SUPREME COURT OF QUEENSLAND

CITATION:	*R v Costello* [2011] QCA 39
PARTIES:	**R** **v** **COSTELLO, Christopher Francis** (appellant)
FILE NO/S:	CA No 203 of 2010 CA No 296 of 2010 DC No 693 of 2010
DIVISION:	Court of Appeal
PROCEEDINGS:	Appeal against Conviction Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2011
JUDGES:	Chief Justice and Muir and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction be dismissed;** **2. The application for leave to appeal against sentence be refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – where appellant submitted that fabricated explanations contained in a police interview and referred to by prosecution in address and summing up were not put to the appellant in cross-examination – where prosecution contended that the appellant's account that he believed the person whom he was communicating with to be an adult male should not be accepted – where appellant submitted that admissions made in respect of two transmitted images showing him masturbating to ejaculation were without his approval – whether such conduct occasioned a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where appellant submitted that the primary judge erred in failing to direct the jury on the use of circumstantial evidence

– whether primary judge should have warned the jury as to the dangers of convicting on such evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant submitted that his behaviour was consistent with that of any other middle aged man engaging in on-line communications – whether conviction unsafe and unsatisfactory

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where appellant submitted that primary judge sentenced on the basis that adult pornography involving sexual violence was found on the appellant's computer – whether appellant was sentenced on an erroneous factual basis

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant submitted that sentence was manifestly excessive in the absence of any real victim, breach of trust or proximity between the offender and victim – whether sentence manifestly excessive

Criminal Code Act 1995 (Cth), s 474.27(1)
Criminal Code 1899 (Qld), s 218A(1)(b)

Browne v Dunn (1893) 6 Rep 67, cited
Grant v The Queen (1975) 11 ALR 503, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Plomp v The Queen (1963) 110 CLR 234; [1963] HCA 44, cited
R v Asplund [2010] NSWCCA 316, cited
R v Birks (1990) 19 NSWLR 677, cited
R v G [1997] 1 Qd R 584; [1995] QCA 517, cited
R v Gajjar (2008) 192 A Crim R 76; [2008] VSCA 268, cited
R v Gatti, unreported, McGill DCJ, DC No 459 of 2010, 6 July 2010, considered
R v Hays (2006) 160 A Crim R 45; [2006] QCA 20, cited
R v Kennedy (2000) 118 A Crim R 34; [2000] NSWCCA 487, cited
R v MRW (1999) 113 A Crim R 308; [1999] NSWCCA 452, cited
R v O'Shara, unreported, ACTSC, 1 August 2008, cited
R v Oxenham, unreported, Wolfe DCCJ 28, DC No 287 of 2008, July 2008, distinguished
R v Porter, ex parte A-G (Qld) [2009] QCA 353, cited
R v Quick; ex parte A-G (Qld) (2006) 166 A Crim R 588; [2006] QCA 477, cited
R v Smith (2007) 179 A Crim R 453; [2007] QCA 447, cited

R v Teasdale (2004) 145 A Crim R 345; [2004] NSWCCA 91, cited
Rampley v R [2010] NSWCCA 293, considered
Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, applied
State of Western Australia v Collier (2007) 178 A Crim R 310; [2007] WASCA 250, considered

COUNSEL: K A Mellifont SC for the appellant
G R Rice SC for the respondent

SOLICITORS: McGinness & Associates for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

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

[2] **MUIR JA**: **Introduction** The appellant was convicted after a trial in the District Court of one count of using a carriage service to transmit to a person, whom he believed to be under 16 years of age, communications which included material that was indecent, with the intention of making it easier to procure that person to engage in or submit to sexual activity with himself. He was also convicted of four counts (counts 2, 3, 4 and 5 in the Indictment) of using electronic communication with intent to expose, without legitimate reason, a person he believed to be under the age of 16 years to indecent matter in Queensland. The count one offence was under s 474.27(1) of the *Criminal Code* (Cth) and the remaining offences were under s 218A(1)(b) of the *Criminal Code* (Qld). The appellant was sentenced to 27 months imprisonment for the count one offence with a release date at the mid point of the sentence. Concurrent sentences of eight months imprisonment were imposed for the remaining offences. The appellant appeals against his convictions and sentences.

