SUPREME COURT OF QUEENSLAND

CITATION:	*R v Garget-Bennett* [2010] QCA 231
PARTIES:	**R** **v** **GARGET-BENNETT, Bradley John** (applicant)
FILE NO/S:	CA No 321 of 2009 DC No 275 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	31 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2010
JUDGES:	Holmes JA, and Fryberg and Applegarth JJ Joint reasons for judgment of Holmes JA and Applegarth J; separate reasons of Fryberg J, dissenting in part
ORDERS:	**1. Leave is granted to appeal against sentence;** **2. The appeal is allowed;** **3. The sentence on count 1 is set aside and a sentence of twelve months imprisonment, with release after serving ten months upon recognizance in the sum of $500 conditioned that the applicant be of good behaviour for two years, is substituted;** **4. The sentence on count 2 is set aside and a sentence of two years and six months imprisonment, suspended after ten months, with an operational period of two years, is substituted.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – INFORMATION, INDICTMENT OR PRESENTATION – AVERMENTS – UNCERTAINTY, DUPLICITY AND AMBIGUITY – where applicant pleaded guilty to using a carriage service to access child pornography material between 1 March 2005 and 14 September 2008 – where applicant made general admissions that he looked at child pornography material on a daily basis – where applicant admitted to three instances of paying for child exploitation material over the internet – whether offence charged capable of being a continuing offence – whether count latently duplicitous CRIMINAL APPEAL – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR

INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to one count of using a carriage service to access child pornography material (count 1) and one count of knowingly possessing child exploitation material (count 2) – where applicant in possession of 44,197 images and 1,188 videos containing child exploitation material – where applicant sentenced to a head sentence of three and a half years with an effective term of imprisonment of 21 months – where applicant entered an early guilty plea – where applicant sought psychological treatment prior to the intervention of police – where applicant had no previous criminal history – where applicant in a stable de facto relationship – where applicant had been in full time employment – where most comparable case on which sentencing judge relied has since been overturned by the Court of Appeal – whether sentence manifestly excessive

Crimes Act 1914 (Cth), s 16BA, s 19AB
Criminal Code 1995 (Cth), s 474.19
Criminal Code 1899 (Qld), s 228D, s 567(1)
Drugs Misuse Act 1986 (Qld), s 5
Social Security Act 1991 (Cth), s 1347

British Motor Syndicate Ltd v Taylor & Son [1900] 1 Ch 577, cited
Cohen v Macefield P/L & Ors [2010] QCA 95, cited
Daly v Medwell (1986) 40 SASR 281, considered;
Dendy v Brinkworth [2006] 97 SASR 407; [2006] SASC 179, cited
Director of Public Prosecutions (Cth) v D'Alessandro [2010] VSCA 60, cited
Hyde v Mason [2005] 2 Qd R 159; [2005] QCA 79, considered
James v R [2009] NSWCCA 62, considered
Jemmison v Priddle [1972] 1 QB 489, cited
Johnson v Miller (1937) 59 CLR 467; [1937] HCA 77, cited
Mouscas v R [2008] NSWCCA 181, considered
R v Bechaz, unreported, Kingham DCJ, District Court of Queensland, 20 July 2009, cited
R v Chen [1997] QCA 355, cited
R v Cooksley [1982] Qd R 405, cited
R v D [1996] 1 Qd R 363; [1995] QCA 329, cited
R v F (1996) 90 A Crim R 356;]1996] NSWSC 519, considered
R v Firth (1865-1872) LR 1 CCR 172, cited
R v Fulop (2009) 236 FLR 376; [2009] VSCA 296, considered
R v Goodwin (2009) 233 FLR 473; [2009] ACTSC 111, cited
R v Gorman, unreported, Bradley DCJ, District Court of Queensland, 7 August 2009, cited
R v Grehan [2010] QCA 42, considered

R v Heaney (2009) 22 VR 164; [2009] VSCA 74, cited
R v Jobson [1989] 2 Qd R 464, cited
R v Morex Meat Australia Pty Ltd & Doube [1996] 1 Qd R 418; [1995] QCA 154, cited
R v Oliver [2003] 1 Cr App R 28; [2002] EWCA Crim 2766, cited
R v Ruha, Ruha & Harris; ex parte Cth DPP [2010] QCA 10, considered
R v Sykes [2009] QCA 267, cited
R v Wilson (1979) 69 Cr App R 83, cited
Rixon v Thompson (2009) 22 VR 323; [2009] VSCA 84, cited
S v The Queen (1989) 168 CLR 266; [1989] HCA 66, cited
Stanton v Abernathy (1990) 19 NSWLR 656, cited
Walsh v Tattersall (1996) 188 CLR 77; [1996] HCA 26, cited

COUNSEL: S L Kissick, with M Nicholson, for the applicant
G R Rice SC for the respondent

SOLICITORS: Neil O'Brien & Associates for the applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **HOLMES JA AND APPLEGARTH J:** On 20 November 2009, the applicant pleaded guilty in the District Court at Southport to one count of using a carriage service to access child pornography material between 1 March 2005 and 14 September 2008, contrary to s 474.19(1) of the *Criminal Code* 1995 (Cth), and one count of knowingly possessing child exploitation material on 13 September 2008, contrary to s 228D of the *Criminal Code* 1899 (Qld). He had earlier entered a plea of guilty at his committal.

[2] The applicant was sentenced to three and a half years imprisonment with a non-parole period of 21 months for the Commonwealth offence and three and a half years imprisonment suspended after 21 months for an operational period of two years for the State offence.

[3] The applicant applies for leave to appeal against the sentences on the ground that they are manifestly excessive. He also applies for leave to appeal on the ground that the learned sentencing judge erred in considering that there was a requirement to fix a non-parole period of 60 to 66 per cent in respect of the Commonwealth offence unless unusual circumstances existed to warrant a reduction in that percentage.

The circumstances of the offences

[4] Queensland police officers from Taskforce Argos received information from Interpol about commercial child exploitation websites and, as a result, identified the applicant as having accessed a hard core child exploitation material website on 19 November 2006. The website consisted of a series of images of a young girl aged under four years old being raped by an adult male. A second series of images depicted several children, aged about seven years old, engaged in a range of sexual acts with an adult male. The applicant's credit card was used to subscribe to the site.

[5] On 13 September 2008 police officers executed a search warrant at the applicant's home. He directed police to a computer and a number of compact discs that he

admitted contained child pornography. He advised police that he had been seeking therapy.

[6] Examination of the applicant's computer found 44,197 images of child pornography that were categorized in accordance with the approach endorsed in *R v Oliver*:[1]

- Category 1 – depicting children posing naked or in sexualised posing showing underwear focusing on genitalia: 40,848 files;
- Category 2 – depicting non-penetrative sexual activity between children or children masturbating: 226 files;
- Category 3 – depicting non-penetrative sexual activity between children and adults including mutual masturbation: 10 files;
- Category 4 – depicting penetrative sexual activity between children and adults: 123 files;
- Category 5 – depicting sadism or bestiality involving children: 2 files.

[7] A significant proportion of the images constituting child exploitation material involved female pre-pubescent children aged between six and twelve years. These images depicted children in sexually explicit ways including nudity, sexually suggestive posing, with an explicit emphasis on genital areas, or engaged in non-penetrative sexual activity with other children or masturbating. Also located amongst these images were pre-pubescent children engaged in sexual intercourse with adults. Cartoons or comics depicting children engaged in sexual poses or activity were also found. There were 1,188 such files.

[8] A large number of video files were located on the applicant's computer. Fifty per cent of these 2,398 files were examined of which 89 depicted child exploitation material. They were categorized as follows:

- Category 1 – 15 videos;
- Category 2 – 16 videos;
- Category 3 – 4 videos;
- Category 4 – 49 videos;
- Category 5 – 5 videos.

The general age of the children appearing on the child exploitation material videos was between one and twelve years. The majority of videos involved these children being digitally or vaginally penetrated. Some were made to perform oral sex on an adult male. Other videos included children engaged in sexual acts with other children, nudity and sexually explicit emphasis on genital areas.

