SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2010] QCA 220
PARTIES:	**R** **v** **SMITH, Damien Joshua** (applicant)
FILE NO/S:	CA No 154 of 2010 DC No 93 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	24 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2010
JUDGES:	Fraser and White JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal against sentence is refused.** **2. A warrant issue for the arrest of Damien Joshua Smith to lie in the registry for seven days.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant sentenced to 18 months imprisonment with release after serving three months upon entering into a recognizance of $500 for three years and subject to supervision for 18 months for one count of using a carriage service to access child pornography material contrary to s 474.19(1)(a)(i) of the *Criminal Code* 1995 (Cth) – whether sentence manifestly excessive – whether sentencing judge gave sufficient regard to applicant's psychological issues – whether requiring the applicant to serve a period of actual imprisonment gave sufficient regard to the principle in s 17A of the *Crimes Act* 1914 (Cth) that imprisonment is a sentence of last resort *Crimes Act* 1914 (Cth), s 17A *Criminal Code* 1995 (Cth), s 474.19(1)(a)(i)

R v Gordon; ex parte Cth DPP [2009] QCA 209, considered
R v Grehan [2010] QCA 42, distinguished
R v Jones (1999) 108 A Crim R 50; [1999] WASCA 24, cited
R v Neumann; ex parte A-G (Qld) [2007] 1 Qd R 53; [2005] QCA 362, cited
R v Oliver [2003] 1 Cr App R 463; [2002] EWCA Crim 2766, cited
R v Saint-Smith, unreported, Dodds DCJ, District Court of Queensland, No 548 of 2009, 12 April 2010, distinguished
R v Sykes [2009] QCA 267, followed

COUNSEL: S L Kissick for the applicant
A K Gett for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of White JA. I agree with those reasons and the orders proposed by her Honour. I too record my appreciation of the assistance provided by counsel who appeared pro bono for the applicant.

[2] **WHITE JA:** The applicant seeks leave to appeal a sentence imposed in the District Court on 25 June 2010 for one count of using a carriage service to access child pornography material, contrary to s 474.19(1)(a)(i) of the *Criminal Code* 1995 (Cth).[1] He was sentenced to 18 months imprisonment with release after serving three months upon entering into a recognizance of $500 for three years and subject to supervision for 18 months.

[3] Mr Kissick of counsel appeared pro bono for the applicant and, speaking for myself, I am grateful for his assistance.

[4] The applicant's sole ground of appeal is that the sentence is manifestly excessive. As Mr Kissick made clear in his oral submissions, the submission is not that a term of imprisonment ought not to have been imposed, but that requiring the applicant to serve some part in actual custody made the sentence manifestly excessive.

[5] The applicant pleaded guilty on ex officio indictment. The period of the offending on the indictment was between 27 June 2007 and 4 December 2008. The applicant was single and aged between 23 and 24 years at the time of the offending. He had a limited criminal history, involving stealing offences in 2001 and assaults occasioning bodily harm in 2006, both of which were dealt with in the Magistrates Court.

---

[1] Neither party to the appeal raised or argued the issue currently reserved in *R v Garget-Bennett* [CA No 321 of 2009] as to whether a charge in a form which charges an offence of using a carriage service to access child pornography material over a substantial period of time has a latent duplicity. Both counsel acknowledged that if the point is a good one, and if it had been raised before the sentencing judge, the matter would have proceeded in all likelihood in accordance with s 16BA of the *Crimes Act* 1914 (Cth), with the conduct that was relied upon in support of the charge being taken into account in passing sentence and that no different sentence would have been imposed in those circumstances.

[6] The sentence hearing proceeded on an Agreed Statement of Facts.[2] Police from the Ipswich Child Protection and Investigation Unit executed a search warrant at the applicant's home address in December 2008. After initially not making his computer available, the applicant told police that he had hidden his laptop in a storm water drain near Toowoomba, where he was working, when he learnt that the police wanted to speak with him. The laptop was retrieved and the applicant participated in a record of interview with police. In the interview he explained that he initially denied having a computer because he knew there was child pornography on it and he was scared. He had purchased the laptop sometime in late 2006 or early 2007 and used it to access the internet up to three times a week. He alone had access to that computer.

