SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hampson* [2011] QCA 132
PARTIES:	**R** **v** **HAMPSON, Bradley Paul** (applicant)
FILE NO/S:	CA No 57 of 2011 DC No 478 of 2011 DC No 581 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2011
JUDGES:	Muir and White JJA and Daubney J Separate reasons for judgment of each member of the Court, Muir and White JJA concurring as to the orders made, Daubney J dissenting
ORDERS:	**Delivered ex tempore on 3 June 2011:**

1. **The application for leave to appeal against sentence be allowed.**
2. **The appeals be allowed and the sentences imposed in respect of counts 1, 2, 3 and 4 on the indictment be set aside.**
3. **For each of counts 1 and 4, the applicant be sentenced to six months imprisonment and that he be released forthwith under the supervision of an authorised corrective services officer for the remainder of a period of two years probation.**
4. **The applicant undergo such psychological and/or psychiatric assessment and treatment as may be directed by an authorised corrective services officer.**
5. **For each of counts 2 and 3, the applicant be sentenced to two years imprisonment and that he be released immediately upon entering into a recognizance in the sum of $1,000 conditioned on his being of good behaviour for two years.**
6. **All such sentences be served concurrently with each other.**
7. **It was declared that the period of 220 days spent by the applicant in pre-sentence custody between 4 June**

2010 and 2 July 2010 and between 16 September 2010 and 25 March 2011 be times served by him under his sentences.

8. **It was directed that the applicant's legal representatives explain the following matters to him in order to satisfy the requirements of s 16F of the *Crimes Act* 1914 (Cth):**
   a. **He has been sentenced to two years imprisonment but the Court has ordered that he be released immediately upon his entering into a bond of $1,000;**
   b. **The purpose of that order is to enable him to be released earlier than the full term of his sentence and to provide him with the opportunity to carry out the balance of his punishment in the community;**
   c. **The bond is conditional upon him being subject to the supervision of a probation officer for a period of two years. The bond is also conditional upon him being of good behaviour and, if he does not comply with its conditions, he may be brought back to Court and dealt with and depending on the nature of the breach, he may be required to serve the balance of his unserved period of imprisonment in prison; and**
   d. **The terms of the bond may be varied or discharged, in appropriate circumstances, at any time during the period of the bond.**
9. **It was directed also that:**
   a. **The consequences of a probation be explained to the applicant; and**
   b. **That the applicant report to an authorised corrective services officer at Bundaberg on or before 4 pm on Monday 6 June 2011.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant posted a number of offensive pictures and comments on the Facebook tribute pages to several dead or missing children – where the applicant was sentenced on his pleas of guilty to 12 months imprisonment and two years probation for each of two counts of distributing and knowingly possessing child exploitation material under the *Criminal Code* (Qld) 1899 – where the applicant was sentenced on his pleas of guilty to three years imprisonment, to be released after 12 months upon his entering into recognizance of $1,000 conditional upon him being of good behaviour for two years, for each of two counts of using a carriage service in an offensive way under the *Criminal Code* (Cth) 1995 – where the sentences were to be served concurrently – where the applicant had

a relevant prior conviction for using a carriage service to menace, harass or cause offence – where the applicant claimed mitigation by reason of his autism – where no comparable cases were available to the sentencing judge – where the applicant argued that the offences were not "within the worst category of cases" – whether the sentence was manifestly excessive

Bail Act 1980 (Qld)
Crimes Act 1914 (Cth), s 16F
Criminal Code Act 1995 (Cth), s 474.17(1), s 474.19, s 474.20
Criminal Code 1899 (Qld), s 228C, s 228D
Penalties and Sentences Act 1992 (Qld), s 92(1)

Agostino v Cleaves [2010] ACTSC 19, distinguished
Lacey v Attorney-General of Queensland (2011) 275 ALR 646; [2011] HCA 10, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, considered
R v Carlton [2010] 2 Qd R 340; [2009] QCA 241, cited
R v Carson (2008) 187 A Crim R 435; [2008] QCA 268, considered
R v Cook; ex parte A-G (Qld); R v Cook; ex parte Commonwealth DPP [2004] QCA 469, considered
R v Dwyer [2008] QCA 117, considered
R v Jackson & Hakim [1988] 33 A Crim R 413, considered
R v NK (2008) 191 A Crim R 483; [2008] QCA 403, cited
R v Pham (2009) 197 A Crim R 246; [2009] QCA 242, cited
R v Robinson [2011] QCA 27, cited
R v Salsone; ex parte A-G (Qld) [2008] QCA 220, cited
Skinner v The King (1913) 16 CLR 336; [1913] HCA 32, considered
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, considered

COUNSEL: D C Shepherd for the applicant
J R Hunter SC, with A K Gett, for the respondent

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

[1] **MUIR JA**: **Introduction**
The applicant was convicted, after pleas of guilty, of the offences set out in the following table. The sentence imposed for each offence and the maximum penalty for the offence is also stated in the table.