The applicant's personal circumstances

[9] The applicant was aged 30 at the time he was charged and was almost 32 at the date he was sentenced. He had no relevant prior criminal history. He was in a stable de facto relationship, and the child of this relationship was 20 months old at the time the applicant was sentenced. The applicant had been in full time employment as a

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1 [2003] 1 Cr App R 28.

boat builder. He continued to consult a psychologist and attended a total of 12 sessions up to and including a session on 3 February 2009.

Submissions at the sentence

[10] The prosecutor placed reliance upon the large number of images, the significant amount of time that the applicant had spent in downloading them and the fact that some of the images fell into the worst category. She conceded that the applicant "should receive a discount" for having entered a plea of guilty at his committal and that his co-operation with police in making full admissions also entitled him to a discount. Reference was made to comparable cases; it was submitted that the matter of *R v Grehan*,[2] heard in the District Court at Brisbane on 29 October 2009, most closely resembled the present case, although that accused had "significant mitigation" and possessed substantially fewer videos.

[11] Grehan was sentenced at first instance to concurrent terms of imprisonment of three years and one day on two counts of knowingly possessing child exploitation material ("the State offences") and one count of using a carriage service to access child pornography material ("the Commonwealth offence"). His imprisonment for the State offences was suspended after he had served 18 months and a non-parole period of 18 months was fixed in respect of the Commonwealth offence. The prosecutor noted that Grehan had filed a notice of appeal.

[12] Ultimately, the prosecutor in this case at first instance submitted that a sentence of between three and a half to four years was appropriate and that "the norm for non-parole periods for Commonwealth offences is after the offender has served 60 to 66 per cent of the head sentence". Counsel who appeared for the applicant at the sentence did not contest the range for which the prosecutor contended. He supported the submission that *Grehan* was comparable, while acknowledging the distinguishing feature of Grehan's psychiatric problems. Ultimately, the applicant's counsel submitted that the applicant's sentence should be "in line with the sentencing in *Grehan*".

Sentencing remarks

[13] The sentencing judge described the images found by police as "cruel, inhumane and disgusting". Her Honour observed that there was a great deal of material and that "the nature and content is at the very highest scale". A sentence which reflected both general and personal deterrence was called for. The fact that the applicant had been receiving treatment and had attended a few sessions before being approached by police was noted. The applicant's guilty pleas were said to be in his favour.

[14] The sentencing remarks included the following:

> "The explanation that you gave for having the material was for sexual gratification. It was a continuing course of conduct and was over a period of three years, or really sort of three and a-half years."

[15] The sentencing judge agreed with the submission that *Grehan* was the most relevant comparable decision and continued:

> "I agree with the prosecutor that the material involved here is not only more substantial but more serious. I, therefore, agree with her range of three and a-half to four years.

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[2] District Court of Queensland at Brisbane, Shanahan DCJ, 29 October 2009.

> Because you have done something to address your problem I consider that the bottom end of that would be appropriate; that is, three and a-half years. The question then becomes what should be the pre-release period. I have the usual schedule from the Commonwealth. Grehan was at the 50 per cent mark. The Crown says here that in view of the seriousness of the material and the other aggravating features that 60 per cent would be appropriate. I will make the order in terms of 50 per cent."

The sentence on count 1 - using a carriage service to access child pornography

[16] One of the difficulties with the sentence as a whole is the uncertainty of precisely what the applicant was being sentenced for in relation to count 1. It charged an offence against s 474.19(1) of the *Criminal Code* (Cth), the relevant parts of which were at the time of this offence:

> **"474.19 Using a carriage service for child pornography material**
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> (1) A person is guilty of an offence if:
> (a) the person:
> (i) uses a carriage service to access material;
> …
> and
> (b) the material is child pornography material."

Count 1 alleged that between 1 March 2005[3] and 14 September 2008, the accused used a carriage service to access child pornography material. The count could properly have reflected the incident identified by the police, in which the applicant accessed a "hard core child exploitation material website" on 19 November 2006 and paid by credit card to subscribe to the site. The statement of facts commenced with a description of that event, followed by an account of the search of the appellant's premises and the material discovered there, which became the subject of count 2. But the statement of facts also summarised admissions by the applicant, some of which suggested other, less particularised offences:

> "During the interview [the applicant] made the following admissions:
> …
> - He used the internet everyday and had a problem with pornography.
> - He had been looking at child exploitation material for the last 5 years depicting children aged from 2-3 years old up to legal age.
> - He paid for child exploitation material using a NAB card 2-3 years ago from a website with a cover page 'early comics magazines'.
> - He generally searched for child pornography each week day before work from 5-7am.
>
> …

[3] The offence did not exist before 1 March 2005. It was introduced by *the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2)* 2004 (Cth).

- He had paid for child pornography on two occasions on the same site. Once 5-6 years ago and then more recently. The material included images and movies. They were more explicit than other images he had downloaded from the internet.
- He downloaded CEM from newsgroups and peer to peer networks such as 'bearshare' and 'limewire'."

…

[17] The statement of facts was reiterated orally by the prosecutor at sentence. She did not indicate on which instance of using the internet to access child pornography she relied as constituting the offence in count 1. The defence did not volunteer any information about the substance of the offence to which the applicant intended to plead guilty. The learned sentencing judge based her remarks on the content of the material found in the applicant's possession, the subject of count 2, and said nothing about the basis on which she was sentencing in respect of count 1.

[18] Here, the respondent asserted, on the strength of the admissions to be found in the statement of facts, that the charge was one of accessing the internet over a period of three and a half years. Considering for the moment only whether the evidence supported such a charge, as opposed to whether it could properly be brought in that way, a careful scrutiny of those admissions does not justify anything so broad. The applicant's reference to looking at child exploitation material over the last five years contained no admission of doing so through use of the internet. His admission to using the internet every day and having a problem with pornography was similarly ambiguous; the two propositions were not necessarily related. His statement that he "generally searched for child pornography each week day before work" was clearer, but appears to have described a current practice, without any indication of when it commenced. It was certainly the case that three instances of his having paid for child pornography material downloaded from the internet could be identified from the admissions; although of those instances, one ("5-6 years ago") fell outside the temporal compass of count 1.

[19] The respondent submitted that all the offences disclosed in the admissions could properly be regarded as falling within count 1, because this was a proper case for charging an activity consisting of a number of acts, each an offence, in a single count. Counsel gave case law examples to support that proposition: *Jemmison v Priddle*,[4] in which the shooting of two deer was held to be properly charged as a single activity of killing game; *R v Wilson*,[5] where the stealing of separate items from different departments of the same store was held to be properly charged, as a single activity, in a single count; *Dendy v Brinkworth*,[6] in which the Full Court of the Supreme Court of South Australia said that, depending on the evidence, clearance of native vegetation from different areas of land in one very large paddock might properly be charged in a single count; *R v Morex Meat Australia Pty Ltd and Doube*,[7] in which it was said that the offence of attempting to pervert the course of justice consisted of conduct having the relevant tendency,

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4 [1972] 1 QB 489.
5 (1979) 69 Cr App R 83.
6 [2006] 97 SASR 407.
7 [1996] 1 Qd R 418.

which could comprise a single act or a series of acts; and *R v Firth*,[8] in which an almost daily act of stealing gas from a main was held to be a continuous taking.

[20] The respondent would have been in a stronger position had it confined that argument to asserting that the applicant's admitted use of the internet to access child pornography on each week day between specified hours, for whatever period that entailed, could be regarded as a single offence. But even so limited, the argument has difficulties. In the form in which it stood at the relevant time s 474.19(1), plainly enough, contemplated a discrete offence committed on every occasion a carriage service was used to obtain access to child pornography. It did not create an offence "defined in terms of a course of conduct or state of affairs";[9] it is not comparable in that respect with the offences considered in the *Morex* case or *Dendy v Brinkworth*. It is questionable whether the admission of the obtaining of access to the material on successive week days discloses such an immediate connection in time, place and purpose of the offences as to warrant a single charge (as the facts in *Jemmison v Priddle* and *Wilson* did). The other three or four acts admitted or identified by the police, of downloading material paid for by credit card at different times over some years, were not so related as to justify their being treated as a single activity, either with each other or with the admitted daily viewing of pornography. If the count were to be regarded as the respondent proposed, as including all of those matters, there is no doubt it would give rise to latent duplicity, because the evidence indicated that they were distinct offences.

