SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lovi* [2012] QCA 24
PARTIES:	**R** **v** **LOVI, Adam Robert** (applicant)
FILE NO/S:	CA No 286 of 2011 DC No 906 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2012
JUDGES:	Chief Justice, Muir JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Leave to appeal against sentence granted.** **2. Appeal allowed.** **3. The sentences imposed at first instance with respect to counts 1-14 and 16 are set aside.** **4. The applicant is resentenced as follows:** **a) With respect to count 15 the applicant be imprisoned for a period of 12 months and that he be released forthwith upon his giving security by recognizance to be of good behaviour for a period of two years;** **b) With respect to counts 1-4 the applicant be imprisoned for a period of one month and that he be released forthwith upon his giving security by recognizance to be of good behaviour for a period of two years;** **c) With respect to counts 5-14 the applicant be imprisoned for a period of six months and that he be released forthwith upon his giving security by recognizance to be of good behaviour for a period of two years;**

d) With respect to count 16 the applicant be released under the supervision of an authorised corrective services officer for a period of two years and comply with the requirements set out in s 93(1) of the *Penalties and Sentences Act* 1992 and report within 24 hours to an Authorised Corrective Services Officer at a designated location.

5. All terms of imprisonment are to be served concurrently.

6. It is directed that the applicant's legal advisors give him the explanations required by s 95 of the *Penalties and Sentences Act* 1992 and s 16F of the *Crimes Act*.

CATCHWORDS: CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – LACK OF JURISDICTION – SENTENCING AFRESH – where the applicant was sentenced in the District Court for 15 counts of using a carriage service to access child pornography (counts 1-15) and one count of possessing child exploitation material (count 16) – where the applicant received a head sentence of 12 months and was required to serve two months in actual custody – where the District Court did not have jurisdiction to hear count 15 when the maximum penalty for possessing child exploitation had increased from 10 to 15 years – where the conviction for count 15 was quashed and sentence set aside – where the applicant re-arraigned before this Court and entered a plea of guilty – where the applicant was 16, 17 and 18 at the time of the offending – where the applicant was 19 at the time of sentencing – whether the Court should have regard to the fact the applicant was a minor when count 1 was committed – whether a conviction should be recorded

Child Protection (Offender Reporting) Act 2004 (Qld)
Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010 (Qld), s 48, s 55
Crimes Act 1914 (Cth), s 16A, s 16A(1), s 16A(2), s 16F, s 17A, s 20(1)(a), s 20C(1)
Criminal Code Act 1995 (Cth), s 474.19(1), s 474.24C
Criminal Code 1899 (Qld), s 228D
District Court of Queensland Act 1967 (Qld), s 61, s 146
Judiciary Act 1903 (Cth), s 68
Penalties and Sentences Act 1992 (Qld), s 9(2)(a), s 9(6A), s 9(6B), s 93(1), s 95
Youth Justice Act 1992 (Qld), s 140, s 144, s 144(2), s 175(1)(g)

Lahey v Sanderson [1959] Tas SR 17, considered
R v Gordon; ex parte Cth DPP [2011] 1 Qd R 429; [2009] QCA 209, distinguished
R v GAM [2011] QCA 288, considered
R v Jones [2011] QCA 147, distinguished

R v Loveridge [2011] QCA 32, considered
R v Mills [1998] 4 VR 235, considered
R v Smith [2010] QCA 220, distinguished
R v Sykes [2009] QCA 267, distinguished
R v Verburgt [2009] QCA 33, distinguished

COUNSEL: J A Allen with L Reece for the applicant
A W Moynihan SC for the respondent
S Keim SC (with leave) for the Commonwealth Director of Public Prosecutions

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

[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**: The applicant was convicted on his pleas of guilty on 15 counts (counts 1-15) of using a carriage service to access child pornography (s 474.19(1) of the *Criminal Code Act* 1995 (Cth)) and one count (count 16) of possessing child exploitation material (s 228D of the *Criminal Code* 1899 (Qld)).

