SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lloyd* [2011] QCA 12
PARTIES:	**R** **v** **LLOYD, Raymond Keith** (applicant)
FILE NO/S:	CA No 130 of 2010 DC No 118 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	11 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2011
JUDGES:	Chief Justice and Chesterman and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal against sentence granted.** **2. Appeal allowed.** **3. Sentence imposed on counts 1 to 10 be varied by deleting the orders that the applicant be eligible for parole on 16 July 2010 and instead that each sentence be suspended forthwith for an operational period of three years.** **4. Term of imprisonment imposed on count 11 be set aside and in lieu thereof that the applicant be sentenced to two years' probation during which the applicant should undergo a course or courses suitable to address any tendency to re-offend.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to eleven counts of possessing child exploitation material – where the applicant was sentenced to three years' imprisonment on each count, imposed concurrently – where the applicant remains in prison approximately six months beyond the date the judge declared him to be eligible for parole – where the applicant has served more than half the duration of the three year terms – where an

order of probation after the suspension of a sentence permitted by s 92(1)(b) of the *Penalties and Sentences Act* 1992 is unavailable – whether sentence was manifestly excessive

Criminal Code 1899 (Qld), s 228D
Penalties and Sentences Act 1992 (Qld), s 92(1)(b)

R v Gordon; ex parte Cth DPP [2009] QCA 209, cited
R v Grehan [2010] QCA 42, considered
R v Hood [2005] 2 Qd R 54, [2005] QCA 159, followed
R v Pham [2009] QCA 242, considered

COUNSEL: J Sharp for the applicant
M B Lehane for the respondent

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

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree with the orders proposed by his Honour, and with his reasons.

[2] **CHESTERMAN JA:** On 20 April 2010 the applicant pleaded guilty to an *ex-officio* indictment which charged him with eleven counts of possessing child exploitation material contrary to s 228D of the *Criminal Code*. On 18 May 2010 he was sentenced to three years' imprisonment on each count. The parole eligibility date was fixed at 16 July 2010, taking into account 301 days he had served in pre-sentence custody, between the applicant's arrest and sentencing.

[3] The applicant seeks leave to appeal against the sentences on the grounds that they are manifestly excessive and that the primary judge gave insufficient weight to the pleas of guilty. The application raises two separate points. The first is that the sentences of three years imposed on each count are themselves excessive and should be reduced to two, or two and a half years. *R v Grehan* [2010] QCA 42 is principally relied upon for this submission. The second point is that the prospect that the applicant would be released at about the parole eligibility date fixed by the judge was illusory and was known to have that character when the sentences were imposed.

[4] The applicant remains in prison after almost 19 months, and about six months beyond the date the judge declared him to be eligible for parole. He has served more than half the duration of the three year terms, imposed concurrently.

[5] On 21 July 2009 police officers searched the applicant's home and found some 609 video files containing child exploitation material ("material") contained in computer towers, hard drives and DVDs. When police arrived the applicant was actively searching the internet for further material. A schedule of facts containing a descriptive summary of the contents of the material was tendered. His Honour paid close attention to the contents of the summary. It is not necessary to reproduce the summary or his Honour's attenuated account of it. It is, I think, enough to record his Honour's summary:

> "In this case there was no torture, masochism or bestiality. However the facts to which I have referred do reveal conduct that caused pain and distress to children, one of whom was an infant. Instruments were inserted vaginally. There was anal and vaginal penile penetration. There was a whipping of a child that caused visible injury. To that extent there was evidence of cruelty and sadistic behaviour depicted on the videos … ."

[6] The applicant's counsel repeated the submission that the material in his possession was not in the "worst category" but whether that be so or not the contents of the material were appalling. As in all these cases the material recorded the degradation and despoliation of children as young as infants, and the destruction of their innocence. The acts performed upon the children were repulsive and repugnant to any ordinary human sensitivity.

[7] The applicant was 56 years old at the time of offending. Importantly he had previous criminal convictions of particular relevance. On 11 February 1994 he was convicted in the District Court at Townsville on seven counts of indecently dealing with a child under the age of 12; with wilfully exposing a child under 12 to an indecent act; with two counts of attempted carnal knowledge of a child under 12, and with procuring a child under the age of 12 to commit an indecent act. He was sentenced to an effective term of imprisonment of eight years.

[8] On 7 December 2001 in the District Court at Townsville he was convicted of indecent treatment of children under 16 and was sentenced to two years and three months' imprisonment and ordered to report his current name and address to Townsville police regularly for 10 years. On two occasions the applicant failed to report. He was convicted of those breaches in the Magistrates Court in October 2006 and February 2008.

[9] In passing sentence the primary judge said:

> "Offences of this kind are not victimless offences. The children involved are real children, even though in many cases they may reside … overseas … . That fact that videos are taken … of the depravity visited upon these children is still a matter of great concern because they are indeed victims. This material … has a market. … your conduct is that of a paedophiliac nature. There is no evidence before me of you having sought treatment or counselling to address your perversion. You have … simply substituted video images of children in these … offences for the real children in your criminal history and all … for your own personal sexual gratification. Those features of your conduct and the type of images and behaviour depicted in them … make this case a serious example of possession … of child exploitation material."

[10] His Honour noted the circumstance that the applicant had pleaded guilty, but thought that that was "the extent of [the applicant's] cooperation" though it was probably "all that [he] could do in the circumstances." His Honour saw no evidence of remorse and noted the applicant's prior criminal history which indicated the applicant to be "a recidivist offender". The judge noted that sentences imposed were intended to deter the applicant and to deter other persons from committing similar offences, "and to make it clear that the community, acting through the Court, denounces the sort of conduct in which [the applicant was] involved." There was no challenge to the findings, or complaints about the judge's approach to sentencing.