[21] But, the respondent said, it was an everyday practice, and a convenient one, for offences to be rolled up in a single charge; to do otherwise would present practical difficulties. That notion may be questioned. It would not seem particularly challenging for the Crown in this case to have charged in separate counts the three or four instances in which the applicant was known to have used his credit card in accessing the relevant sites, with another count, if the evidence was thought to support it and for whatever period the Crown thought it could make out, of an offence representing the admitted daily internet use. Alternatively, (and as might be necessary if the case were one involving multiple offences) the Crown could make use of the procedure provided for in s 16 BA of the *Crimes Act* 1914 (Cth), of asking the sentencing judge to take a list of offences into account, upon the defendant's consent and admission of guilt of the relevant offences.

[22] The respondent argued that in any event the rule of duplicity was designed to prevent unfairness and could have little application on a guilty plea, citing comments to that effect by Hunt CJ at CL in *F*,[10] a decision of the New South Wales Court of Criminal Appeal. It is true that where a defendant chooses to plead guilty to a count alleging more than one offence, it is improbable that a Court would interfere on appeal. In *F*, the issue of duplicity was raised because the applicant pleaded guilty to a count alleging supply of three different named drugs. But the problem here is quite different. Count 1 did not on its face reveal that more than one offence was charged by it. The Crown prosecutor at sentence did not identify which was the offence charged; she did not, for example, say that it was the series of acts constituted by weekday viewing that was relied on, or that all the instances in which material was purchased were included. Nothing was said to indicate that the count was intended to represent all of the conduct alluded to in the statement of

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8 (1869) 11 Cox CC 234.

9 *Walsh v Tattersall* (1996) 188 CLR 77 at 91 per Gaudron and Gummow JJ.

10 (1996) 90 A Crim R 356 at 359-60.

facts, as opposed to putting that conduct to the court in a (questionable) attempt to provide context; to suggest, for example, that the offence was not an isolated transaction.[11]

[23] The charge alleged a single offence; the Crown did not submit that more than one offence should be taken into account; and it was not apparent by his plea or anything said on his behalf that the applicant intended to plead guilty to more than a single offence of using the internet to access child pornography. The sentence of three and a half years imposed on count 1 is doubly problematic: the learned judge did not identify what offence she was sentencing for; and, in the absence of any agreement by the applicant that, notwithstanding the single count, he was to be sentenced for more than one offence, her Honour could not properly have proceeded to sentence for all the offences disclosed by the statement of facts[12].

[24] The inevitable inference is that the learned primary judge either proceeded to sentence on a wrong basis or imposed a sentence which was manifestly excessive for a single offence of using the internet to access child pornography. This court should set aside the sentence on count 1 and re-sentence on the basis of a single offence. The respondent did not in its submissions identify which offence it would choose to rely on if the count were found to be duplicitous. In those circumstances, it would be rational to regard the relevant offence as that immediately identified in the statement of facts and the prosecutor's submissions at sentence: that the applicant had

> "... accessed a hard core child exploitation website on the early morning of the 19th of November 2006".

The sentence on count 2 - possessing child exploitation material

[25] The applicant's contention that the sentences were manifestly excessive was largely based on the fact that the sentencing judge placed particular reliance on the District Court sentence of *Grehan*, which had been set aside on appeal. Sentences of two years imprisonment on each count were substituted for the original sentences of imprisonment of three years and one day. The sentences for the State offences were suspended after six months, with an operational period of two years, and an order was made for Grehan's release upon recognizance after serving six months of the sentence for the Commonwealth offence. The applicant submitted that when regard was had to *Grehan*, it was manifest that the sentences imposed on him were excessive and failed to achieve the aim of reasonable consistency in sentences.

[26] The respondent sought to dissuade this court from reliance on *Grehan*, at least for the proposition that where the Commonwealth offence is joined with the State offence of possession the two offences are to be punished to the same extent. The respondent sought to support the sentence on Count 1, and submitted that a "lesser sentence for Count 2 would have been appropriate". The court in *Grehan* had focussed its considerations on the proper sentence for possession. In the appeal in *Grehan*, this Court was not asked to differentiate between the State and Commonwealth offences with respect to penalty.[13] The respondent submitted that

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11 As *R v Cooksley* [1982] Qd R 405 at 409 and *R v Jobson* [1989] 2 Qd R 464 at 467 suggest is permissible; but see also *R v D* [1996] 1 Qd R 363 at 403 for a clear statement to the contrary.

12 *R v D* at 403-4.

13 [2010] QCA 42 at [43].

the applicant's "overall criminality would ordinarily be made referrable to the major of the two charges" and that the Commonwealth offence was the more serious offence because it carried a maximum penalty of 10 years, whereas the maximum penalty for the State offence was five years. But the charge of possession itself was rendered serious through the fact that the pornographic material was acquired through internet use. The facts in *Grehan* bore some broad similarity to those in the present case, but the real point of distinction was Grehan's mental illness, which contributed to his offending.

[27] The respondent referred to some first instance decisions[14] of the Queensland District Court, which were of limited assistance, and to *R v Sykes*[15] in which this Court declined to disturb a sentence of 15 months with release after six months for an offence of accessing 120 images and a sentence of 12 months suspended after four months for possession of another 20 images. Counsel also referred to cases decided by the New South Wales Court of Criminal Appeal and by the Victorian Court of Appeal. Consideration of these decisions raises the issues considered in *R v Ruha, Ruha & Harris; ex parte Cth DPP*,[16] that sentencing judges should take into account decisions that are sufficiently like the subject case to shed light on the proper sentence. That includes comparable decisions both in Queensland and in other States and Territories, although account should be taken that both the head sentence and order for early release in such cases might have been influenced by inconsistent local sentencing practices.[17]

[28] The respondent referred to *Mouscas v R*[18] in which the applicant was sentenced for one count of possession of child pornography contrary to s 91H(3) of the *Crimes Act* 1900 (NSW). Pursuant to s 166 of the *Criminal Procedure Act* 1986 (NSW), an offence of using a carriage service to access child pornography contrary to s 474.19(a)(i) of the *Criminal Code* 1995 (Cth) was placed on a certificate and taken into account at sentence. Mouscas possessed almost 42,000 child pornography images and 251 video files classified as child pornography. Accordingly, the number of child pornography images was comparable to that of the applicant in this case, although Mouscas possessed more video images. An effective sentence of two years and nine months with a non-parole period of 18 months was imposed and the New South Wales Court of Criminal Appeal concluded that the sentence was not manifestly excessive.

[29] In *R v Fulop,*[19] the appellant pleaded guilty to one count of using a carriage service to access child pornography, contrary to the Commonwealth *Criminal Code*, and one count of knowingly possessing child pornography, contrary to the provisions of s 70 of the *Crimes Act* 1958 (Vic). The State offence carried a maximum period of imprisonment of five years. The appellant was in possession of 41,594 picture and video images. He was aged 52 and had no previous convictions. He was originally sentenced to four years imprisonment with a non-parole period of three years. The Court of Appeal of the Supreme Court of Victoria reduced the sentence to a total effective sentence of two and a half years imprisonment, with release on recognisance after the serving of two years.

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14 *R v Bechaz,* unreported, Kingham DCJ, District Court of Queensland, 20 July 2009 and *R v Gorman,* unreported, Bradley DCJ, District Court of Queensland, 7 August 2009.

15 [2009] QCA 267.

16 [2010] QCA 10.

17 At [56].

18 [2008] NSWCCA 181.

19 [2009] VSCA 296.

[30] There are, in our view, two respects in which *Fulop* was a more serious case than the applicant's. Although it is not clear how the charge was framed in that case, the appellant in *Fulop* presumably accepted responsibility for the commission of the Commonwealth offence over an extended period; the Court described "the length of time and the frequency with which the appellant obtained access to the images" as one of "the most significant aspects of his offending". Secondly, the Court remarked upon the fact that the appellant was in denial to some extent and sought to minimise his attraction to the images that he downloaded, sorted and stored. Although the appellant's counsel was in possession of reports by a psychologist and a psychiatrist, he did not tender them and this did not improve the appellant's position. Rather than being in self-deluded denial, the applicant in this matter appreciated that he needed treatment for his condition and sought therapy before the intervention of the police.