[7] He told police he had used the internet to access adult pornography and innocuous sites but that he had also signed up for 'illegal' or child pornography. He told police that initially he looked at '18+ stuff'. He then started to use the search terms 'teen porn' and 'lolita' to locate images. He pasted the images from websites and saved them to a folder on his computer but said he never looked at them again. He told police he first started looking at child pornography in late 2006. He was aware that it was an offence to do so. He said there were no images on his computer at the time of interview because he 'felt sick' after looking at them and deleted them.

[8] In the past he had paid to access sites using a debit card and had paid for membership. Although the sites permitted downloading of films, he did not do so. Police told the applicant that they had received information that he had used his debit card on separate occasions to purchase 30 day memberships to each of a number of child pornography websites. He responded that he had a poor memory for names.

[9] Subsequently, a forensic analysis of the applicant's laptop located 1,449 images of child pornography, of which 1,175 were unique and 274 were duplicate images. The images were either temporary internet files or deleted files. The analysis showed that the applicant actively searched for and viewed images of child pornography on numerous websites during the period. The most recent access date was 4 December 2008, less than a week before he first became aware of police interest. Some were from the websites named to him by police which he said he could not recall, including very recent access.

[10] The material located was categorised according to the scale adopted in *R v Oliver*.[3] The court in *Oliver* suggested the following graduated levels of seriousness in respect of images of child pornography:

1. Images depicting erotic posing with no sexual activity;

2. Sexual activity between children or solo masturbation by a child;

3. Non-penetrative sexual activity between adults and children;

4. Penetrative sexual activity between children and adults;

---

2 AR 32-35.

3 [2003] Cr App R 463; [2002] EWCA Crim 2766.

5. Sadism or bestiality.

When those categorisations were applied to the child pornography material contained on the applicant's laptop computer, the following breakdown could be made:

- Category 1: 1,341 images (1,086 unique) of pre-pubescent and pubescent female children aged between approximately three and 15 years, erotically posing nude or in various states of undress.

- Category 2: six images (all unique) of pre-pubescent and pubescent male and female children aged between approximately six and 14 years engaged in solo masturbation, or kissing/touching each other.

- Category 3: nine images (all unique) of female children aged approximately 12 to 15 years engaged in non-penetrative sex with adults.

- Category 4: 91 images (72 unique) of adults and female children aged between three and 15 years engaged in fellatio, anal sex, digital vaginal penetration and penile/vaginal sex. The majority of the images depicted female children aged over eight years.

- Category 5: two images depicting torture or cruelty to pre-pubescent female children.

[11] The sentencing judge had the assistance of a psychologist's report prepared by Mr Peter Perros. Mr Perros set out the applicant's family background, which was generally corroborated by the applicant's mother. The applicant had had an unhappy childhood punctuated by domestic violence triggered by his father's alcoholism (his mother left his father when the applicant was six years old); possibly some cognitive disturbance from an accidental head trauma when he was a small boy; and extreme psychological abuse from his mother's former de facto partner. The applicant did not achieve well at school and left in grade 10 to pursue studies in hospitality, both in Queensland and in England. He returned to Australia in 2004 and elected not to continue working as a cook because he found it too stressful. He worked on a mining campsite as a cleaner between May 2005 and May 2008 and thereafter became a cleaning contractor and a labourer.

[12] The applicant had only one serious relationship and was devastated when his partner had an abortion in January 2006. He had been close to her young child. Following the breakdown of the relationship, the applicant reported being alone, having no hobbies, no interests and not being involved in any associations. His family reported three attempts at self-harm, one serious. He had a significant alcohol problem. The applicant was prescribed anti-depressant medication after the serious suicide attempt in 2008, and at the time of the report in June 2010 attended Alcoholics Anonymous. He was not receiving counselling.

