated. However, since the applicant has spent six days in custody pending bail being granted, I would make, subject to the consent of the applicant with respect to the probation orders, the following orders:

> 1. Leave to appeal against the sentences is granted.
> 2. On counts one and two, the appeal is allowed to the extent that the sentence of four months imprisonment is suspended after six days, with an operational period of twelve months.
> 3. It is declared that the six days in custody from 16 September 2005 to 21 September 2005 both inclusive be treated as time already served.
> 4. On counts three to five, the appeal is allowed; the sentence in each instance of four months imprisonment is set aside and in lieu thereof it is ordered that the applicant be placed on probation for a period of 12 months, with a special condition that he submit to such psychiatric or psychological treatment as may be directed by a community corrections officer.