[3] The only issue between prosecution and defence on the trial was whether there was proof beyond reasonable doubt of the appellant's belief that his communications over the internet were with a person under 16 years of age.

[4] It is convenient to discuss the evidence before the jury prior to considering the grounds of appeal.

The facts

[5] Early in the trial, the defence admitted the following facts:

1. On a number of dates between and including 19 January 2009 and 16 February 2009, the appellant engaged in nine chats on "Yahoo Messenger" with "Cassie Henry" and that the appellant used the user name "firsthandaus";
2. "Cassie Henry" was the user name of a police officer;
3. On 30 January 2009 and 11 February 2009, the appellant chatted with "Cassie" on "MSN messenger" under the user name "exposed";
4. During chats including and between 29 January 2009 and 12 February 2009, the appellant transmitted indecent pictures and/or videos to "Cassie Henry". The transmissions involved, inter alia, images of the appellant's penis and scrotum, the appellant touching his penis, masturbating to ejaculation, applying shaving cream to his genital area and shaving his pubic hair;

5. That the pictures and videos were indecent;
6. On 16 February 2009, "Cassie" provided a mobile telephone number to the appellant and that the appellant called the number that day.

[6] The appellant was arrested on 27 February 2009 and charged with the subject offences. He participated in an interview with police that day. Evidence of the interview was not led by the prosecution but portions of the interview were led by defence counsel in re-examination to rebut the inference that the appellant had recently invented his evidence that he believed that "Cassie" was not a 14 year old girl.

[7] The sole witness for the prosecution was the police officer who used the user name "Cassie Henry". He explained how the subject communications had taken place and how the subject images had been transmitted and displayed. A booklet containing a compilation of the texts of the chats between "Cassie Henry" and the appellant was tendered through him.

[8] The appellant gave evidence to the following effect. He had 15 years experience of chatting in chat rooms and would spend up to 50 hours per week in such activities. His chats with "Cassie" were among 50 to 100 that he would have had in any given week. He believed "Cassie" was a 30 to 50 year old male. He had on occasions pretended to be a 21 year old girl when chatting in chat rooms.

[9] In evidence-in-chief, the appellant was taken to a particular chat room communication and asked how it affected his belief as to "Cassie's" age. He said that "a real 14 year old would be able to answer that very quickly rather than wait such a period of time". This opinion was seemingly based on his belief that "[a] real 14 year old" had "total knowledge of what porn is and has accessed porn at some time". The person he was communicating with "didn't have their story and they were searching for some answer to give". He considered it "just ludicrous" for "Cassie" to say in relation to pornographic matter that she "never knew people talked about that sort of stuff in here." He said:

> "[m]y belief is that a real 14 year old girl would have knowledge of masturbation, would have knowledge of sex, and would have knowledge that people of that age are engaging in that."

He gave other examples of statements by "Cassie" from which he deduced that "Cassie" was not a young female. He said that "Cassie's" naivety was inconsistent with her chosen user name, "Cassiedaluvbug".

[10] Other matters referred to by the appellant as supporting his belief as to Cassie's age and gender were: the delays in responding to communications; an inability or reluctance to produce a photograph when requested; the photo used by "Cassie" to identify herself was that of an 11 or 12 year old, not a 14 year old; the improbability that "Cassie's" mother would restrict her access to her mobile phone when she appeared to have unrestricted access to the internet; and "Cassie's" suggestion that she was studying calculus. The appellant professed to be aware that calculus was a year 11 or 12 subject.

[11] It is now convenient to address the grounds of appeal.