[13] Mr Perros concluded that the applicant had "probably been suffering from depression since his early childhood, arising from being psychologically abused by his mother's boyfriend", compounded upon problems arising from his father's violence. Mr Perros concluded that "the index offences are out of character and were committed during an episode of severe depression". He noted that the

applicant was "very embarrassed" by his offending behaviour. Mr Perros described the offending behaviour as "a compulsive internet addiction that was his way of escaping from his personal distress". He noted that the applicant needed long-term clinical psychology treatment in addition to his anti-depressant therapy to address his poor resilience and his maladaptive strategies for dealing with stress. He thought the applicant's risk of re-offending was reduced because of his adjustment to work, reduced alcohol intake and his medication for depression. Mr Perros did not seek to explain why the applicant's history and depression operating on "a compulsive internet addiction" led him to access such a large quantity of child pornography.

[14] The prosecutor below submitted for a sentence of 18 months to two years imprisonment to be released on a recognizance order after serving one-third in actual custody, to be followed by a period of probation. Her Honour was provided with a schedule of comparative sentences and particularly referred to *R v Gordon; ex parte Cth DPP,*[4] *R v Sykes*[5] and *R v Grehan*.[6] Defence counsel submitted for a term of imprisonment of 12 to 15 months but with immediate release on a recognizance order and a period of probation. He referred to a District Court decision, that of *R v Saint-Smith*.[7] Counsel urged upon her Honour that the applicant was engaged in rehabilitation, although in what manner was not particularised, and was co-operating with his medication. At the time of sentencing, he was on parole for a drink driving offence but his traffic history was not before the Court. The court received an oral report from the prosecutor that the applicant was performing satisfactorily on that current probation order.

[15] In her sentencing remarks, her Honour noted that a significant number of the images were at the higher end of the scale, meaning that they involved actual harm and injury to the children who were the subject of the images. She noted that the applicant had paid on a number of occasions to access the sites over a 17 month period. She emphasised the important factor of general deterrence. On the mitigating factors, her Honour noted the applicant's co-operation with police; his plea on ex officio indictment; and his family background, which offered some explanation for his conduct. She accepted that the applicant was remorseful, that the offending conduct was out of character and that it was unlikely that the applicant would re-offend, having addressed some of his problems. She noted the maximum period of imprisonment of 10 years was an indication of the seriousness with which the offence was viewed. Finally, her Honour recognised that imprisonment should be viewed as a sentence of last resort but that a short period of actual imprisonment needed to be served.

[16] In order to assess the applicant's contention that in doing so, her Honour erred by imposing a sentence that was manifestly excessive in all the circumstances, consideration needs to be given to comparative sentences.[8] Some of them involve State offences of possession of child exploitation material which has a lower maximum penalty, and some combine both State and Commonwealth offences.

---

4 [2009] QCA 209.
5 [2009] QCA 267.
6 [2010] QCA 42.
7 Unreported, Dodds DCJ, District Court of Queensland, No 548 of 2009, 12 April 2010.
8 There have been many recent reviews by this court of the sentences imposed in this area of offending. It is proposed to discuss only those relied upon by counsel. See generally, *R v Vantoosten* [2009] QCA 54.

Mr Kissick submitted that this combination with State offences renders those cases of more limited value because of the combination and the lower state maximum, but, more significantly, because the legislative principle in s 17A of the *Crimes Act* 1914 (Cth), that imprisonment is a sentence of last resort, is excepted from the State offence of possessing child pornography by s 9(5) of the *Penalties and Sentences Act* 1992 (Qld).[9] In practical terms, the cases where both Commonwealth and State offences are charged tend to result in much the same sentence being imposed for each.[10] Additionally, Mr Kissick submitted that the learned sentencing judge did not sufficiently have regard to the applicant's "extreme psychological issues", referring to the analysis by Chesterman JA in *Grehan.*[11]

[17] Since so much weight was put upon *Saint-Smith*[12] by Mr Kissick, it is convenient to start with that decision. The offender was a school teacher aged in his fifties who pleaded guilty on ex officio indictment to two offences, one of using a carriage service to access child pornography material, committed over a ten month period, the second the State offence of knowingly possessing child exploitation material. There were 3,524 category 1 images, including three saved videos; 124 category 2 images, including two saved videos and one saved picture; 55 category 3 images; 59 category 4 images, including one saved video; and two category 5 images. The offender had not purchased any of the material nor did he trade. Prior to sentence the offender had engaged in extensive therapy with two practitioners, one of 10 sessions and the other of 13 sessions. He was thought to be at low risk of re-offending with proper management and had no prior convictions. He had been a useful member of the community for many years and had experienced a significant level of public shaming as a consequence of his exposure and had lost his career.