[3] The following table sets out the dates of the offences, the maximum penalties and the sentences imposed:

Counts	Date of Offence	Max Penalty	Sentence
1 – 4	27/03/2009 29/04/2009 25/05/2009 19/06/2009	10 years	On each count, 1 month imprisonment, concurrent with other sentences imposed
5 – 14	02/08/2009 10/09/2009 17/12/2009 25/02/2010 26/02/2010 02/03/2010 19/03/2010 20/03/2010 21/03/2010 03/04/2010	10 years	On each count, 8 months imprisonment, concurrent with other sentences imposed, to be released on a $400 recognisance for 2 years after serving 2 months
15	20/05/2010	15 years	12 months imprisonment, concurrent with other sentences imposed, to be released on a $400 recognisance for 2 years after serving 2 months
16	Between 9/04/2009 and 25/05/2010	5 years	8 months imprisonment to be suspended after 2 months with an operational period of two years

[4] On 14 February 2011, the applicant was granted an extension of time within which to appeal against his conviction with respect to count 15. This Court ordered that conviction be quashed and the sentence set aside as, at the time the applicant entered

his guilty plea, the District Court did not have jurisdiction to hear that matter. The applicant was re-arraigned on count 15 before this Court and entered a plea of guilty.

[5] The applicant now seeks leave to appeal against the sentences imposed on the remaining counts.

Facts

[6] On 25 May 2010, detectives from Task Force Argos executed a search warrant at the applicant's home and seized a laptop computer on which a number of files were located. A schedule of facts, which was not in dispute on sentencing, stated in respect of these files:

Facts
The images depict mainly young females aged around 7 years old to pre-teens, sexually posed or engaged in sexual acts with adult males. There are also images of adult females involved in sexual acts with young females. In one image an adult female is depicted performing oral sex on a young male who appears to be 3-5 years of age. His face cannot be seen as with a number of the images, thus making age determination quite difficult. The images towards the worst end of the scale in category 4 depict young females, aged 5-7 years being penetrated by adult males. A further image depicts a young female aged 7-9 years posed on all fours, held by other older females and penetrated from behind by another older female who appears to be wearing a sex toy. There is a clear expression of pain on the child's face. The category 5 image depicts a young female child 7-10 years of age who is naked. Her legs are spread apart and tied down using yellow rope.

[7] There were also a number of movies found on the laptop depicting young females between the ages of seven to about 12 engaged in various sexual acts with adults.

[8] The applicant was 19 at the time of sentencing. He was 16 at the time count 1 was committed, 17 at the time of the offending involved in counts 2-14, 18 when committing the count 15 offence and 17 and 18 during the period with which count 16 is concerned. He had no prior criminal convictions, but had been ordered to serve 80 hours of community service in relation to a driving offence. His performance of his obligations in that regard was unsatisfactory.

[9] The applicant had a good work history and a history of unpaid community work. At the time of his arrest he was in the process of applying to join the Armed Forces.

[10] Counsel for the respondent state of Queensland and counsel for the Crown in right of the Commonwealth ("the Commonwealth") conceded that the plea of guilty and sentence on count 15 had to be set aside as, at the time of sentencing, the District Court lacked jurisdiction to hear the matter, the maximum penalty for the offence being 15 years imprisonment. That maximum penalty had been increased from 10 to 15 years on 15 April 2010, whereas the jurisdiction of the District Court was not increased from 14 to 20 years until 1 September 2010.[1] Counsel for the respondent also submitted that the sentencing discretions were required to be exercised afresh in respect of all counts as the applicant had been sentenced on the basis that the sentence imposed in respect of count 15 was a head sentence reflecting the overall criminality of the offending conduct. The applicant and the Commonwealth accepted that this contention was correct and I agree. It follows that the applicant was sentenced on an erroneous basis and must be re-sentenced.

[11] Counsel for the respondent submitted as follows. The applicant possessed a significant quantity of child exploitation material of the most serious and vile kind. He downloaded some 540 images and the sentencing judge was correct to describe the applicant as having engaged in "a persistent and protracted course of conduct".[2] The appropriate sentencing range in respect of count 16 (the State offence) was a head sentence of 12–18 months imprisonment including a minimum period of two months in actual custody.[3]

[12] Matters in mitigation were the applicant's guilty plea, the applicant's age and his prospects of rehabilitation.[4] It was submitted that the applicant's youth was of limited weight due to the fact that he had previously been convicted of anti-social behaviour and failed to take advantage of an opportunity to demonstrate "that he could rehabilitate". Also, the principle in s 9(2)(a) of the *Penalties and Sentences Act* 1992 that a sentence of imprisonment should be imposed only as a last resort does not apply by virtue of s 9(6A) of that Act and a short term of actual imprisonment was within the permissible range.

[13] The sentences for the Commonwealth offences should be concurrent with the sentence imposed in respect of count 16. As was said in *R v Smith*:[5]

> "In practical terms, the cases where both Commonwealth and State offences are charged tend to result in much the same sentence being imposed for each."