The trial miscarried because the prosecutor, in his address, argued that in his police interview the appellant had fabricated explanations for his stated belief about Cassie's age without having put an allegation of such fabrication to the appellant in cross-examination

[12] Counsel for the appellant's submissions may be summarised as follows. The appellant had the logs of the subject conversations for some months and had the

opportunity "to study them" after being charged. It was suggested to him by the prosecutor that he had sought to identify passages in the logs which would support his "now claim, that naivety was overdone" and to make an "after the fact rationalisation…that this was a male" whereas he believed to the contrary throughout. What was put ignored the interview with police which took place 11 days after the last of the chats with "Cassie" in which the appellant had provided a version of events largely consistent with the version given by him in evidence. The prosecutor did not mention this interview or suggest that any aspect of the appellant's evidence was inconsistent with what he had said in the interview.

[13] Reference was made to passages from the transcript of the re-examination of the appellant dealing with the police interview. In those passages the appellant had said that he believed that he was chatting with "a guy posing as a girl" and he had given explanations for that belief. In one such passage after it was suggested to him by the interviewing police officer that it was unlikely that he would have chatted to a person he knew to be a male, he responded:

> "Oh there's the internet's a fantasy world, the whole thing is a fantasy world, it's just if a guy gets his jollys out of posing as girl for a while, ah it really doesn't phase (sic) me, I don't care, but the things that you're trying to infer about me, are ridiculous and, and the stuff that you won't find, on any of that stuff that you've seized, will back it up."

[14] The appellant's counsel complained that the prosecutor did not raise with the appellant his assertion in his address to the jury that from the date of the appellant's phone call to "Cassie's" telephone number, the appellant must have known that he had been speaking to a man. Reference was made to the prosecutor's contention that this "enabled [the appellant] to present a point of view to the police which…was a rationalisation which occurred after the event and he's continued with that rationalisation here in the witness box today." It was submitted that the jury had been invited to infer that the appellant had fabricated his story and that the primary judge not only repeated that submission without criticism when summarising the prosecution case, but went further and informed the jury, erroneously, that the prosecutor had argued that:

> "when he was approached by the police early in that morning, his suspicions would have been further aroused and you should examine what he said in that record of interview in that light."

[15] The evidence was that the police had arrived at the appellant's home very early on 27 February 2009 but had delayed questioning him to allow him to get his son off to school. Defence counsel had sought a direction in terms of *Browne v Dunn*[1] on the basis that it was never put to the appellant that he had anticipated the visit by the police and had mentally formulated a version to meet the police allegations.

[16] Defence counsel contended that this was a fundamental irregularity which was compounded by the primary judge's expansion on the prosecution's summing up. The prosecutor argued that it was never suggested that the appellant had in fact used the available time to "reflect on a version which the defendant might in due course give to police," and that he had merely pointed out that the opportunity to so act had

---

1 (1893) 6 Rep 67.

been available to the appellant. This was said to be simply a factual matter which could not invoke the rule in *Browne v Dunn*.

[17] Counsel for the appellant referred to a number of decisions in which it was held that a miscarriage of justice had occurred as a result of failure by a prosecutor to put matters relied on in the prosecutor's address to relevant witnesses: *R v Kennedy,*[2] *R v MRW,*[3] *R v Teasdale*[4] and *R v Smith.*[5]

Consideration

[18] It was central to the prosecution case that the appellant believed that he was communicating with a 14 year old girl. That was put to the appellant several times in the course of cross-examination. It was also put to him that the phone call to "Cassie" made him "very suspicious" that he had not "in fact been talking to a girl".

[19] Counsel for the respondent submitted that whether the prosecution's cross-examination "raised an allegation of recent invention is debateable." It seems to me that recent invention was fairly obviously raised. However, defence counsel was able to meet the allegation very effectively in re-examination by taking the appellant through those parts of his record of interview which put his side of the story. Counsel for the respondent submitted, and I accept, that the prosecution's failure to place the record of interview before the jury was to the forensic advantage of the appellant as the prosecution deprived itself of the ability to cross-examine the appellant on his police interview. The appellant's evidence in re-examination went unchallenged.