Count	Date of offences	Nature of offences	Sentence:
1	Between 14 February 2010 and	Distributing child exploitation material	12 months imprisonment and two

	28 February 2010	(s 228C *Criminal Code* (Qld)) Max: 10 years	years probation (s 92(1) *Penalties and Sentences Act* 1992 (Qld))
2	On or about 15 February 2010	Using a carriage service in an offensive way (s 474.17(1) *Criminal Code* (Cth)) Max: 3 years	3 years imprisonment with release after 12 months
3	Between 22 February 2010 and 28 February 2010	Using a carriage service in an offensive way (s 474.17(1) *Criminal Code* (Cth)) Max: 3 years	3 years imprisonment with release after 12 months
4	On or about 4 June 2010	Knowingly possessing child exploitation material: (s 228D *Criminal Code* (Qld)) Max: 5 years	12 months imprisonment and 2 years probation (s 92(1) *Penalties and Sentences Act* 1992 (Qld))

[2] The applicant applied for leave to appeal against these sentences on the grounds that they were manifestly excessive. The applicant had spent 220 days in pre-sentence custody before being sentenced on 25 March 2011. He was in custody serving his sentence from that date to the date of the hearing of his application on 3 June 2011.

The orders and directions made and given on 3 June 2011

[3] At the hearing of the application for leave to appeal, the following orders, directions and declarations were made:

1. The application for leave to appeal against sentence be allowed.
2. The appeals be allowed and the sentences imposed in respect of counts 1, 2, 3 and 4 on the indictment be set aside.
3. For each of counts 1 and 4, the applicant be sentenced to six months imprisonment and that he be released forthwith under the supervision of an authorised corrective services officer for the remainder of a period of two years probation.
4. The applicant undergo such psychological and/or psychiatric assessment and treatment as may be directed by an authorised corrective services officer.
5. For each of counts 2 and 3, the applicant be sentenced to two years imprisonment and that he be released immediately upon entering into a recognizance in the sum of $1,000 conditioned on his being of good behaviour for two years.
6. All such sentences be served concurrently with each other.

[4] It was declared that the period of 220 days spent by the applicant in pre-sentence custody between 4 June 2010 and 2 July 2010 and between 16 September 2010 and 25 March 2011 be times served by him under his sentences.

[5] It was directed that the applicant's legal representatives explain the following matters to him in order to satisfy the requirements of s 16F of the *Crimes Act* 1914 (Cth):

1. He has been sentenced to two years imprisonment but the Court has ordered that he be released immediately upon his entering into a bond of $1,000;
2. The purpose of that order is to enable him to be released earlier than the full term of his sentence and to provide him with the opportunity to carry out the balance of his punishment in the community;
3. The bond is conditional upon him being subject to the supervision of a probation officer for a period of two years. The bond is also conditional upon him being of good behaviour and, if he does not comply with its conditions, he may be brought back to Court and dealt with and depending on the nature of the breach, he may be required to serve the balance of his unserved period of imprisonment in prison; and
4. The terms of the bond may be varied or discharged, in appropriate circumstances, at any time during the period of the bond.

[6] It was directed also that:

(a) The consequences of a probation be explained to the applicant; and

(b) That the applicant report to an authorised corrective services officer at Bundaberg on or before 4 pm on Monday 6 June 2011.

[7] My reasons for those orders and directions are as follows.

The applicant's antecedents

[8] The applicant was 29 years of age when sentenced on 25 March 2011. He had a relevant prior conviction. On 7 October 2008, he was convicted of using a carriage service to menace, harass or cause offence and was placed on a good behaviour bond. The offending conduct was constituted by the use of a device to manipulate the timbre of the applicant's voice when he telephoned the male and female complainants and made lewd enquiries of them. When confronted by police, he admitted his conduct and explained that he was simply joking and that the complainants would have known the calls to be a joke.

[9] The applicant had earlier been convicted of breaches of the *Bail Act* 1980 (Qld) for failing to appear in accordance with an undertaking. He attended at court as directed, waited a number of hours and then left to attend university before his matter was reached. He attended court the following day, where he was told that a warrant had issued.

[10] The applicant is autistic and, on the basis of a diagnosis of autism by a psychologist to whom he was referred to by Centrelink, he was placed on a disability support pension. Despite that, he has obtained other employment in unskilled fields but has not managed to stay in any one job for long.