[31] *James v R*[20] was a case in which the applicant sought leave to appeal from sentences imposed of using a carriage service to access child pornography contrary to the Commonwealth *Criminal Code* and possession of child pornography contrary to the *Crimes Act* 1900 (NSW). A partial examination of the applicant's computer revealed 3,235 child pornography images and 77 videos. He was sentenced to 18 months imprisonment for the Commonwealth offence, cumulative on three months of a six month sentence for the State offence, giving an effective sentence of 21 months, of which he was required to serve 15 months. That sentence was not disturbed on appeal. Blanch J, with whom Beazley JA and Howie J agreed, described the sentences that were imposed as moderate.

[32] In relation to the respondent's submissions as to why *Grehan* should not be followed, whether or not the Commonwealth or State offence should be regarded as the more serious must depend on the surrounding circumstances. This includes whether there are commercial elements to the obtaining of the material, irrespective of whether the material is obtained through internet download or transmission or acquisition in some other form, such as upon disc. For the reasons we have given in relation to count 1, we do not accept the premise on which the respondent's submissions were based, that the Commonwealth offence in this case was the more serious of the two, so that the sentence as a whole should be framed by reference to its criminality. Finally, we do not accept the submission that in *Grehan*, the Court dealt with the offence of possession without regard to the overall criminality arising from the combination of offences involved. To the contrary, after having concluded from a review of sentences that the highest sentence imposed for possession of child exploitation material without other charge was 18 months, the Court proceeded to impose a higher head sentence, of two years, for the offences before it.

[33] The objective seriousness of the applicant's offence of knowingly possessing child exploitation material was very comparable to those of *Grehan*. The nature and content of the pornographic material was similar. Each was in possession of in excess of 40,000 images. In *Grehan*, 1.35 per cent of the images were in category 4 or 5. In the applicant's case there was approximately 0.28 per cent in those categories. Grehan was in possession of substantially fewer videos, namely 32 videos of which 50 per cent were in category 4 or 5. Examination of the 89 videos containing child exploitation material found amongst the applicant's video files indicated that approximately 60 per cent were in category 4 or 5.

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20 [2009] NSWCCA 62.

[34] The applicant and Grehan were of a similar age, Grehan being 30 when sentenced and between 26 and 29 when the offences were committed. Grehan had had no previous criminal history and was in regular employment. The respondent properly pointed to the distinguishing feature: that Grehan was diagnosed as having a psychiatric disorder, namely obsessive compulsive disorder of such severity as to amount to a mental illness. It was chronic in nature and had existed since childhood, associated with marked depression and anxiety. It was a factor which would make prison more difficult for the applicant. Most significantly, it had led to the applicant's persistence in collecting and storing pornographic images. It was relevant to assessing culpability and in lessening the relevance of deterrence, for the purposes of setting a head sentence. On the other hand, it is significant that this Court in *Grehan* took the view that the head sentence of three years was excessive, regardless of those considerations.[21] The marked disparity of 18 months between the sentence in the present case and that imposed in *Grehan* suggests that the head sentence here for the offence of possession was manifestly excessive.

Conclusion

[35] For the reasons given, this Court should set aside the sentences of three and a half years imposed in respect of both offences. This Court must now decide the sentences that are appropriate to the circumstances of the applicant's offending, including the period of actual imprisonment that he should serve. The sentence should reflect the need for denunciation and deterrence, whilst taking into account circumstances of mitigation. The circumstances of mitigation include the applicant's early plea of guilty, his co-operation with the authorities and, importantly, the fact that he sought professional treatment for his behaviour before the authorities intervened.

[36] Leave to appeal against the sentences should be granted. The appeal should be allowed. On the second count the appellant should be imprisoned for two years and six months. There is no reason ordinary sentencing practices in relation to State offences should not prevail, with the early plea of guilty reflected by suspension of the sentence after a period of ten months imprisonment, with an operational period of two years. On the first count the applicant should be sentenced to imprisonment for twelve months and (to maintain consistency with the head sentence) released after serving ten months upon recognizance in the sum of $500, conditioned that he be of good behaviour for two years.

[37] The fact that the sentence of imprisonment for twelve months for the Commonwealth offence is substantially less than the sentence of imprisonment in relation to the State offence provides no indication that in future similar cases the sentences for the Commonwealth and State offences should not be the same or that the sentence for the Commonwealth offence should not be longer than the State offence of possession. The sentence that is appropriate to each offence, and the period of actual imprisonment ordered to be served, must depend on the circumstances of the case.

[38] In this case the applicant was charged with a single offence of using a carriage service to access child pornography, and the respondent did not seek to have other offences of accessing taken into account by the procedure provided for in s 16BA of the *Crimes Act*. The sentence of twelve months imprisonment that we have ordered

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21 At [38].

in respect of the Commonwealth offence does not indicate what an appropriate sentence would have been for the Commonwealth offence if the respondent had relied upon the s 16BA procedure and other offences had been taken into account. The sentence of twelve months imprisonment does not detract from what this and other courts have said concerning the serious nature of the Commonwealth offence.[22] It reflects the fact that the sentence for the Commonwealth offence is for one act of accessing child pornography.

[39] The applicant's other admitted acts of accessing child pornography via the internet have been taken into account in regard to the circumstances under which he came into possession of the substantial quantity of child exploitation material with which he was found on 13 September 2008. Having regard to those circumstances, a sentence imprisonment of two years and six months is appropriate for the State offence. Such a sentence achieves consistency with the similar circumstances of *Grehen*, whilst taking account of the distinguishing feature of Grehen's diagnosed mental illness.

Orders

1. Leave is granted to appeal against sentence.

2. The appeal is allowed.

3. The sentence on count 1 is set aside and a sentence of twelve months imprisonment, with release after serving ten months upon recognizance in the sum of $500 conditioned that the applicant be of good behaviour for two years, is substituted.

4. The sentence on count 2 is set aside and a sentence of two years and six months imprisonment, suspended after ten months, with an operational period of two years, is substituted.

[40] **FRYBERG J:** Most of the relevant facts are set out in the joint judgment of my colleagues. I shall supplement them only as necessary.

Count two (the State offence)

[41] Unlike the Commonwealth *Criminal Code*, the Queensland *Criminal Code* draws no distinction between child pornography material and child abuse material. By s 228D it makes possession of child exploitation material an offence. "Child exploitation material" is defined to include (among other things) anything from depiction of a child in a sexual context to depiction of a child being subjected to abuse, cruelty or torture.[23] Most of the images in the present case were in the former category, although the reverse was true of the 89 videos which were examined. The applicant did not distribute any material, nor did he possess it for sale. The decision in *R v Grehan*[24] and the decisions there referred to suggest that the sentence of 3½ years imprisonment imposed at first instance was too high.

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22 cf *Director of Public Prosecutions (Cth) v D'Alessandro* [2010] VSCA 60 in which the respondent pleaded guilty to six counts involving the illegal use of a carriage service, including transmission of child pornography.

23 *Criminal Code* (Qld), s 207A.

24 [2010] QCA 42.

[42] The sentencing judge referred to the fact that the applicant had pleaded guilty and had cooperated with the police right from the outset. She did not indicate how she took those factors into account in the sentence imposed. If she did so by reducing the head sentence, she must have started from a head sentence in the range of four to five years (the latter being the maximum for the offence). That would have been an error; this was not an offence in the most serious category. If she did so by suspending the sentence after 21 months, she failed to give appropriate recognition to the applicant's cooperation in the administration of justice. He would have been eligible for parole after 21 months if the sentence had not been suspended.[25]

[43] The respondent expressly conceded that a lesser sentence would have been appropriate.

[44] In these circumstances I see no point in conducting a further review of the cases. The appeal must be allowed and the applicant resentenced. I agree with my colleagues that a head sentence of 2½ years imprisonment is appropriate.

[45] I do not agree that the applicant's cooperation in the administration of justice is adequately recognised by its suspension after 10 months. The applicant made full admissions to the police from the outset and he pleaded guilty at the committal hearing. He was committed for sentence. Offenders who plead not guilty and maintain that posture even after an indictment is presented routinely have a plea of guilty recognised by having to serve one-third of their sentence provided they notify their intention to plead guilty before the case is listed for trial. The applicant's cooperation is worth a good deal more than that, even taking into account that the Crown would have had a strong case against him, and it should be recognised. I would suspend the sentence after eight months for an operational period of two years.