[18] The learned District Court Judge accepted that while the offending was serious, it was not as serious as other cases. His Honour weighed whether, as a general deterrent, it was necessary for the offender to spend some actual time in custody. An important factor influencing the sentencing judge was the very long delay between detection and sentence due to no fault of the offender, but the failure of the investigation. A sentence of imprisonment for 18 months with an immediate release order and two years probation was imposed. There are clear differences with the present case – the much greater public shame and loss of career, the particular circumstance of the long delay between detection and charging and sentence and the significant attempts at rehabilitation which had been largely successful.

[19] In *R v Sykes,*[13] the offender pleaded guilty to one count of accessing child pornography material pursuant to s 474.19(1) of the *Criminal Code* 1995 (Cth) and one count under the State legislation of knowingly possessing child exploitation material on ex officio indictment. He was sentenced on the Commonwealth offence to imprisonment for 15 months to be released after serving six months upon entering into a recognizance of $2,000 for two years and subject to supervision for two years. A lesser term of imprisonment was imposed for the State offence. The offender had 42 category 1 images, 11 category 2 images, 16 category 3 images, and 20 category 4 images in a temporary folder. On a subsequent search, police found

---

9 See *R v Verburgt* [2009] QCA 33 and the discussion about the ambit of the exception of sexual offending against children from s 9(2).

10 *R v Grehan* [2010] QCA 42 per Chesterman JA at [42].

11 [2010] QCA 42.

12 Unreported, Dodds DCJ, District Court of Queensland, No 548 of 2009, 12 April 2010.

13 [2009] QCA 267.

15 in category 1, one in category 2 and four in category 3. The total images, the subject of the Commonwealth charge, was 120 images. That offender was 28 with no prior criminal history. He had an excellent work history but as a consequence of being charged and the publicity therefrom, he had to relocate, lost two jobs, suffered public humiliation and his marriage failed. He had attended counselling on several occasions and had asked for assistance in managing his offending thoughts.

[20] Mullins J,[14] with whom the other members of the court agreed, referred to the statement made by Kennedy J in *R v Jones*,[15] highlighting why deterrence is an important factor in this type of offending. The quotation may, with benefit, be reproduced here:

> "The production of child pornography for dissemination involves the exploitation and corruption of children who are incapable of protecting themselves. The collection of such material is likely to encourage those who are actively involved in corrupting the children involved in the sexual activities depicted and who recruit and use those children for the purpose of recording and distributing the results. The offence of possessing child pornography cannot be characterised as a victimless crime. The children, in the end, are the victims. …"[16]

Similar observations are made in other appellate decisions. A feature of some of the offenders is their failure to appreciate the real pain and corruption which is visited upon the children who are used in the images which they enjoy. In *Sykes*, as here, the original sentencing submissions recognised that no other sentence but imprisonment was appropriate, but the question was whether a component of actual custody was required. After reviewing a number of decisions, her Honour concluded that although the number of images was relatively modest, the accessing had occurred over a period of some months; some images were of extremely young children involving exploitation and degradation; and deterrence remained the paramount consideration. She dismissed the application. There are parallels with this application. Mr Kissick submitted that *Sykes* could be distinguished because it included State charges where imprisonment is not a sentence of last resort, but that was recognised in *Sykes* and did not infect the approach to the Commonwealth offence.

[21] In *R v Gordon; ex parte Cth DPP*,[17] the offender was a 57 year old pharmacist with no criminal history who pleaded guilty on ex officio indictment to two counts of accessing child pornography contrary to the *Criminal Code* (Cth) and one count of possessing child exploitation material contrary to the State *Criminal Code*. The offender had downloaded 3,292 images of child exploitation material, the greater majority of which were category 1 images, 87 were in category 2, 73 were in category 3, 161 in category 4 and two were in category 5. He had accessed the material over a period of nine months. There was much duplication of the images and many were said to be relatively innocuous. The offender was sentenced to 12 months imprisonment with immediate release and a good behaviour bond for three years. A similar penalty was imposed with respect to the State offence. The

---

14 Ibid at [14].
15 (1999) 108 A Crim R 50 at 52; [1999] WASCA 24 at [9].
16 Ibid.
17 [2009] QCA 209.

Commonwealth DPP appealed (out of time) against the sentence, basically because it was manifestly inadequate. The court refused to extend time, commenting that there may have been an error in the exercise of the sentencing discretion but the court was not persuaded that "a substantial period in actual custody" would have to be imposed were the appeal to proceed.