The offending conduct and related matters

[11] Some of the background to the offending conduct is conveniently described in the applicant's counsel's outline of submissions as follows:

> "[4] The applicant subscribed to the tribute pages on the social networking site, *Facebook*, relating to the deaths of Elliott Fletcher and Trinity Bates. Elliott Fletcher, age 12 years, died after being stabbed at School in Shorncliffe. Trinity Bates, aged 8 years, was taken from her bedroom in her home in Bundaberg and later found deceased in a nearby

storm water drain. Many people subscribed to these pages and expressed ('Posted') various sentiments of sympathy.

[5] Soon after the tribute pages were established, a number of 'posts' which contained offensive and insulting material, were posted to the tribute pages. A number of users were identified as having posted the offensive comments and material, but only one user was identified as being within the reach of the Australian police.

[6] The applicant subscribed to *Facebook* under an assumed name. The posts were identified as originating from a computer at the applicant's home in Tarragindi, Brisbane. Police were able to discover that he had joined the tribute pages on Facebook and that he was 'friends' with other users who had been identified as having also posted offensive comments and images."

[12] The following particulars of the offences were included in an agreed statement of facts:

"**Count 1: (Distribute Child Exploitation Material) & Count 2: (Use a carriage service to menace, harass or cause offence)**
On or about 15 February 2010, the defendant using the pseudonym, "Dale Angerer" posted to the Elliot Fletcher tribute page an image of Elliot Fletcher's face with the words "WOOT IM DEAD" superimposed on the image.

On or about 15 February 2010, the defendant posted a morphed image of Elliot Fletcher's head in the hopper of a wood-chipper. There is a graphic simulation of blood exiting the wood-chipper. The profile picture of "Dale Angerer" is depicted next to the wood-chipper and a caption bubble reads, "Hi, Dale Angerer here I fully endorse this product. This woodchipper can mince up any dead corpse or your money back guarantee."

Count 1: (Distribute Child Exploitation Material) & Count 3: (Use a carriage service to menace, harass or cause offence)
On 23 February 2010, the defendant using the pseudonym, "Dale Angerer" posted to the Trinity Bates tribute page a manipulated image of a male giving a press conference with a superimposed speech bubble "NO NEW LEADS BUT THE PERP CAN'T BE FAR AWAY". Superimposed behind the male giving the press conference is the profile image for "Dale Angerer".

Between 23 and 27 February 2010, as numerous comments were posted by users expressing their sympathy about the death of Trinity Bates, the defendant posted a series of comments to the tribute page about Trinity Bates and other users:-

- "My definition of pleasure?, sticking my cock up an 8 year olds ass and listening to her ribs crack, skeeeeet."
- (In reply to a sympathy post by a user Danielle) "Danielle has the face of a child raping murderer."
- "I think she is going to be out for the rest of the season"

- "I'm getting tired, I've just been watching some porn my friend sent me of his next door neighbour who by the looks of it has 2 sex children and have blown a huge load all over my screen and I have to be up early in the morning to adjourn over some court cases."
- "I tried hiding the body under the Hunter st drains where I finished raping her but obviously the cops found it."
- "The ass rape in prison is first class"
- "Pedo strikes again"
- "She had the ass of an 8 year old girl" (regarding a post about Trinity Bates)
- In reply to a post from another user asking for a person to rape a person expressing sympathy for Trinity Bates: "I hope she leaves a window open for me to crawl through."
- "I got mad, she wouldn't lick her own shit off my cock so I murdered her, Im sure you all would have done the same."

On or about 25 February 2010, the defendant using the pseudonym, "Dale Angerer" posted to the Trinity Bates tribute page an image of Trinity Bates' face with the words "WOOT IM DEAD" superimposed on the image.

On or about 26 February 2010, the defendant using the pseudonym, "Dale Angerer" posted to the Trinity Bates tribute page an image of Trinity Bates' face superimposed with four erect penises simulating ejaculation. The image is manipulated such that it appears the Trinity Bates is grasping two of the penises with her hands.

On or about 27 February 2010, the defendant using the pseudonym, "Dale Angerer", posted two images to the Trinity Bates tribute page. One image depicts an image of Trinity Bates superimposed upon a cartoon of a bear with its male genitals exposed. The caption below the image state "PEADOBEAR DID IT!". The second image depicts an image from a movie of the upper torso of a male. The image has been altered as the word "DALE" is superimposed on the male's shirt and a bubbled caption reads, "I DIDN'T DO IT!!".

Count 4: Possess Child Exploitation Material

A forensic examination of the defendant's seized computer equipment located a quantity of child exploitation material. A total of 96 images (27 unique) depict or describe children in sexual acts and 106 images (36 unique) depicted sadism of children.