Count one (the Commonwealth offence)

[46] The first count was:

> "Between the first day of March 2005 and the fourteenth day of September 2008 at Oxenford in the State of Queensland BRADLEY JOHN GARGET-BENNETT used a carriage service to access child pornography material."

[47] The charge was brought under s 474.19 of the *Criminal Code* (Cth). That section commenced on 1 March 2005 (which explains the commencement date of the period in the charge) and for the whole of the charged period it relevantly provided:

> "**474.19 Using a carriage service for child pornography material**
>
> (1) A person is guilty of an offence if:
> (a) the person:
> (i) uses a carriage service to access material; or
> (ii) uses a carriage service to cause material to be transmitted to the person; or
> (iii) uses a carriage service to transmit material; or
> (iv) uses a carriage service to make material available; or
> (v) uses a carriage service to publish or otherwise distribute material; and

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25 *Corrective Services Act 2006* (Qld), s 184(2).

(b) the material is child pornography material.

Penalty: Imprisonment for 10 years.

(2) To avoid doubt, the following are the fault elements for the physical elements of an offence against subsection (1):
(a) intention is the fault element for the conduct referred to in paragraph (1)(a);
(b) recklessness is the fault element for the circumstances referred to in paragraph (1)(b)."

[48] The applicant was charged under sub-para (a)(i). It will be noticed that this provision has two physical elements (to use the arcane language of the Code[26]): using a carriage service (conduct for which the fault element is intention[27]) and to access material (a result for which the fault element is recklessness[28]). The offending conduct is denoted by the verb "use".

[49] Sentence was imposed on the basis of a statement of facts which was tendered by the Crown without objection from the applicant. The offending material had been found on seven compact discs and three hard drives and the applicant had been interviewed. No recording of the interview was tendered but it was summarised in the statement:

"During the interview he made the following admissions:

- Owning the computer tower and the compact discs. He admitted the compact discs contained both adult and child pornography.
- *He used the internet everyday and had a problem with pornography.*
- He had been looking at child exploitation material for the last 5 years depicting children aged from 2-3 years old up to legal age.
- He paid for child exploitation material using a NAB card 2-3 years ago from a website with a cover page 'early comics magazines'.
- *He generally searched for child pornography each week day before work from 5-7am.*
- He couldn't estimate how much CEM would have been on his computer tower.
- *He admitted viewing the images of child exploitation material made him aroused.*
- *He said he masturbated each morning over the pictures he found.*
- He was getting therapy for his sex addiction.
- The material on the CD's he had transferred from his hard-drive when it was failing, he did not want to lose the images because of the time he had spent downloading them.

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26 Section 4.1.
27 Section 474.19(2)(a).
28 Section 5.6(2).

- He had paid for child pornography on two occasions on the same site. Once 5-6 years ago and then more recently. The material included images and movies. They were more explicit than other images he had downloaded from the internet.
- He downloaded CEM from newsgroups and peer to peer networks such as 'bearshare' and 'limewire'.
- He searched words such as 'child' within the peer to peer programs.
- He figured out code names used for child pornography such as 'hussy fan', 'baby shivered', 'ray gold'."[29]

[50] The hearing proceeded without any objection to the form of the charge. It was tacitly accepted by all participants that the conduct set out in the statement constituted one offence. O'Sullivan DCJ sentenced the applicant on the basis of all of the conduct described in the statement. In neither his notice of appeal nor his outline of argument did the applicant suggest any deficiency. The oral submissions on his behalf made no complaint about the form of the charge nor any suggestion of unfairness of process. But at the outset of oral submissions on behalf of the respondent, it was suggested from the Bench that the charge might be duplicitous. Not surprisingly, counsel for the applicant accepted the proffered gift, albeit initially without much enthusiasm. The parties were given time to file written submissions in relation to this curve ball from left field (to mix my metaphors) and we have considered those submissions. Failure to take the objection at first instance does not preclude raising it on appeal.[30]

Duplicity

[51] Offences are usually defined in acts of Parliament by reference to conduct (act or omission) constituting the offence. An infinite variety (or at least a very large number) of words may denote the conduct. In some cases the impugned conduct may be possible only by doing a number of acts over a period of time, perhaps in a variety of places. Trafficking in dangerous drugs is an example of such an offence. A conviction requires proof of carrying on the business,[31] something which by definition involves multiple acts over a period of time. Obtaining payment of a social security payment which was payable only in part in breach of s 1347 of the *Social Security Act 1991* (Cth) was another.[32] The respondent does not argue that the form of charge in the present case can be justified on that basis. On the other hand proscribed conduct might be capable of completion by a single brief act. Many, perhaps most, offences are in this category. Subject to any contrary intention in the legislation,[33] each such act may be charged as a separate offence. However in some cases, a series of acts may also be charged as one offence. As this Court has held, "There are no doubt cases in which, notwithstanding that offences could be charged separately, it is nevertheless permissible and even appropriate to prefer only one charge".[34] If it is not so permissible, the charge is bad for duplicity.

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29 Emphasis added.
30 *Walsh v Tattersall* (1996) 188 CLR 77 at p 82 per Dawson and Toohey JJ.
31 *Drugs Misuse Act 1986* (Qld), s 5.
32 *Hyde v Mason* [2005] 2 Qd R 159.
33 Gaudron and Gummow JJ so interpreted s 1347 in *Walsh v Tattersall*.
34 *R v Chen* [1997] QCA 355.

[52] No question of duplicity arose here on the face of the charge. This was a case in which, as in *S v The Queen*,[35] any duplicity arose from a "latent ambiguity".[36] The accuracy of that description does not matter. It refers to a situation where although only one offence is charged, the particulars or the evidence reveal more than one offence (or, more accurately, conduct capable of being charged as more than one offence) answering the charged description.

[53] Was the conduct in the present case capable of being charged as more than one offence? I agree with my colleagues[37] that it was. But I would go further than they do. To my mind the applicant's admissions, especially those emphasised above,[38] clearly suggested that he had committed at least one offence per weekday throughout the period in question. He admitted that he used the Internet every day; that he generally searched (by implication, on the Internet) for child pornography each weekday; that he found pictures (by implication, during those searches) over which he masturbated each morning; and that he viewed the images (by implication, the pictures which he found). The pictures undoubtedly constituted child pornography material. They could be viewed on his computer only if they had been downloaded on the Internet. Each time he used the Internet to view (i.e. download) a pornographic picture (or at least each time he used it to view a file containing multiple pictures) he used a carriage service to access child pornography material. Importantly, both counsel conducted the case on the basis that all of the pornographic material examined by police could be taken into account in sentencing, and that was what the judge did. Even allowing for an element of hyperbole, the applicant could have been charged with a multiplicity of offences (provided they were properly identified) had the Crown wished to take that course. Although it did not do so, it was, with the utmost respect to those who hold a different view, self-evident that the count was intended to represent all of the conduct set out in the statement of facts.

[54] That being so, was this a case where it was appropriate or at least permissible to charge all of the conduct as one offence? The form of the indictment was, I assume, controlled by s 567(1) of the *Criminal Code* (Qld). That provides that except as otherwise expressly provided, an indictment must charge one offence only and not two or more offences. It was not argued that the section precludes charging multiple acts as one offence, and that is the Queensland practice in appropriate cases. A decision on whether it is necessary or desirable for there to be a statutory formulation of the doctrine stated in *R v Chen*[39] can await an appropriate case for determination.

[55] In *Hyde v Mason* I observed that the reason for the rule that no one count in any complaint may charge a person with the commission of more than one offence has changed over time,[40] and referred to the well-known passage from the judgment of Gaudron and McHugh JJ in *S v The Queen*:

> "The rule against duplicitous counts in an indictment originated as early as the seventeenth century. See, e.g., *Smith v. Mall* (1623)

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35 (1989) 168 CLR 266.

36 As Dawson J pointed out in that case (p 274), the expression was used by Dixon J in *Johnson v Miller* (1937) 59 CLR 467 at p 486.