[20] It is not the case either that the substance of the prosecution case was not put to the appellant. It was squarely raised with him that he had been in possession of the logs for a number of months, that he had had the opportunity to study them since being charged and that he had "set about looking to identify those passages which would support…[his] now claim." It was put to him that in the last few months he had engaged in an "after the fact rationalisation" that "Cassie" was a male, contrary to his belief. In short, it was apparent to the appellant and his counsel throughout that the prosecution was contending that any account of the appellant's to the effect that he understood "Cassie" to be an adult male should not have been believed.

[21] In those circumstances there was no unfairness or irregularity in either the prosecutor's address or the summing up. There is nothing to be served by analysing the various authorities relied on by the appellant. The principles are not in dispute. The authorities relied on merely provide examples of circumstances in which a failure to observe the rule in *Browne v Dunn* has led to procedural unfairness. This is not such a case.

The primary judge erred in failing to direct the jury on the use of circumstantial evidence

[22] Counsel for the appellant submitted that the prosecution case on the critical issue in the trial, namely whether the appellant believed he was dealing with a person younger than 16 years of age, was a matter of inference. It was argued that, as the prosecution case was entirely circumstantial, the jury should have been directed that

---

2 (2000) 118 A Crim R 34 at [35]–[40].
3 (1999) 113 A Crim R 308 at [20]–[50].
4 (2004) 145 A Crim R 345 at [29].
5 (2007) 179 A Crim R 453.

even if they rejected the appellant's direct evidence that he did not believe that he was speaking to a 14 year old, they could not convict unless they concluded that the only rational inference to be drawn from the content of the chat logs was that the appellant believed he was chatting with a person under the age of 16 years.[6]

Consideration

[23] The primary judge gave a conventional direction on the drawing of inferences. He explained that the prosecution had to satisfy the jury beyond reasonable doubt that the appellant did not believe that the person with whom he was chatting was under 16. In that regard his Honour said:[7]

> "The defendant has given evidence that he didn't hold such a belief. The defendant's explanation that he believed the person was not a person under the age of 16 is not excluded by the prosecution beyond reasonable doubt, the charge must fail and as both counsel have said to you in this case that appears to be the central issue."

Presumably, "if" commenced the second sentence or it was understood that the sentence was to be so construed.

[24] His Honour pointed out that "belief is something different from absolute knowledge" and reminded the jury that:

> "if the explanation that [the appellant] believed was not a person under 16 is not excluded by the prosecution beyond reasonable doubt, the charge will fail…"

[25] Significantly, he also directed that if the jury found the appellant's evidence unconvincing they should put it to one side and convict only if satisfied beyond reasonable doubt of the appellant's guilt by the rest of the evidence which was "really the transcript of the logs".

[26] Where a prosecution case relies on circumstantial evidence it is conventional for the trial judge to direct that guilt should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances. But as Dawson J observed in *Shepherd v The Queen*:[8]

> "…there is no invariable rule of practice, let alone rule of law, that the direction should be given in every case involving circumstantial evidence. It will be for the trial judge in the first instance to determine whether it should be given. As Barwick C.J., speaking for the Court, observed in *Grant v The Queen*:
>
> > 'Where the circumstances of the case seem to require that some such direction be given, the summing up regarded as a whole may prove to be, and generally may be likely to be, inadequate. On the other hand, having regard to the circumstances of the case and the nature of the summing up, the failure to give the special direction may not in a particular case result in an inadequacy of the summing up as a whole. It

---

6 *Plomp v The Queen* (1963) 110 CLR 234 at 252.

7 Record Book, 159.

8 (1990) 170 CLR 573 at 578.

> may none the less be concluded from the terms of the summing up that the jury were fully instructed.'" (citations omitted)

[27] Contrary to the respondent's counsel's contention the prosecution case was reliant on circumstantial evidence. The appellant gave direct evidence of his state of mind but the prosecution case was that such evidence should not be accepted and that the jury should infer from the logged communications and other evidence that the appellant believed "Cassie" to be under 16 years of age.