The 96 images (27 unique) which depict or describe children in sexual acts are manipulated images of mostly deceased children with graphic material, that is images and/or text, superimposed on them. Images of deceased children include, Madeline McCann and James Bulger, with penises superimposed on their faces. The image of James Bulger has the text "HAD IT COMING" superimposed on it.

> Three unique images depict three different babies with a penis superimposed over its mouth. One unaltered image is of a female child, approximately 10-12 years of age in a g-string bikini in. a sexualised pose with her legs spread.
>
> Eight images depicted actors from movies with offensive or demeaning text captions about children superimposed. The text caption on a movie still of actor Robert De Niro stated *"You talking to me faggot? You talking to me! I fucked James Bulger up the Ass!"* Another image depicts a movie still of actor Kevin Spacey. The superimposed text caption reads, *"Been fucking Trinity Bates sad stinking corpose all day, give me the works burger."* The text caption on a movie still of actor John Goodman reads *"Son this is what happens when you FUCK TRINITY IN THE ASS."*
>
> The 106 images (36 unique) which depict sadism of children are manipulated images children with graphic material, that is images and/or text, superimposed on them. One morphed or manipulated image depicts the head of Adam Walsh, a child murdered in the United States, being hit by a baseball bat. Another morphed image depicts a baby being put through a wood-chipper with the text, "Hi, Dale Angerer here I fully endorse this product. This wood-chipper can mince up any dead corpse or your money back GUARANTEE." Another manipulated image depicts a male child approximately 5-10 years of age with their head in a dog's mouth and bared teeth.
>
> A forensic analysis also located a number of the unaltered images which formed the basis for the manipulated or 'morphed' image."

The sentencing remarks

[13] The primary judge referred to the fact that the applicant had breached conditions of his bail and, in consequence, had spent seven and a half months in pre-sentence custody. He remarked that the importance of general deterrence loomed large for conduct of the type in question. Reference was made to the applicant's history of autism and social ineptitude which, it had been argued, led to his misuse of the internet. His Honour concluded, however, that the circumstances and nature of the applicant's offending required that he serve more time in actual imprisonment than he had served in pre-sentence custody.

Counsel for the applicant's submissions

[14] The submissions of counsel for the applicant may be summarised as follows. The offence of using a carriage service in an offensive way provided for by s 474.17(1) of the *Criminal Code* 1995 (Cth), having a maximum penalty of three years imprisonment, although not a trivial offence, is not "one which the legislature regards with great severity". Within the same subdivision of the *Criminal Code* (Cth), are offences relating to the use of carriage services to make threats or hoax threats or to access child pornography for which the maximum penalty is 10 years imprisonment.

[15] The effect of the applicant's conduct was to augment the grief already being experienced by the family of Trinity Bates and Elliot Fletcher. There was limited material upon which the extent of the reaction to the applicant's conduct or the number of people who were actually exposed to it could be gauged.

[16] The offence was objectively less serious than an offence against s 474.17(1) which directs threats against another person or persons who regard the threat seriously and who alter their daily life in response. In terms of criminal sanction, it is a more serious offence to cause another person to be in fear than it is to cause another person distress. Cases such as *Agostino v Cleaves*,[1] which involve the creation of genuine fear, are objectively more serious offending. The schedule of summarised cases tendered by the prosecution in relation to prosecutions for offences under s 474.17(1) reveal that the offenders sentenced to terms of imprisonment were those whose conduct had caused genuine fear to those threatened.

[17] While the applicant's conduct was designed to offend others and reflects poorly on him, it is not conduct which would ordinarily be understood as exposing a person to criminal sanction and the possibility of jail. His conduct was not a deliberate and conscious contravention of the criminal law.

[18] Counts 1 and 4 concerning child exploitation materials are objectively less serious than offending which involves the possession of a proliferation of child exploitation material depicting the sexual abuse of children. The subject material, apart from one image referred to earlier, consisted of images of the deceased children's faces onto which sexual images had been superimposed. The images did not involve any actual sexual abuse of any of the children depicted. The offending here can, thus, be distinguished readily from the offending in *R v Carson*.[2]

[19] The sentencing judge gave insufficient weight to the offender's autistic condition. He was on a disability support pension as a result of a diagnosis made by a psychologist to which the applicant was referred to by Centrelink. The applicant's conduct demonstrated a lack of insight into the effect that his conduct would have on others, a lack of empathy and difficulty in personal interactions. These are traits commonly associated with autism.

[20] The applicant was not the only person who posted offensive material on the subject site. Consequently, the inappropriateness of his conduct would not have been highlighted to him in the same way as it would have been had he been the only offender.