37 Paragraph [20].

38 Paragraph [49].

39 Footnote 33 above.

40 [2005] 2 Qd R 159 at p 164 (McMurdo P and Mullins J agreeing).

> 2 Rolle 263 [81 E.R. 788]; *R. v. Stocker* (1696) 5 Mod. 137 [87 E.R. 568]. It may be, as suggested by Salhany in 'Duplicity - Is the Rule Still Necessary?', *Criminal Law Quarterly*, vol. 6 (1963) 205, at pp. 206-207, that the rule grew out of the strict formalities associated with criminal pleadings at a time when the difference between misdemeanour and felony was the difference between life and death. However, the rule against duplicitous counts has, for a very long time, rested on other considerations. One important consideration is the orderly administration of criminal justice. There are a number of aspects to this consideration: a court must know what charge it is entertaining in order to ensure that evidence is properly admitted, and in order to instruct the jury properly as to the law to be applied; in the event of conviction, a court must know the offence for which the defendant is to be punished; and the record must show of what offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should arise, of a plea of autrefois acquit or autrefois convict. See, generally, *R. v. Sadler* (1787) 2 Chit. 519; *R v Hollond* (1794) 5 T.R. 607, at p. 623 [101 E.R. 340, at p. 348], per Lord Kenyon CJ. See, as to the need for distinct consideration in relation to penalty, *R. v. Stocker*; *R. v. Sadler*; *R. v. Morley* (1827) 1 Y. & J. 221 [148 E.R. 653]; *Cotterill v. Lempriere* (1890) 24 Q.B.D. 634, at p. 637, per Lord Coleridge CJ. See, as to the availability of a plea in bar, *R. v. Robe* (1735) 2 Str. 999 [93 E.R. 993]; *Davy v. Baker* (1769) 4 Burr. 2471 [98 E.R. 295]; *R. v. Wells; Ex parte Clifford* (1904) 91 L.T. 98; *R. v. Surrey Justices; Ex parte Witherick* [1932] 1 K.B. 450.
>
> The rule against duplicitous counts has also long rested upon a basic consideration of fairness, namely, that an accused should know what case he or she has to meet. See, for example, *R. v. Robe* (1735) 2 Str., at p. 999 [93 E.R., at p. 994] where it was said 'this is so general a charge, that it is impossible any man can prepare to defend himself on this prosecution ...'. See also *R. v. Hollond* (1794) 5 T.R., at p. 623 [101 E.R., at p. 348], per Lord Kenyon C.J.; *R. v. North* (1825) 6 Dowl. & Ry. 143, at p. 146 [28 R.R. 538, at p. 541]; *R. v. Morley* (1827) 1 Y. & J., at pp. 224-225 [148 E.R., at p. 654]; and *Cotterill v. Lempriere* (1890) 24 Q.B.D., at p. 639, per Lord Esher M.R. Of course, the degree of unfairness or prejudice involved will vary from case to case, and it may be, as suggested by Professor Glanville Williams in 'The Count System and the Duplicity Rule' [1966] *Criminal Law Review* 255, at p. 264, that on occasions the uncertainty is not 'such as to disable the defendant from meeting the charge'."[41]

For that reason, a conviction based on a duplicitous count may be upheld on the ground that there has been no substantial miscarriage of justice, even if an objection was raised at the trial.[42]

[56] Most of the cases on duplicity have recently been reviewed, at considerable length, in other jurisdictions.[43] Those reviews make it clear that, as Gleeson CJ once said,

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41 *S v The Queen* (1989) 168 CLR 266 at pp 284-5 per Gaudron and McHugh JJ.

42 *Ibid*, at p 277 per Dawson J; *Cohen v Macefield P/L &Ors* [2010] QCA 95 at [30].

"... the courts have never managed to produce a technical verbal formula of precise application which constitutes an easy guide ... to whether the common law rule has been infringed".[44] Often the question is in large part one of fact and degree. The following considerations are relevant (the list is not exclusive):

- the terms of the statute creating the offence;
- whether on the particulars and the evidence the charge can be seen as one of a composite offence having regard to the number of acts, the relationship between them, the period over which they took place, their similarity, where the acts took place, their result and possibly the intention with which they were done (there may be other factors as well);
- whether the form of the charge or conviction caused any element of unfairness to the accused;
- whether the form of the charge caused any difficulties regarding the admissibility of evidence;
- whether the form of the charge was likely to have embarrassed the accused in making a submission of no case to answer;
- whether the form of the charge affected the directions to the jury and adversely to the accused;
- whether the form of the charge was adequately cured by particulars or a statement of facts;
- for the purposes of sentencing, what level of culpability was embodied in the conviction;
- whether it was possible to identify the conduct the subject of a conviction with sufficient certainty to ground or exclude a plea of autrefois convict or autrefois acquit.

When the question arises on appeal it is also relevant to take into account whether objection was taken at the trial and whether the accused pleaded guilty.

Application of the relevant considerations

[57] The applicant's submissions on this aspect of the matter were:

> "6. It is submitted that the count of accessing was bad for duplicity.
>
> …
>
> 9. … [D]ifficulties arise in respect of ambiguity and risk of prejudice even on a plea of guilty. See particularly the principles in *R v D*.[45]
>
> 10. The difficulty with relying on multiple acts of accessing in the one count is that the Court may have difficulty discerning the correct level of criminality or the purposes of sentencing."

[58] The wording of those submissions suggests that counsel had in mind the form of the section as it now stands rather than the form as it stood at the relevant time. By the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010*, s 474.19(1)(a) was repealed and replaced with the following:

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43 *R v Heaney* [2009] VSCA 74; *Rixon v Thompson* [2009] VSCA 84; *R v Goodwin* [2009] ACTSC 111.

44 *Stanton v Abernathy* (1990) 19 NSWLR 656 at p 666.

45 [1996] 1 Qd R 363.

"(a) the person:
(i) accesses material; or
(ii) causes material to be transmitted to himself or herself; or
(iii) transmits, makes available, publishes, distributes, advertises or promotes material; or
(iv) solicits material; and
(aa) the person does so using a carriage service; and".

The impugned conduct under that provision is indeed accessing material as the applicant submits (albeit doing so using a carriage service). It was not so under the legislation as in force at the time charged in this case. Then the impugned conduct was using a carriage service. As already observed, the physical element of the offence was denoted by the verb "use".

[59] It has long been accepted that in legal parlance "use" is a word of wide signification.[46] It has been deployed in Australia in a variety of contexts: the use of land; the unlawful use of a motor vehicle; the confiscation of property used for crime; and the use of a patent or trade mark are but a few examples. In most if not all of them it is capable of referring to a single act; but more commonly it encompasses repeated acts, sometimes repeated over a prolonged period. Of course that does not answer the question in the present case. It merely suggests that Parliament has chosen a word which more readily sustains the conclusion advocated by the Crown than would many others.

[60] I am fortified in that view by the decision of the Full Court of the Supreme Court of South Australia in *Daly v Medwell*.[47] The appellant in that case had been convicted by a magistrate of one count of using a telecommunications service for the purpose of harassing a person. The hearing proceeded on the basis that the complaint alleged a single offence consisting of a continuing course of conduct between the dates specified in the complaint. The evidence disclosed that he had made at least seven or eight hang-up calls to the telephone where an ex-employee was living. The relationship between the appellant and the young woman was one of intense animosity. The appellant complained of both duplicity and uncertainty in the complaint and the conviction. His first appeal was dismissed by a judge of the Supreme Court and a further appeal by the Full Court. King CJ wrote:

> "It is not difficult to envisage instances, of course, in which a single telephone call of itself may not amount to use for the purpose of harassment, but in which a number of calls of the same kind by reason of the cumulative effect, might be regarded as use of the telephone service for the purpose of harassment. Likewise, as the learned Judge on appeal recognized, it is not difficult to imagine a situation in which a single call by reason of its nature might be characterized without more as use of the telephone service for the purpose of harassment. But, even where that is the case, it does not follow that subsequent telephone calls may not be so linked with the initial telephone call as to form part of the same use of the telephone service. The concept of harassment itself contains within it some element of continuity or at least the capacity for some element of continuity. Likewise, 'use' in one of its senses involves some

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46 *British Motor Syndicate Ltd v Taylor & Son* [1900] 1 Ch 577 at p 583 per Stirling J.
47 (1986) 40 SASR 281.