[28] In discussion with counsel prior to addresses the primary judge observed that there was no issue about circumstantial evidence. Neither counsel expressed a contrary view and neither sought any direction or redirection on circumstantial evidence. That fortifies me in my view that little would have been served by adding to the clear and simple directions given by the primary judge a further direction on circumstantial evidence. The jury could not have been in any doubt that it could not convict unless the inference could be drawn beyond reasonable doubt from the nature and content of the communications between the appellant and "Cassie" that the appellant believed "Cassie" to be under the age of 16 and unless no other inference was reasonably open. Accordingly, this ground of appeal has not been sustained.

The conviction was unsafe and unsatisfactory

[29] Counsel for the appellant contended that a middle aged man engrossed in an on-line fantasy would behave as the appellant in fact behaved and said that he had behaved. The point of the make believe environment was to be served, so it was said, by the participants making their role playing as credible as possible. The prosecution identified material in the logs which it asserted was convincing evidence of the appellant's belief that he was chatting with a 14 year old girl. That approach, it was argued, ignored the fact that if the appellant was innocent he was trying to behave exactly as if he was chatting with a 14 year old girl.

[30] Counsel for the respondent submitted that the jury was entitled to reason that the appellant did hold the requisite belief from matters including:

1. During each chat session the appellant was presented with an electronic display picture of a young girl;
2. The appellant assumed the role of providing sex education to "Cassie". Displays of images by the appellant accompanied by verbal instructions to masturbate and to view pornography took place in that context;
3. The online conversations were studded with terms of endearment by the appellant apparently designed to win the trust of a naïve young girl, for example, "Smart young lady", "pretty", "sweetie", "very cute", "great personality" and "sweet young lady";
4. In addition to discussions of sexual matters the appellant showed persistent interest in matters of general interest appropriate to the life-style of a young girl;
5. There was a progression in the salaciousness of both text and images over time;
6. Web-cam displays by the appellant of his penis and of acts of masturbation for the viewing interest of another adult male could be regarded as unlikely;
7. On a number of occasions the appellant sought a mobile phone number from "Cassie" and expressed a desire to talk with "her". On 2 February 2009 the

> appellant declared that his purpose in wishing to talk to "Cassie" was to verify the person with whom he was chatting. On 16 February 2009 the appellant called the mobile telephone number provided by the police officer. Immediately upon hearing an adult male voice the appellant's on line demeanour changed and the final chat session was terminated abruptly.

Consideration

[31] It is apparent from the foregoing that there was ample evidence from which the jury could have inferred beyond reasonable doubt, that the appellant, despite his protestations to the contrary, believed that he was dealing with an underage girl. The point made by the respondent's counsel as to the improbability of the appellant spending such a lengthy period in discussions with an adult male is a telling one. It is fortified by the objective improbability of the appellant's transmitting pornographic images of himself to "Cassie", if his understanding was that "Cassie" was a mature male. It was not suggested by the appellant that his sexual orientation was anything other than heterosexual.

[32] In cross-examination the appellant was adamant that he did not want voice contact with "Cassie". He said, "[t]here was never going to be a phone number supplied. This was an adult male. They were never going to give me a phone number, in my belief". Yet when the appellant was given a telephone number he rang it immediately. His assertion that "…it was going to be a scam of some description" rang hollow. It was open to the jury on the whole of the evidence to be satisfied of the appellant's guilt.[9]

The admissions on behalf of the appellant that two transmitted images showed him masturbating to ejaculation were made without the appellant's approval and occasioned a miscarriage of justice

[33] Counsel for the appellant submitted that the appellant's instructions were to admit that the images of masturbating which he had transmitted were indecent if shown to a child, not to admit that the images showed him masturbating to ejaculation. The appellant swears that he was not shown a DVD of the images until part way through the sentencing proceedings and that the images showed "masturbation of pre-ejaculate but not to ejaculation". It was submitted that the prosecutor placed some reliance on the masturbation being to ejaculation in his address to the jury and that it was "a feature which the jury may have relied on their reasoning of guilt".