[14] Counsel for the Commonwealth submitted that s 16A(1) of the *Crimes Act* 1914 (Cth) ("the *Crimes Act*") required the Court to impose a sentence of "a severity appropriate in all the circumstances of the offence". The Court needed to consider all matters known to the Court including the need for deterrent sentences in such cases and the matters in s 16A(2) of the *Crimes Act*. Attention was drawn to s 17A which provides that a sentence of imprisonment may be imposed only if no other sentencing options are appropriate.

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1 See s 48 and s 55 of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act* 2010 (Qld) and s 61 and s 146 of the *District Court of Queensland Act* 1967 (Qld).

2 It seems from the agreed facts that eight videos and fewer than 200 still images were downloaded.

3 *R v Sykes* [2009] QCA 267; *R v Smith* [2010] QCA 220; *R v Jones* [2011] QCA 147; and *R v Verburgt* [2009] QCA 33.

4 *R v Bainbridge, Cullen & Ludwicki* (1993) 74 A Crim R 265; *R v Taylor & Napatali* (1999) 106 A Crim R 578; *R v Dullroy & Yates; ex parte A-G (Qld)* [2005] QCA 219; *R v Lovell* [1999] 2 Qd R 79 at 83.

5 [2010] QCA 220 at [16].

[15] Counsel for the Commonwealth referred to s 20C(1) of the *Crimes Act* which provides:

> "A child or young person who, in a State or Territory, is **charged with or convicted of** an offence against a law of the Commonwealth **may** be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory." (emphasis added)

[16] It was submitted that s 20C(1) does not apply because the applicant was 18 when charged and convicted of the Commonwealth offences. The sentencing options available under the *Youth Justice Act* 1992 (Qld) ("YJA") were also not available to the applicant. Had the applicant been under 17 when charged with count 1, s 20C would have allowed the Court to apply the YJA including s 175(1)(g) which limits the period of detention a court may order.

[17] However, the sentencing judge was required by s 144(2) of the YJA to have regard to the fact that the applicant was a minor when the count 1 offence was committed. That requirement was not brought to her attention. But while the sentencing judge did not specifically consider the matters in s 144(2), she did have regard to the applicant's age at the time of offending.

[18] In response to a submission by the applicant based on Article 1 of the *United Nations Convention on the Rights of the Child*, it was submitted that at the time of committing the offences the subject of counts 2-14, the applicant was not a child as defined by Article 1 of the Convention, which provides:

> "For the purposes of the present Convention, a child means every human being below the age of eighteen years **unless, under the law applicable to the child, majority is attained earlier**." (emphasis added)

[19] The YJA provides that a child is "a person who has not turned 17 years". The applicant was 17 when he committed the offences the subject of counts 2-14.

[20] The submissions by counsel for the applicant were to the following effect. Section 140 of the YJA applied in relation to count 1 by operation of s 68 of the *Judiciary Act* 1903 (Cth). Consequently, s 144 of the YJA required the Court to have regard to the fact that the applicant was a child when the offence was committed and to have regard to the sentence which might have been imposed on the applicant if sentenced as a child.[6] The sentencing judge was not referred by either counsel to this consideration and did not advert to it in her sentencing remarks. The sentencing discretion thus miscarried with respect to count 1.

[21] The offences the subject of counts 2-14 were committed when the applicant was aged 17. Offenders of that age in other states and territories of Australia could, and most likely would, be sentenced pursuant to the applicable juvenile sentencing legislation.[7] The terms of s 20C of the *Crimes Act* evince a legislative intention that federal offenders be subject to applicable juvenile sentencing legislation. Section 474.24C of the *Criminal Code Act* 1995 (Cth), which applies to the Commonwealth offences, recognises the significance of an offender being aged less than 18 years.

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6 *R v PGW* [2002] QCA 462.

7 *R v Loveridge* [2011] QCA 32 per McMurdo P at [5]-[7].

Also, the sentencing judge, in exercising the judicial power of the Commonwealth, was required to strive for reasonable consistency in the sentencing of federal offenders necessary for systematic fairness.[8] Failure to have regard to these matters and also the ratification by Australia of the *United Nations Convention on the Rights of the Child*, Article 37(b), caused the sentencing discretion to miscarry.

[22] Article 37(b) provides:

> "The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

[23] The sentencing judge erred in finding that sentences of imprisonment were the only appropriate sentences. Short periods of imprisonment are regarded as generally undesirable.[9] A proper exercise of the sentencing discretion would have resulted in sentences for counts 1-15 that released the applicant on a recognizance pursuant to s 20(1)(a) of the *Crimes Act* and to a sentence of probation in respect of the count 16 offence.