[21] The applicant's pleas of guilty and co-operation with the administration of justice demonstrated remorse. That, and his young age, limited criminal history coupled with prospects of rehabilitation, should have been given more priority in the exercise of the sentencing discretion.

[22] An appropriate sentence for the Commonwealth counts would have been one which ordered the immediate release of the applicant coupled with two years probation so as to provide appropriate supervision. It was submitted that the appropriate orders on appeal were:

> Counts 1 and 4: imprisonment for 290 days (approximately 9 and a half months) with the period from 16 September 2010 to 3 June 2011 declared as time served, together with probation for 2 years.
>
> Counts 2 and 3: imprisonment for 290 days.

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1 [2010] ACTSC 19.

2 [2008] QCA 268; *R v Carlton* [2009] QCA 241; *R v Pham* [2009] QCA 242 and *R v Salsone; ex parte A-G (Qld)* [2008] QCA 220.

Counsel for the respondent's submissions

[23] Counsel for the respondent made the following submissions. The Internet and, specifically, a social networking platform like Facebook readily enables the anonymous dissemination of information to a vast audience. The investigation of offences is difficult and general deterrence is a major consideration.

[24] About 7,500 people joined the tribute page in respect of the young school boy and about 1,900 joined the page relating to the other child. A page does not have to be joined before it can be viewed and the pages were generally available to the public.

[25] This case involved a deliberate posting of egregiously offensive material to web pages that the applicant knew were being viewed by thousands of people with the specific intention of generating outrage. Commonly, cases of distributing child exploitation material involve like-minded individuals seeking to promote and satisfy their prurient interests. In this case, the applicant set out to offend those seeking a public space to seek solace and express sympathy in conjunction with like-minded people distressed at the deaths of the two children.

[26] The objective circumstances of the applicant's conduct were particularly bad. Although it may, perhaps, be possible to imagine worse examples of this offence, these offences fall into the "worst category" meriting the imposition of the maximum sentence.

[27] The extent to which the applicant can claim mitigation by reason of his autism is significantly limited by the absence of any expert evidence as to its nature and extent and how it may affect his culpability. However, the sentencing judge acknowledged the possibility that the origin of the applicant's offending lay in his autism and social ineptitude. The photographs on the applicant's computer, however, suggest a troubling fixation with dead children.

[28] The guilty pleas aside, there was no evidence of the regret and remorse referred to by the applicant's counsel in his submissions to the primary judge and, therefore, not much mitigating material to which the sentencing judge could give weight.

[29] The posting of the material to the tribute pages is a serious example of the offence of distributing child exploitation material as is the possession of the various "morphed" images of these two, and other, dead children. It would have been permissible for the sentencing judge to increase the sentence he might otherwise have imposed for counts 2 and 3 so as to reflect the totality of the applicant's criminality.[3] The prosecutor suggested that approach, but the sentencing judge's approach was appropriate because he was able to fix the period of actual custody at 12 months and, as there were none of the "collateral consequences" referred to in *R v NK*,[4] the additional criminality reflected in the state offences justified a head sentence of three years.

Consideration

The offences under s 474.17(1)

[30] Counsel for the applicant submitted that no comparable case had been decided at appellate level in respect of the s 474.17(1) offences and counsel for the respondent admitted that their industry had failed to reveal any comparable cases in Australia, the

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3 *R v Robinson* [2011] QCA 27 per McMurdo P at [24].

4 [2008] QCA 403 per Fraser JA at [74].

United Kingdom or Canada. There was debate about whether the subject offences fell within the worst category of cases falling within s 474.17(1). In *Veen v The Queen [No 2]*,[5] Mason CJ, Brennan, Dawson and Toohey JJ in a discussion of sentencing principles, after referring to the role of an offender's antecedent criminal history, in the sentencing process said:

> "[T]he maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed…That does not mean that a lesser penalty must be imposed if it be possible to envisage a worst case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category."

[31] In *R v Dwyer*,[6] Keane JA observed:

> "An approach which seeks to grade the criminality involved in such cases by a close comparison of aggravating and mitigating factors, as if there is only one correct sentence, is to be deprecated as involving the illusion of a degree of precision which is both unattainable, and, in truth, alien to the sentencing process."

[32] In the absence of comparable decisions, as counsel for the applicant conceded, the sentencing judge had little to guide him in determining an appropriate sentence. In a similar context, Street CJ observed in *R v Jackson & Hakim*:[7]

> "There is accordingly no perceivable sentencing pattern reflecting the accumulation of judicial wisdom deriving from multiple instances of sentencing decisions. Inevitably this imports a wide discretionary field open to a sentencing judge."