Consideration

[34] The argument advanced on behalf of the appellant is spurious. The admissions by the defence were negotiated between the parties and were contained in a typed document, the contents of which were formally admitted by defence counsel. In the prosecutor's opening, reference was made to images of the defendant exposing his penis and masturbating on camera to ejaculation. In cross-examination the prosecutor enquired:

> "As against that, you accept, don't you, that you not only – not only exposed your penis but masturbated to ejaculation on more than one occasion for the benefit of this other user?"
> The appellant replied, "And any number of others at the same time."

---

9 *MFA v The Queen* (2002) 213 CLR 606 at 614 - 615.

[35] The general rule is that an accused person is bound by the way a trial is conducted by his or her counsel, regardless of whether that was in accordance with the wishes of the accused.[10] Notwithstanding this, "wholly exceptional circumstances" may arise in which the way in which the trial has been conducted has resulted in a miscarriage of justice.[11] This is not such a case. The admissions which the appellant now wishes to withdraw were affirmed by him in cross-examination. Not only that, he was aware throughout that the prosecution's allegations were consistent with the admissions.

[36] The distinction the appellant seeks to draw is probably not one which, even if correct, would render the admissions factually erroneous. If the fact was that the appellant masturbated to a point at which fluid other than semen was emitted from his penis, it is difficult to see what material bearing that could have on the jury's reasoning. There was no suggestion that the appellant, in deference to "Cassie's" sensibilities or for some other reasons, refrained from exposing her to the sight of him ejaculating fully and even if there had been such a suggestion it would have been irrelevant to the critical issue of belief. The argument is singularly bereft of merit.

Application for leave to appeal against sentence.

[37] Two grounds were relied on by the appellant. The first was that in sentencing the appellant the primary judge sentenced on an erroneous factual basis, namely that adult pornography involving sexual violence including rape was found on his computer. The second ground was that the sentence was manifestly excessive.

[38] Counsel for the respondent accepted that the primary judge erred in concluding that adult pornography involving sexual violence, including rape had been found on the appellant's computer. It was submitted however that the error did not adversely affect the exercise of the sentencing discretion as the error was made in the course of the primary judge's discussion of extenuating or mitigating circumstances. That submission should be accepted. Immediately prior the mistaken passage the primary judge observed:

> "There is nothing to indicate such activity [chat room interactions involving the appellant and others engaging in overt sexual conduct] involved other than consenting adults until this occasion".

The primary judge went on to address factors such as the breakdown of the appellant's marriage, his depressive symptoms, hardship likely experienced by him in prison, loss of access to his children, and the collapse of his business before specifically dealing with the vice his Honour perceived in the appellant's conduct. The vice was exposing a girl who was ostensibly only 14 years of age to explicit and indecent sexual activities. In so doing he noted that the appellant's lewd involvement with adults was not illegal. The primary judge's error did not have any material bearing on the sentence passed. The sentencing discretion did not miscarry.[12]

[39] In support of the submission that the sentence was manifestly excessive the appellant's counsel relied on two District Court decisions: *R v Oxenham*

---

10 *R v Birks* (1990) 19 NSWLR 677 at 685.

11 *R v G* [1997] 1 Qd R 584 at 586.

12 *R v KAC* [2010] QCA 39; *Baxter v The Queen* (2007) A Crim R 204.

(Wolfe DC CJ 28 July 2008 unreported*)* and *R v Gatti* (McGill DCJ 6 July 2009 unreported). In *Oxenham* the defendant pleaded guilty to two counts of grooming (s 474.27) and one count of using the internet to expose (s 218A). The offender had no relevant prior convictions and pleaded guilty at an early stage. The offending conduct involved a series of chats with a police officer posing as two "14 year olds" and one chat with another fictitious female child, all over a period of 10 weeks. The offender did not actually try to meet his correspondent. He desisted of his own volition and made full admissions to police. He was sentenced to two and a half years imprisonment with release after eight months.