Consideration

[24] The applicant's submissions based on uniformity of sentencing and on the prospect that the applicant may have been sentenced under juvenile offending legislation if sentenced in other states can be put to one side. No attempt was made to identify the manner and degree to which such considerations served to moderate or otherwise affect the appropriate sentences.

[25] Counsel for the respondent placed reliance on *R v Verburgt*.[10] In her reasons in that case, Holmes JA conducted the following review of sentences imposed or considered in this Court for offences under s 228D of the *Criminal Code* (Qld):

> "In *R v Daw* [2006] QCA 386, a sentence of nine months imprisonment to be served by way of an intensive correction order, imposed on a 23 year old who had downloaded 58 images and had pleaded guilty on an ex-officio indictment, was set aside, and a two year probation order with no conviction recorded was substituted.
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> In *R v Richardson; ex-parte A-G (Qld)* [2007] QCA 294, the Attorney-General's appeal against a sentence of 12 months imprisonment, wholly suspended for three years, imposed on a 24 year old respondent without prior convictions who had downloaded and subsequently discarded multiple files of child pornography, was dismissed.
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> In *R v Riley* [2007] QCA 391, a sentence of six months imprisonment, suspended after two months with an operational period of 12 months, imposed on a 28 year old without criminal history who had possession of 55 images and 21 videos containing child exploitation material, was set aside. In that case, the sentencing judge had erred by failing to refer to s 9(2)(a) of the *Penalties and Sentences Act*, which required the court to have regard to the

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8 *R v Tran* [2007] QCA 221; see also *Leeth v The Commonwealth* (1991) 174 CLR 455.

9 *R v Riley* [2007] QCA 391 at [11] citing *R v C* [1996] QCA 234 at *R v Hamilton* [2000] QCA 286.

10 [2009] QCA 33.

> principle that a sentence of imprisonment should be only imposed as a last resort, and at that time applied to s 228D offences. The applicant had served 15 days of imprisonment; the Court sentenced him to six months imprisonment suspended forthwith, with an operational period of 12 months.
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> In *R v Wharley* [2007] QCA 295, the learned judge had properly had regard to s 9(2)(a). He had imposed a sentence of six months imprisonment, suspended after two months with an operational period of two years, on an applicant 45 years old with no previous convictions. He was found in possession of 43 pornographic images of children held on disc. That sentence was upheld. Significantly, that applicant, unlike any other in the cases … mentioned, was convicted after a trial.
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> Finally, in *R v Salsone; ex parte A-G (Qld)* [2008] QCA 220, the Attorney-General appealed against sentences involving probation and community service without conviction imposed on a 21 year old offender who had pleaded guilty to one count of distributing and one count of possession child exploitation material. The material consisted of some thousands of images and a number of video files. The distribution charge was constituted by the applicant's having made the material available to others by placing it in a Limewire shared folder. In that case, the appeal was allowed and a sentence of 15 months imprisonment, suspended forthwith for two years, was substituted on the distribution charge, while two years probation was ordered on the possession charge. Convictions were recorded in respect of both counts."

[26] In *R v Verburgt*,[11] the 39 year old applicant with no previous convictions and a good work history who pleaded guilty to the offences on an ex-officio indictment was sentenced to 12 months imprisonment with release after three months on recognizance for the Commonwealth offence of using a carriage service to access child pornography material and to 12 months imprisonment with an order for release on parole after four months for an offence under s 228D of knowingly possessing child exploitation material. The Court, having found that the exercise of the sentencing discretion had miscarried, set aside the sentences imposed at first instance and substituted a sentence of six months imprisonment suspended immediately with an operational period of two years. The applicant had already spent over two months in custody.

[27] The President, with whose observations Chesterman JA agreed, said that had she been sentencing the applicant at first instance, she would have imposed a sentence of 12 months probation in respect of count 1 (the Commonwealth offence) to ensure that the applicant received counselling and treatment and a sentence of 18 months imprisonment in respect of count 2, fully suspended with an operational period of three years.

[28] Counsel for the respondents also referred, in particular, to *R v Sykes*,[12] *R v Smith*[13] and *R v Jones*.[14]

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11 [2009] QCA 33.
12 [2009] QCA 267.
13 [2010] QCA 220.
14 [2011] QCA 147.