[33] It would tend to follow that the absence of guidance from comparable sentences as to an appropriate sentence in a particular case would make it more difficult for an appellate court to conclude that the sentence imposed fell outside the range of an exercise of a proper sentencing discretion. In *Markarian v The Queen*,[8] Gleeson CJ, Gummow, Hayne and Callinan JJ emphasised the extent of the discretion available to sentencing judges:

> "As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies." (citations omitted)

[34] I accept the submission by counsel for the applicant that the applicant's offending conduct was not within the worst category of cases for which the three year penalty was provided. No great imaginative powers are required to think of more serious offending. Counsel for the applicant instanced a course of threatening conduct which affected the victim psychologically, caused genuine fear and caused the victim to alter his or her daily life. The use of the Internet to harass and bully to the extent that the victim suffered lasting psychological harm or was driven to suicide may be thought to be a more serious category of offending. So too, would be the use of the

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5 (1988) 164 CLR 465 at 478.
6 [2008] QCA 117.
7 [1988] 33 A Crim R 413 at 434.
8 (2005) 228 CLR 357 at 371.

Internet to publish false and defamatory matter leading to the loss of the victim's good reputation and/or the collapse of a business.

[35] This is not to say that the subject conduct was not extremely serious. It was ghoulish and disgusting by any reasonable standards and its inevitable consequence was to cause emotional pain and distress to grieving relatives and friends of the deceased children. The sentencing judge described it as "depraved". I would not dissent from that description. The images on the Tribute to Trinity Bates were particularly offensive in that they depicted erect penises positioned across the faces of young children, in one case, a baby. The conduct also had the consequence, which could readily have been anticipated, of defacing and degrading an electronic shrine to the memories of persons held dear by the participants in the Facebook page.

[36] Another aspect of the offending conduct which the applicant's submissions overlooked is that it interfered with the legitimate use of the Internet by members of the public. Such conduct, if unchecked, could discourage the use of the Internet. For these reasons, as the sentencing judge recognised, general deterrence was an important factor in formulating an appropriate sentence. Relevant also to the need for a sentence serving the purposes of general deterrence, was the difficulty in detecting the perpetrators of such offending.

[37] Counsel for the applicant observed, correctly, that the schedule of cases provided by the respondent listing sentences for offences under s 474.17(1) revealed, at least as a general proposition, that custodial terms of imprisonment were imposed only on offenders whose conduct was threatening or which caused genuine fear. The list contained only one offence of misuse of the Internet, *Agostina v Cleaves*.[9] In that case, the 19 year old offender with a bipolar disorder became a "Facebook friend" of the victim who, after forming a relationship with a previous partner of the offender, started receiving threatening messages on his Facebook profile from the offender. The victim, out of fear for himself and his family, ended his relationship with the woman concerned, but nevertheless, the offending conduct, which contained threats of harm, continued.

[38] The judge who heard the appeal held that the term of six months imprisonment, whilst severe and at the upper end of an acceptable range, was not beyond it. The appeal was dismissed. In the judge's reasons, reference is made to a number of sentences imposed for the use of a carriage service to threaten, harass and/or offend. The longest sentence imposed in any of the four decisions discussed was imprisonment for 12 months. In that case, the offending conduct involved the making of 42 calls to each of two women. The calls were lengthy and caused considerable distress to the victims, one of whom suffered severe stress and deteriorating health. The appellant had a severe personality disorder and was undergoing therapy.

[39] In order to give effect to the necessity for general deterrence and, in this case, also personal deterrence and public denunciation, a custodial sentence was appropriate. However, despite the breadth of the sentencing discretion discussed above, it is my view that the three year terms of imprisonment for each of counts 2 and 3 were manifestly excessive. The offending was not within "the worst category of cases for which [the penalty of three years imprisonment] is prescribed" and the sentences greatly exceeded those normally imposed for breaches of s 474.17(1). The schedule

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9 [2010] ACTSC 19.

provided by the respondent shows that it is not uncommon for an offender in less serious cases to be placed on a good behaviour bond. Only one term of imprisonment exceeded six months.

[40] I know turn to a consideration of counts 1 and 4.

The offences under the Criminal Code Qld

[41] Referring to ss 228C and 228D of the *Criminal Code* (Qld), Philippides J, Fraser JA and Daubney J agreeing, said in *R v Carson:*[10]

> "The evil addressed by such provisions is the feeding of the market for the sexual exploitation, corruption and moral degradation of children: *R v Reid; ex parte Attorney-General of Queensland* [2000] QCA 218, at 8; *R v Plunkett* [2006] QCA 182 at 3. Indeed, the policy objectives for the new provisions were identified as being "to respond to the growing incidence of child pornography" by inserting specific offences in the *Criminal Code* with appropriate penalties in respect of "child exploitation material" (see *Criminal Code (Child Pornography and Abuse) Amendment Bill* 2004 Explanatory Notes). The provisions significantly increased the penalties that applied under the legislation it replaced and which had been criticised as being inadequate: *R v Finch; ex parte A-G (Qld*) [2006] QCA 60 at [15]; *R v Plunkett* [2006] QCA 182 at 1."