[40] The offender in *Gatti* was convicted after a trial of one count of grooming and two counts of exposing and was sentenced to 18 months imprisonment with release after nine months. The offender was 58 years of age. He had no relevant prior criminal history and made full admissions which narrowed the scope of the trial. He engaged in six explicit chat sessions with a police officer and on two occasions sent a total of eight indecent images to his correspondent whom he believed to be an under age female. He made no arrangements to meet her.

[41] Reference was made also to cases of *R v Porter, ex parte A-G*[13] and *R v Quick; ex parte A-G (Qld)*.[14] They were cases of actual indecent conduct perpetrated on young females in which sentences had been imposed respectively of two years imprisonment suspended after 248 days with an operational period of three years and 18 months suspended after three months with an operational period of two years. It was submitted that "real" child abuse, the subject of these cases, was significantly more serious than on-line grooming cases as in such cases:

(a) There was no real victim;
(b) There was no breach of trust; and
(c) There was no proximity between the offender and the real or fictional victim and thus no real possibility of coercion or intimidation.

[42] In *Rampley v R*[15] McClelland CJ at CL, with whose reasons the other members of the court agreed, observed that in cases such as the present, the legislature has created an offence in order to enhance the prospects of detection of the offending conduct and "accordingly deter offenders and minimise the use of the internet for the sexual corruption of children." The need for deterrent sentences was also stressed in a decision of the Western Australian Court of Appeal, *Western Australia v Collier*.[16] That was a providing rather than a grooming case but the principles are equally applicable.

[43] In *R v Hays*,[17] de Jersey CJ observed, with reference to offences of procuring and intent to expose to indecent matter:

> "A meeting for the purpose of sexual exploitation carries particular risk to the immature victim. But so does indecent communication by an offender of mature years directed at an immature and therefore vulnerable child over the Internet. The graphic, salacious nature of what this applicant said, and did, if directed to a truly vulnerable 13 year old girl, would have carried serious potential to corrupt."

---

13 [2009] QCA 353.
14 [2006] QCA 477.
15 [2010] NSWCCA 293.
16 (2007) 178 A Crim R 310 at [43] and [47].
17 (2006) 160 A Crim R 45.

[44] The appellant derives no support from *Oxenham*. The early release date reflected a plea of guilty and the fact that the offender desisted of his own volition and made full admissions to police. *Gatti* assists the appellant's argument, but only to a degree. The appellant's offending conduct, which involved the real time transmission of acts of masturbation, was more serious than the conduct in *Gatti*. Moreover, the subject conduct appears to have involved a more concerted and subtle exercise in seduction and corruption than the corresponding conduct in *Gatti*.

[45] The maximum penalty for the count 1 offence was 12 years imprisonment. Some sentences imposed for like offences under the *Criminal Code* (Qld) tend to suggest that the subject sentence was high but the maximum penalty for the Queensland offences was rather lower (five years). The sentence is supported by *Oxenham,* the two years and nine months sentence with a recognisance release order after one year and six months imposed in *Rampley* and from the sentences in *R v Gajjar* (2008) 192 A Crim R 76; *R v O'Shara* (ACTSC 1 August 2008 unreported) and *R v Bozinovsk* (NSWDC 4 June 2009 unreported) discussed in *Rampley*.

[46] The sentence unsuccessfully appealed against in *R v Asplund*[18] and the comparable sentences discussed in the reasons of McClellan CJ at CL in *Asplund* also tend to support the sentence imposed for count 1.

[47] For these reasons I am not persuaded that the sentence was manifestly excessive.

Conclusion

[48] For the above reasons I would order that:

1. The appeal against conviction be dismissed; and
2. The application for leave to appeal against sentence be refused.

[49] **WHITE JA:** I have read the reasons for judgment of Muir JA and agree with his Honour's reasons and the orders which he proposes.

---

18 [2010] NSWCCA 316.