[29] In *Sykes*, this Court refused a 28 year old applicant, with no prior criminal history and a good work history, leave to appeal against sentences imposed, after pleas of guilty, of 15 months imprisonment to be released after serving six months for a Commonwealth offence under s 474.19(1) of the *Criminal Code* (Cth) and 12 months imprisonment suspended after four months for an offence under s 228D of the *Criminal Code* (Qld).

[30] In her reasons, with which the other members of the Court agreed, Mullins J referred to *R v Gordon; ex parte Cth DPP*,[15] in which the respondent had been sentenced to 12 months imprisonment with immediate release on a recognizance for two accessing offences and to 12 months imprisonment wholly suspended with an operational period of three years for an offence of possession of child exploitation material. Mullins J observed that *Gordon*, in which the applicant Commonwealth DPP had been refused an extension of time within which to appeal, "confirms that a sentence of imprisonment which did not involve a period of actual custody was not precluded for offences of the type and seriousness for which the applicant was sentenced".

[31] The applicant in *Smith*, who was aged 23 and 24 during the offending period of approximately 18 months, had a prior criminal history of minor stealing offences and of assaults occasioning bodily harm. He was refused leave to appeal against a sentence of 18 months imprisonment with release after serving three months upon entering into a recognizance for three years for one count of using a carriage service to access child pornography contrary to s 474.19(1) of the *Criminal Code*. The applicant had actively searched for and viewed a great many relevant images on numerous websites during the offending period.

[32] The 47 year old applicant in *Jones* had no prior criminal history. He pleaded guilty to one Commonwealth offence of using a carriage service to access child pornography and to two counts of possessing child exploitation material. He was sentenced to 15 months imprisonment to be released on a recognizance after three months for the first offence and to concurrent 12 month terms of imprisonment suspended after two months for the other two offences. The applicant had downloaded 17 movie files and 44 still images in the course of a single day. The Court, having found that the exercise of the sentencing discretion had miscarried, confirmed the sentence of 15 months imprisonment, but ordered the applicant's immediate release on a recognizance. The sentences of 12 months imprisonment were suspended immediately.

[33] None of the decisions to which this Court was referred involved an offender as young as the applicant: 16 at the time he commenced offending and 17 at the time of the offending conduct involved in counts 2 to 14. None provides support for the imposition of a term of actual custody for an offender of the age and circumstances of this offender.

[34] There is nothing to be gained by focussing on count 1 once it is concluded that the exercise of the sentencing discretion miscarried and that the applicant must be re-sentenced. Nor for reasons which, I trust, will become apparent is it necessary to pronounce upon the relevance or applicability of any United Nations Convention or, in respect of count 16 only, the consequences of possibly conflicting approaches implicit in s 144 of the YJA and s 9(6A) of the *Penalties and Sentences Act*.

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15 [2009] QCA 209.

[35] In relation to the Commonwealth offences, as counsel for the Commonwealth pointed out, s 16A of the *Crimes Act* requires that in sentencing the applicant the Court must take into account the applicant's age, antecedents and prospects of rehabilitation. The applicant is a young man with no previous criminal history, a good work ethic and a history of voluntary community service. A number of referees testified to his honesty, enthusiasm and industry. There is every reason to suppose that, given the opportunity, he will continue to be a useful member of the community.

[36] I am unable to accept the submission by counsel for the respondent that the applicant's poor performance on the community service order militates against the imposition of a non-custodial sentence. When the applicant breached the terms of his community service order he was working six days a week. It seems that he was unrepresented when the order was made and that he failed to take appropriate action to have it revoked or varied. That does not excuse his conduct, but it does not necessitate the conclusion that the applicant is likely to breach the terms of any probation order or recognizance. It will be apparent to the applicant and his legal advisors that the likely consequence of such a breach would be the applicant's imprisonment. The Court was informed that the applicant had continued to perform his community service and that his obligations in that regard are nearing an end.

[37] The inapplicability of the directive in s 9(2)(a) of the *Penalties and Sentences Act* that a sentence of imprisonment should be imposed as a last resort does not require the conclusion that persons convicted of offences under s 228D must be sentenced to a period of actual imprisonment. As Holmes JA pointed out in *Verburgt*, s 9(6B) of the *Penalties and Sentences Act* prescribes deterrence and antecedents as both of primary importance. The sub-section also identifies prospects of rehabilitation and remorse as matters of primary importance.