[11] In *Grehan* I undertook a review of the authorities dealing with the imposition of sentences for possessing material and concluded:

> "[42] My review of the authorities, which I do not warrant to be complete, indicates that the courts have not imposed a sentence greater than 18 months' imprisonment on charges of possessing CE material *simpliciter*. There have been longer sentences in cases where the offender distributed the material, or made it. The cases also suggest that where the Commonwealth offence of using a carriage service is joined with possession the two offences, though different and with different maximums, are punished to the same extent. The number of images possessed and their content are, rightly in my opinion, considered highly relevant to sentence."

[12] Neither Ms Sharp who appeared for the applicant nor Mr Lehane who appeared for the respondent pointed to an authority overlooked in my review which might have invalidated the observation that 18 months' imprisonment for an offence against s 228D alone had been imposed.

[13] What distinguishes this case, however, from the others is the applicant's numerous and serious past offences against young children. Most of the offenders whose situation is discussed in the authorities were relatively young men without prior criminal convictions. Those who had convictions such as *Pham* [2009] QCA 242 saw that circumstance exacerbate the sentence (though *Pham* was dealt with for distributing as well as possessing material). Another feature of some of the cases is that the offenders had voluntarily undertaken psychological or psychiatric treatment to remove or control the impulses which led to the offending. By contrast the applicant, on the primary judge's assessment, had shown no remorse for his conduct and did not appear to regard it as abhorrent. As well he was a recidivist who possessed paedophiliac tendencies. These features do not appear in any of the other cases.

[14] *Grehan* noted [27] that:

> "Sentences of imprisonment are imposed for offences against s 228D … primarily by way of deterrence",

referring to the judgment of Keane JA in *R v Gordon; ex-parte Commonwealth DPP* [2009] QCA 209 at [22]. The primary judge regarded the need for both general and particular deterrence as significant in dealing with the applicant. In this his Honour was entirely correct. Given the applicant's history and the primary judge's assessment of him, particular deterrence was in this case at least as important as general deterrence. That was not a factor in the cases discussed in *Grehan*. Those other offenders had declared a desire not to re-offend, and some had taken steps towards rehabilitation.

[15] For these reasons it cannot be said that the sentences of three years' imprisonment were, in the unusual circumstances of this case, excessive.

[16] The applicant's second complaint, that he has already served more than half the total period of imprisonment and is yet without prospect of immediate release on parole has substance.

[17] It was submitted for the applicant at sentence that his pleas of guilty should be recognised, conventionally, by the suspension of the sentences after 12 months, at

the one third mark. The court was urged to suspend the sentences rather than fix a parole eligibility date because as a matter of practicality the applicant would not be released then or shortly afterwards. The reason for that was explained to the court. When assessing applications for parole the relevant Board placed considerable weight on whether an applicant had completed a program to assist with rehabilitation. Such programs are not offered to prisoners on remand (or, it might be noted, to those whose sentences are under appeal) so that the applicant could not enrol in a suitable course until after his sentence on 18 May 2010. There was then but two months to the parole eligibility date but the duration of the courses could extend to six or even ten months. He is still unable to enrol.

[18] The primary judge refused to suspend the sentences. His Honour said:

> "… your history is such that I consider parole supervision rather than Court supervision [after a suspended sentence] to [be] more appropriate and potentially of greater benefit, to the extent that you might avail yourself of assistance, to you. Further, I do not consider that the Court should make orders which in effect purposefully circumvent a proper and appropriate sentencing option simply because it is said that the procedures of the Corrective Services authorities and the parole authorities might delay a prisoner's released from gaol earlier than might otherwise be the case. A parole eligibility is what it purports to be … not an entitlement to immediate or expeditious release."

[19] His Honour's concern cannot be the subject of valid criticism. There are good reasons for thinking that the applicant would benefit from professional supervision which might tend to lessen his predilection for mistreating children, or watching them mistreated. Society would be an equal beneficiary.

[20] The court must however face the reality that the applicant is unlikely to be released on parole before he has served substantially the whole of the terms of imprisonment imposed on him. Such a result would not give requisite credit to his pleas of guilty to an *ex-officio* indictment. It would be unjust and is not what was intended by the primary judge. The applicant is in no way responsible for the delay, during which he was incarcerated, in bringing the charges to court. He could not in that period undertake an appropriate course and so qualify for release on parole at the time intended by the sentencing court.

[21] Effect can be given to what the court intended and to achieve some proper proportion of time served to head sentence by suspending the sentences forthwith but requiring the applicant to serve a period of probation during which he can be required to undertake appropriate courses designed for his rehabilitation.

[22] Because the applicant cannot be sentenced to a term of imprisonment for 12 months or less (because he has already served a longer term) an order for probation after the suspension of a sentence permitted by s 92(1)(b) of the *Penalties and Sentences Act* 1992 is unavailable. Instead the course endorsed by Jerrard JA in *R v Hood* [2005] QCA 159 at [48] should be followed.

[23] I would vary the sentences imposed on each of counts 1 to 10 by deleting the orders that the applicant be eligible for parole on 16 July 2010 and order instead that each sentence be suspended forthwith for an operational period of three years. On count 11 I would set aside the term of imprisonment and order instead that the applicant be sentenced to two years' probation during which he should undergo a course or

courses suitable to address any tendency to re-offend. The applicant has given his consent to such an order. The orders of the District Court should not otherwise be disturbed.

[24] **WHITE JA:** I have read the reasons for judgment of Chesterman JA and agree with his Honour's proposed orders for the reasons set out in his judgment.