> continuity of conduct and it seems to me that the expression 'use for the purpose of harassment' can properly cover a continuing course of conduct consisting of a number of incidents so identified with one another by their nature or by time, place or circumstance, that they can properly be regarded as a single course of conduct and a single continuing use of the telephone service."[48]

[61] Prior J agreed. He wrote:

> "The meaning of the words 'use' and 'purpose' have been dealt with in many cases. I do not see this as an appropriate occasion to particularize on those issues. I would simply wish to add to what the Chief Justice has said that in my view, the form of this offence is such that, just as this complaint was valid, so too a complaint for a single use could also validly have been made. However, as the Chief Justice has said, in this case there could have been no doubt that a course of conduct was being relied upon by the prosecution to prove the particular offence charged."[49]

Olsson J agreed with the other members of the court.

[62] As in that case, so in this. The wording of the statute supports the view that multiple acts capable of constituting the offence may be charged as a composite offence.

[63] The statement of facts discloses a very large number of nearly identical acts, far too many to consider charging separately in any practical sense. The inference is irresistible that cumulatively they lead to the applicant storing on disk the vast collection of images and videos discovered by the police. The acts followed a pattern, being committed in the early morning each weekday. All were carried out using the applicant's computer from his home. All were carried out for the same purpose. It is true that they took place over a period of 3½ years; but they did not constitute a series of events remote in time from each other. They were committed with daily regularity. In my judgment they were so closely related that they could properly be charged as one offence.

[64] Counsel for the applicant very properly did not submit that the hearing below involved any unfairness to the applicant, who had gone over the statement of facts and agreed with them. The judge referred to the total number of images and videos in her reasons for judgment and took all of them into account. The applicant conceded that the sentence proposed by the Crown (3½ to 4 years with a non-parole period of 60%) was within the range. The applicant did not suggest that any error in the sentence was caused by the form of the charge or conviction.

[65] The applicant's plea of guilty meant that no problem arose with regard to the admissibility of evidence, a submission of no case to answer or directions to a jury. The statement of facts was not perfect and may not have been adequate for a trial (it did not clearly distinguish between files and images and it left a fair bit to inference). However it was adequate to convey the essential elements necessary for sentencing on a plea of guilty.

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48 *Ibid*, at pp 296-7.

49 *Ibid*, at p 297.

[66] In some cases a court may have difficulty discerning the correct level of criminality for the purposes of sentencing (as the applicant submits). Had the applicant raised the question of duplicity at first instance, such a difficulty might have arisen in the present case. In the event, the judge assessed culpability on the basis that the applicant used the carriage service on a large number of occasions and accessed a vast amount of pornography. All of his conduct and its outcome was taken into account. So it should have been. Doubtless that explains why the applicant does not now submit that the court *did* have difficulty discerning the correct level of criminality.

[67] It is not submitted that any problem arises in relation to the doctrines of autrefois convict or autrefois acquit.

[68] The foregoing considerations explain why the question of duplicity was not raised by the applicant at first instance or initially on appeal. In my judgment this proposed ground of application should be rejected.

The first ground of the proposed appeal

[69] The first ground of the proposed appeal was that the sentence of 3½ years imprisonment imposed by the judge was manifestly excessive. Unusually, the applicant did not seek to support this ground in his outline of submissions by reference to a range of sentences open to the judge, as revealed by other cases. He based the submission on only one case, *R v Grehan*. It is worth recording the submission in full:

> "9. The sentencing judge, Crown counsel and counsel for the appellant all relied upon *R v Grehan*, at that time a first instance sentence of the District Court, as comparable and of assistance to the court. The learned prosecutor informed the sentencing judge, quite properly, that the matter was subject to appeal. At first instance *Grehan* was sentenced to 3 years and 1 day's imprisonment with parole (Commonwealth) and suspension (State) at 18 months.
>
> 10. On appeal (*R v Grehan* [2010] QCA 42) the Court allowed the appeal and reduced the sentence to one of 2 years imprisonment with recognizance release (Commonwealth) and suspension (State) after serving 6 months.
>
> 11. Grehan too had a vast array and number of images, although it is accepted that the applicant had more videos and can be considered a worse category of offender. However, Grehan also had images and videos in the worst (5th category).
>
> 12. Grehan and the applicant both accessed the images for a substantial, and similar, period of time.
>
> 13. Grehan pleaded guilty to an ex officio indictment. The appellant pleaded guilty at committal and was committed for sentence. Because the brief involving the forensic analysis of the computer is required for both the ex officio and committal there is little or any difference in mitigation between an ex officio and a committal for sentence.
>
> 14. The appellant made admission including as to the length of time he accessed the material.

15. Grehan was 30 at sentence. The applicant was 31 at the time of sentence.

16. Neither Grehan nor the applicant distributed child pornography.

17. The applicant had a short and relatively old criminal history.

18. Particularly, in Grehan's case, he had a psychiatric disorder which was described on appeal as being of '*such severity as to amount to a mental illness.*' This was a significant factor in mitigation not present in the applicant's case. See also [26] and [37] of the judgment where the role of Grehan's compulsive obsessive psychiatric disorder is recognized. At [41] the effect of Grehan's disorder in regards to making prison more difficult is also recognized by the Court as a mitigating factor.

19. However, the applicant had recognized his problem and was seeking treatment prior to the involvement of the Police.

20. Clearly Grehan was less morally culpable and general deterrence was less of a feature in his case.

21. However, those considerations considered, it is still clear, in my respectful submission, that the sentence imposed on the applicant was manifestly excessive.

22. It is accepted that Grehan does not set a range of penalty, however there was analysis of cases in that judgment and it is factually, save for the mental health issues, quite close factually."

I accept all but the last two paragraphs of that submission.

[70] It is simply not correct that there was any analysis of cases of using a carriage service in *Grehan*. The case analysis began at para [27] with the words "Sentences of imprisonment are imposed for offences against s 228D of the *Criminal Code* (Qld) primarily by way of deterrence". The analysis which followed examined the cases from the point of view of that section. A number of the cases did not involve the use of a carriage service. The analysis concluded with an explanation of why it was so limited:

> "[43] I have not given any separate consideration to the Commonwealth offence, the subject of count 3. It was not dealt with separately in submissions and although it carries a longer maximum penalty, 10 years, we were not asked to differentiate between the State and Commonwealth offences with respect to penalty."

It follows that *Grehan* is useless as a comparable case in respect of sentencing under s 474.19 of the *Criminal Code* (Cth).

[71] Lest the approach taken by counsel in *Grehan* be thought applicable in all cases, I point out that it should not always be assumed that the same sentence should be imposed for offences under the latter as for offences under the former. At the relevant time the maximum penalty under the latter was imprisonment for 10 years, double the maximum under the former (it has since been increased to 15 years). Sentences should take that fact into account.

[72] In her sentencing remarks O'Sullivan DCJ said:

> "HER HONOUR: This is a great deal of material. I accept the Crown Prosecutor's submission that videos are more serious because of their potential use. I take into account that the videos including category four and category five material.
>
> It is relevant that I consider the nature and content of the material, including the age of the children and the gravity of the sexual activity portrayed. In your case the nature and content is at the very highest scale. It is also relevant for me to take into account the number of images or items of material possessed. Again, you are at the very highest scale.
>
> …
>
> Your material involves protracted abuse of children. The Prosecutor said the videos were awful and involved very young children."

[73] The applicant did not challenge the prosecutor's description of the videos:

> "The videos - the material on the videos was substantially more serious in nature than the images he possessed. The - of the - in excess of 44,000 images he possessed, the majority of those were in category 1, depicting naked posing, however, in my submission, the possession of the videos is substantially more serious and some of those involved children as young as three years old being raped, involved bestiality, penetration and you know, it is extensive conduct. It's continuing contact. Those films can make thousands of still images.
>
> All up, there were 705 movie files on the compact discs and then on the - on his hard drive, which is on page 4 of the statement of facts, there are 2,398 videos located on his hard drive. Only 50 per cent of these were examined by police. It was an arduous task for the officers involved, due to the amounts of material located. Most of those videos fell into category 4. Specifically 89 were viewed by officers at Task Force Argos and the majority, 49 of those 89 videos, depicted the penetration of children by adult males, including children as young as two to three years old.
>
> In respect of the videos, the general age of the children were female pre-pubescent children, aged between one to 12 years old, so young children, in my submission and the majority of the videos involved children being digitally or vaginally penetrated and made to perform oral sex on adult males.
>
> There were videos that included toddlers and babies ..."