[42] Her Honour proceeded to discuss authorities which made the point that offences involving the possession and dissemination of child pornography were not victimless crimes, but "ones which necessarily create a market for corruption and exploitation of children." Her Honour referred to observations of Williams JA in *R v Cook; ex parte A-G (Qld); R v Cook; ex parte Commonwealth DPP* in which Williams JA stated:[11]

> "…possession of child pornography for personal gratification is none the less a serious offence because without people wanting to possess it, there would be no market for the product. The production and distribution of pornographic material depends upon there being a market for it, that is persons wishing to possess the product for their own gratification."

[43] Her Honour noted that this Court had recognised "that the sentencing purposes of deterrence and denunciation have particular significance in offences involving child pornography."

[44] I do not consider that the posting of the material displaying penises over the faces of the dead or missing children was a serious example of the offence of distributing child exploitation material, as counsel for the respondent suggested. Nor did the applicant's possession of such images constitute a serious example of such criminal conduct. The making and use of the images displayed singular insensitivity, the callous disregard of the feelings of others, probably a sadistic desire to inflict emotional pain and also revealed a worrying state of mind. However, the conduct, while an affront to community standards, did not involve the sexual exploitation, corruption and moral degradation of children. It is a combination of those factors and the way in which offending conduct encourages, aids or participates in such matters

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10 [2008] QCA 268 at [27].

11 [2004] QCA 469 at [26].

which defines the seriousness of conduct which falls within s 228C and s 228D. In my respectful opinion, these sentences are also manifestly excessive. They appear to have been based on the premises that the offending was more serious than it actually was.

Conclusion

[45] In my view, appropriate terms of imprisonment for counts 2 and 3 would have been two years with release after eight months. The early release would recognise the pleas of guilty and other factors of mitigation relied on by the applicant. Relevant in this regard are the applicant's age, his limited criminal history and his autism. Although in relation to the autism, I acknowledge the force of the submission that it should be given little weight in the absence of evidence as to the bearing of the condition on the applicant's offending. Two year terms of imprisonment are warranted if the sentences are imposed as head sentences which reflect the overall criminality of the offending conduct in the four offences.

[46] **WHITE JA**: On 3 June 2011 I joined with Muir JA in the orders, directions and declaration which he has set out at [3] – [6] with reasons to be published subsequently. I agree with Muir JA's reasons.

[47] The conduct of the applicant in posting the material was deeply offensive and disgusting and would be to all right-thinking members of the community. Unlike Daubney J, I do not regard the fact that there was open access elevates the applicant's conduct above the conduct which has limited circulation when that latter conduct has had a proven detrimental effect on the recipient.

[48] I agree with Muir JA's observations that the mere fact that a worse case may be postulated does not preclude the imposition of the maximum penalty but this present conduct, appalling as it was, falls far short. Moreover, the penalty imposed below gave no acknowledgment to the important principle in sentencing of comparative consistency between cases with similar features even if, as here, the comparative cases were objectively worse criminal conduct.

[49] **DAUBNEY J**: The facts of this case are set out at length in the judgment of Muir JA, and it is not necessary for me to repeat them. For my part, however, I would refuse the application for leave to appeal against sentence. My reasons for dissenting from the view of the majority can be stated rather briefly.

[50] Section 474.17(1) of the *Criminal Code* (Cth) provides:

> "(1) A person is guilty of an offence if:
>
> (a) the person uses a carriage service; and
>
> (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.
>
> Penalty: Imprisonment for 3 years."

[51] This section imports an objective test of offensiveness. There are, however, no fixed degrees of offensiveness. At best, some qualitative description may be used to describe material as "somewhat offensive" or "mildly offensive", at one end of the scale, to "extremely offensive" at the other.

[52] The learned sentencing judge's assessment of the objective degree of offensiveness of the conduct in this case was as follows:

> "However that may be, one can only judge your conduct as being depraved. It was plainly conduct which was intended to offend those who were genuinely grieved by tragic events in their lives. No right-thinking member of the community could fail to be outraged by that sort of conduct."

This assessment was not challenged. It is, frankly, difficult to see how it could have been. The learned sentencing judge thereby clearly assessed the applicant's conduct at the high end of the range of offensiveness.