[22] Mr Kissick placed reliance on observations in *R v Grehan*[18] regarding the approach to sentencing a person who is mentally disturbed. In *Grehan*, the offender pleaded guilty to two counts of knowingly possessing child exploitation material contrary to the State *Criminal Code* and one count of accessing child pornography contrary to the *Criminal Code* (Cth). He was sentenced to imprisonment for three years and one day, to be suspended after serving 18 months in the case of the State offences and with a non-parole period of 18 months in the case of the Commonwealth offence. The Commonwealth offence related to 4,572 images and 32 videos. The State charge concerned over 40,000 images. They covered all categories of the *Oliver* categorisations. The period of offending extended over more than three years and the offender had visited more than 200 websites to view child pornography. He pleaded guilty on ex officio indictment. A clinical psychologist diagnosed him with a psychiatric illness – obsessive compulsive disorder, chronic in nature, existing since childhood and associated with marked depression and anxiety. The offender's obsessive compulsive disorder led him to download and file the images which were not looked at again.

[23] Chesterman JA, with whom the other members of the court agreed, accepted the submission that mental disorder, short of insanity, will operate on sentence as a mitigating factor, since it diminishes the moral culpability of the offender.[19] His Honour accepted that the psychologist's report demonstrated a "deep seated and long lasting psychiatric disorder" which, in large part, explained the applicant's offending and observed that the primary function of deterrence had no particular role to play. His Honour concluded that the offender had a psychiatric disorder of such severity as to amount to a mental illness and the sentence was ameliorated for that reason. The court substituted a sentence of two years to be suspended after serving six months. While the applicant, here, has and continues to suffer from depression, now treated, and has personality deficits possibly derived from his abusive childhood, Mr Perros' report did not suggest his mental frailties were so overwhelming that he was suffering from a severe psychiatric condition, such as to compromise his choices about the offending conduct, as in *Grehan*. Furthermore, in *Grehan* the offender was required to serve actual imprisonment.

[24] Mr Kissick submitted that s 17A of the *Crimes Act* 1914 (Cth) impliedly operated to refer to "actual" imprisonment as one of last resort, for there was no dispute that a term of imprisonment was appropriate and that something less, such as a good behaviour bond, was not. The authorities all point to a term of imprisonment of about 18 months for accessing a quantity of images in all the *Oliver* categories without more. Section 20(1)(b) of the *Crimes Act*, not s 17A, gives the sentencing court a discretion whether a sentence of imprisonment should be fully suspended or not. The exercise of that discretion, which is part of the total sentencing process,[20] gave the learned sentencing judge the occasion to weigh up the various factors in mitigation, as well as the seriousness of the offending. The requirement for general

---

18 [2010] QCA 42.

19 *R v Neumann; ex parte A-G (Qld)* [2007] 1 Qd R 53; [2005] QCA 362 at [27].

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

deterrence clearly operated here and her Honour was alive to the imperatives of s 17A when she said:

> "I do accept, as Mr Kissick has pointed out, that imprisonment should be viewed as a sentence of last resort in these circumstances, and certainly I do view this as a sentence of last resort. But because particularly of the element of deterrence, in my view a short period must be served."[21]

There is no error to be discerned in her Honour's approach.

[25] The applicant has been on bail pending appeal. Mr Kissick requested that any warrant that might issue in the event that the application were unsuccessful should lie in the registry for seven days. These are the orders that I propose:

1. The application for leave to appeal against sentence is refused.

2. A warrant issue for the arrest of Damien Joshua Smith to lie in the registry for seven days.

[26] **APPLEGARTH J:** I agree with the reasons of White JA and the orders proposed by her Honour. I also join in expressing appreciation of the assistance of Mr Kissick of counsel, who appeared pro bono for the applicant.

---

21 AR 27.