[74] In this Court the applicant orally submitted that the range was 2 to 2½ years imprisonment, but offered no cases to support that range. The respondent proposed the range of 3 to 3½ years, down from the 3½ to 4 years proposed at first instance. The cases referred to by the respondent suggest that the bottom of the range may be below the estimate; but they do not demonstrate any error in the figure for the top of the range.

[75] The applicant has not demonstrated that the head sentence imposed below was manifestly excessive on this basis.

[76] However the respondent's concession impacts on the sentence imposed in a different way. In passing sentence, O'Sullivan DCJ said:

> "The Crown Prosecutor and your counsel say the most relevant [comparable decision] is that of Grehan, and I agree. I agree with the Prosecutor that the material involved here is not only more substantial but more serious. I, therefore, agree with her range of three and a half to four years.
>
> Because you have done something to address your problem I consider that the bottom end of that would be appropriate; that is, three and a half years."

[77] At that time, this Court had not delivered judgment in *Grehan* and the sentence of three years imprisonment stood. That sentence plainly influenced both the prosecutor's and the judge's assessment of the range here. It made the assessment erroneous. Her Honour's intention that the sentence be at the bottom end of the range did not take effect. Whether that should be characterised as a miscarriage of discretion or as producing a sentence which was manifestly excessive is of no consequence. It is necessary to resentence the applicant.

The second ground of the proposed appeal

[78] The second ground of the applicant's proposed appeal was:

> "The learned sentencing judge erred in considering that there was a requirement to fix a non-parole period of 60 - 66% unless unusual circumstances existed to warrant a reduction in that percentage."

The applicant was given leave to amend his application to add this ground at the hearing. Regrettably, he has not taken advantage of the leave and the original application remains unamended. Fortunately, the only consequence of this omission is a poor reflection on his solicitors. The ground is misconceived.

[79] The applicant's submissions on this ground began by referring to a submission by the prosecutor at first instance:

> "Your Honour, ultimately, my submission in relation to sentence is that the only appropriate sentence is a term of imprisonment. In my submission, a head sentence of between three and a half to four years is appropriate. In my submission, the norm for non-parole periods for Commonwealth offences, is after the offender has served 60 to 66 per cent of the head sentence."

It was submitted that this proposition was legally incorrect, on the basis of the decision of this Court in *R v Ruha*.[50]

[80] The problem for the applicant is that the submission went no further. The applicant did not demonstrate that the judge adopted the prosecutor's approach. What her Honour said was this:

> "The question then becomes what should be the pre-release period. I have the usual schedule from the Commonwealth. Grehan was at the 50 per cent mark. The Crown says here that in view of the seriousness of the material and the other aggravating features that 60

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[50] [2010] QCA 10.

> per cent would be appropriate. I will make the order in terms of 50 per cent."

In other words, her Honour rejected the prosecutor's submission. It follows that the second ground of the proposed appeal must fail.

[81] It may be that this demonstrates that her Honour was led into error in relation to the pre-release period by excessive reliance upon *Grehan*. In this Court Grehan was given a recognisance release order to take effect after six months of the two year sentence had been served. It is unnecessary to decide the point, as the applicant must in any event be resentenced.

Sentence

[82] In my judgment the applicant's conduct in using the internet to download the offending material was significantly more serious than his conduct in simply possessing it. It is notorious that the internet has changed child pornography from a cottage industry to a multinational business. Those who use it to access such material necessarily contribute to a massive increase in the amount of child abuse occurring throughout the world. The fact that the applicant on several occasions paid for the material downloaded aggravates the problem. Taking into account the mitigating factors described by my colleagues and the matters referred to above,[51] I would sentence the applicant on count one to imprisonment for three years and one day.

[83] The purpose of the one day is, of course, to enable the fixing of a non-parole period under s 19AB of the *Crimes Act 1914* (Cth). O'Sullivan DCJ obviously saw benefit in suspending the sentence for one of the offences and facilitating the placement of the applicant on parole in respect of the other. The mere fact that the applicant had sought treatment before the police appeared on the scene does not mean that he would not benefit from supervision. On the contrary, such supervision is important to ensure that he does not have a relapse or cease attending his therapist. The reports tendered at first instance demonstrate that he has a considerable way to go in achieving rehabilitation.

Orders

[84] I would make the following orders:

1. Application for leave to appeal granted.
2. Appeal allowed.
3. Set aside the sentence imposed on count one in the District Court on 20 November 2009 and in lieu thereof:
   (a) sentence the appellant to imprisonment for three years and one day;
   (b) fix 10 months as the non-parole period in respect of that sentence.
4. Direct that the Registrar cause a copy of the explanation annexed to these reasons to be delivered to the appellant.
5. Set aside the sentence imposed on count two in the District Court on 20 November 2009 and in lieu thereof:
   (a) sentence the appellant to imprisonment for 2½ years;
   (b) order that that sentence be suspended after the appellant has served eight months for an operational period of two years.

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[51] Paragraph [45].

EXPLANATION TO THE PRISONER[52]

Service of your sentence will entail a period of imprisonment of 10 months or slightly less.[53] The Attorney-General must at the end of that period order your release from prison on parole provided you accept the parole conditions.[54] Unless you are then serving a sentence under a State or Territory law, you will be released pursuant to that order.[55] You will complete the service of your sentence in the community.[56] The parole order will be subject to the condition that you must, during the parole period, be of good behaviour and not violate any law and may be subject to other conditions imposed by the Attorney-General.[57] If the Attorney-General proposes that you be subject to supervision for any part of the parole period, the order will specify the day on which the supervision period ends,[58] and in that case the order will be subject to a condition that you must during the supervision period be subject to the supervision of a parole officer or other person specified in the order, and must obey all reasonable directions of that officer or other person.[59] The order will be a sufficient authority for your release if and only if you indicate your acceptance of its conditions in writing on the order or a copy of it.[60] The Attorney-General may at any time before the end of the parole period vary or revoke a condition of the order or impose additional conditions in it.[61]

The order may be revoked by the Attorney-General at any time before the end of the parole period if you fail to comply with a condition of the order or there are reasonable grounds for suspecting that you have failed to comply.[62] If you are sentenced to imprisonment for more than three months for an offence committed during the parole period, the parole order will be taken to have been revoked upon the imposition of the sentence[63] and you will become liable to serve in prison the period unserved as at the date of revocation.[64] If the order is revoked by the Attorney-General, you will be liable to arrest without warrant[65] and if it is revoked because you are sentenced to imprisonment of three months or more, the sentencing court will issue a warrant for your detention.[66] If the parole period ends without the order being revoked, you will be taken to have served the part of the sentence that remained to be served at the beginning of the parole period and to have been discharged from imprisonment.[67]

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52 *Crimes Act 1914* (Cth), s 16F(1).
53 *Crimes Act 1914* (Cth), s 19AL(1).
54 *Crimes Act 1914* (Cth), s 19AL(5).
55 *Crimes Act 1914* (Cth), s 19AM.
56 *Crimes Act 1914* (Cth), s 16F(1)(a).
57 *Crimes Act 1914* (Cth), s 19AN(1)(a), (c).
58 *Crimes Act 1914* (Cth), s 19AL(4)(b).
59 *Crimes Act 1914* (Cth), s 19AN(1)(b).
60 *Crimes Act 1914* (Cth), s 19AL(5).
61 *Crimes Act 1914* (Cth), s 19AN(2).
62 *Crimes Act 1914* (Cth), s 19AU(1).
63 *Crimes Act 1914* (Cth), s 19AQ(1).
64 *Crimes Act 1914* (Cth), s 19AQ(5), s 19AA(2); *Corrective Services Act 2006* (Qld), s 214.
65 *Crimes Act 1914* (Cth), s 19AV(1).
66 *Crimes Act 1914* (Cth), s 19AS.
67 *Crimes Act 1914* (Cth), s 19AZC(1)(b).