[53] The only ground on which the applicant sought to challenge the sentence was that it was manifestly excessive. In that regard, counsel for the applicant submitted:

> "[21] It is respectfully submitted that the learned Sentencing Judge failed to give proper weight to the objective circumstances of the applicant's conduct, and failed to give proper weight to the matters in mitigation, particularly the personal background of the applicant, and arrived at a sentence which was, in all the circumstances, manifestly excessive."

[54] It was submitted that, whilst the applicant's conduct was undoubtedly offensive, it was objectively less serious than an offence against s 474.17(1) which directs threats against another person or persons who regard the threat seriously and who alter their daily life in response. Reference was made to cases, including *Agostino v Cleaves*,[12] in which lesser periods of imprisonment had been imposed under s 474.17(1) for conduct which was seriously personally threatening to the recipient. There is, however, an important distinguishing feature between those other cases and the present. In the other cases, the carriage service was used to convey the menacing, harassing or offensive material directly to the recipient – by phone call, text message, email, or (as occurred in *Agostino*) messages posted on the recipient's personal profile site on Facebook, (such messages are not generally able to be seen by the public at large.) What the applicant in the present case did was not merely post the extremely offensive material to be received by an individual, or small group of people. It was posted on the tribute pages which had been set up to honour the memory of the two deceased children. These tribute pages are designed to be viewed by the public at large. In the circumstances of this case, the nature of the offending was quite different to that considered in the other cases. It did not involve private threats. Rather, it involved the vile desecration of the memories of the two deceased children in a manner which was not private to their families (although that would have been bad enough) but to the public at large. The fact that the offensive material was broadcast publicly, rather than to private recipients, does not mean that it was not seriously offensive, for the purposes of s 474.17(1); it is offending conduct of quite a different character from private communications. The fact that this seriously offensive material was publicly broadcast in this way is clearly one of the circumstances to which regard must be had in determining the objective response of a reasonable person.

[55] Similarly, the applicant's attempt to compare the seriousness of this conduct with the seriousness with which the distribution of child exploitation material ought be treated in the sentencing process founders on the fact that the *Criminal Code* (Cth) contains

[12] [2010] ACTSC 19.

provisions which expressly deal with the distribution of child pornography material by means of a carriage service – s 474.19 and s 474.20 created offences for that type of conduct for which the maximum penalty is 15 years imprisonment.

[56] There is nothing to suggest that the learned sentencing judge did not appreciate the nature of the conduct caught by s 474.17(1) or did not appreciate the need to apply an objective test in assessing the degree of offensiveness of the applicant's conduct.

[57] Next it was said that the learned sentencing judge gave too little weight to the applicant's personal circumstances, and in particular the fact that the applicant displayed autistic traits. In fact, the learned sentencing judge expressly acknowledged these factors in his sentencing remarks, saying:

> "It seems that the origin of your offending may lie somewhere in your history of autism and in your own social ineptitude which led you to misusing the internet in the way you did."

[58] It is also quite clear that the learned sentencing judge took this, and the other mitigating factors, into account by ordering the release of the applicant on probation after having served one-third of the three year head sentence.

[59] In short:

(a) the learned sentencing judge, having made an objective assessment of the seriousness of the offensiveness of the conduct in question, determined that a head sentence of the maximum term of imprisonment for an offence of this (not of some other) nature was appropriate;

(b) the learned sentencing judge exercised the sentencing discretion to take account of the mitigating factors by ordering the release of the applicant after serving one-third of the head sentence.

[60] In *Skinner v The King*,[13] Barton ACJ, with whom Gavan Duffy, Powers and Rich JJ agreed, said:

> "It follows that a Court of Criminal Appeal is not prone to interfere with the Judge's exercise of his discretion in apportioning the sentence, and will not interfere unless it is seen that the sentence is manifestly excessive or manifestly inadequate. If the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the Judge has acted on a wrong principle, or has clearly overlooked or undervalued, or overestimated or misunderstood, some salient feature of the evidence, the Court of Criminal Appeal will review the sentence; but, short of such reasons, I think it will not."

[61] For the reasons I have given, I do not consider that it has been demonstrated that the sentence below was obviously excessive. I do not consider that it has been demonstrated that the learned sentencing judge acted on a wrong principle. Nor do I consider that it has been demonstrated that, in the exercise of the sentencing discretion, he clearly overlooked, undervalued, overestimated or misunderstood any of the salient features in the case before him. It might be said that either or both of the head sentence or the requirement for time in custody were more severe than would be imposed by another judge. But that is not the test for present purposes.

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[13] (1913) 16 CLR 336 at 340; see also *Lacey v Attorney-General of Queensland* (2011) 275 ALR 646, per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [11].

The test is whether it has been demonstrated that the sentence was manifestly excessive.

[62] Accordingly, I would refuse the application for leave to appeal against sentence.