[38] Imprisonment for short periods of young offenders, such as the applicant, who have not been previously imprisoned, is generally recognised as potentially harmful to their rehabilitation.[16] Batt JA accurately remarked in *R v Mills*[17] that rehabilitation benefits the community as well as the offender. As Burbury CJ observed in *Lahey v Sanderson*:[18]

> "The courts have recognised that imprisonment is likely to expose a youth to corrupting influences and to confirm him in criminal ways, thus defeating the very purpose of the punishment imposed. There has accordingly been a universal acceptance by the courts in England, Australia, and elsewhere of the view that in the case of a youthful offender his reformation is always an important consideration and, in the ordinary run of crime the dominant consideration in determining the appropriate punishment to be imposed. It has been said by Lord Goddard, the former Lord Chief Justice of England, that a judge or magistrate who sends a young man to prison for the first time takes upon himself a grave responsibility. With that I respectfully agree."

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16 See eg *R v McGaffin* [2010] SASCFC 22 at 23, 24.

17 [1998] 4 VR 235 at 241.

18 [1959] Tas SR 17; cited with approval in *R v Price* [1978] Qd R 68 at 70-71 and *R v Taylor & Napatali* (1999) 106 A Crim R 578 at 583.

[39] I accept that the offences under consideration are very serious and not "victimless crimes" and that general deterrence is one of the matters to which "primary" regard must be had. However, in the circumstances I have outlined, and having particular regard to the applicant's age of 16 and 17 throughout most of the offending period and his prospects of rehabilitation, I would sentence the applicant to 12 months imprisonment in respect of count 15, but order his immediate release on a recognizance and make a probation order for the state offence. The latter will provide appropriate supervision and assist in the applicant's rehabilitation.

[40] One final matter must be dealt with. Counsel for the applicant submitted that no conviction should be recorded in respect of any of the offences. He pointed to the age of the applicant, the onerous reporting requirements under the *Child Protection (Offender Reporting) Act* 2004 to which he would be subjected over a lengthy period and the potential impact of the recording of a conviction on his employment prospects. Counsel for the respondent and for the Commonwealth opposed such a course.

[41] Section 12 of the *Penalties and Sentences Act* gives a court a discretion as to whether a conviction should be recorded. In considering whether or not to record a conviction, the Court is required by s 12(2) to have regard to all the circumstances of the case including:

> (a) the nature of the offence; and
> (b) the offender's character and age; and
> (c) the impact that recording a conviction will have on the offender's –
> (i) economic or social wellbeing; or
> (ii) chances of finding employment.

[42] The applicant is presently employed as a chef. There is no evidence that the recording of a conviction would materially interfere with his pursuit of such a career or his working in the type of employment he has had in the past. There is also no evidence that the recording of a conviction would adversely affect the applicant's employment prospects with the Armed Forces, but I think it reasonably safe to assume that it would.

[43] The principal difficulties faced by the applicant in seeking to have no conviction recorded are the seriousness of the offences committed by him, the protracted duration of the offending conduct and the circumstance that its cessation was not voluntary. The conduct cannot be seen simply as an act, or even a few acts, of youthful folly. For these reasons, I do not regard it as appropriate that a conviction not be recorded in respect of count 16. For similar reasons, it is appropriate to record convictions in respect of the other counts. The relevant provision in respect of the Commonwealth offences is s 19B(1) of the *Crimes Act* which relevantly provides:

> "**19B Discharge of offenders without proceeding to conviction**
> (1) Where:
> (a) a person is charged before a court with a federal offence or federal offences; and
> (b) the court is satisfied, in respect of that charge or more than one of those charges, that the charge is proved, but is of the opinion, having regard to:

(i) the character, antecedents, age, health or mental condition of the person;
(ii) the extent (if any) to which the offence is of a trivial nature; or
(iii) the extent (if any) to which the offence was committed under extenuating circumstances;

that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation;

the court may, by order:

(c) dismiss the charge or charges in respect of which the court is so satisfied; or
(d) discharge the person, without proceeding to conviction in respect of any charge referred to in paragraph (c), upon his or her giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court, that he or she will comply with the following conditions:…"

[44] This is not a case in which it is appropriate that only "nominal punishment" be imposed or that the offender simply be released on probation. The matters discussed earlier outweigh the considerations favouring the non-recording of a conviction and necessitate the exercise of the discretion against that course.

[45] The applicant having been re-arraigned in respect of count 15 and having pleaded guilty, I would order in respect of count 15 that the applicant be imprisoned for a period of 12 months and that he be released forthwith upon his giving security by recognizance to be of good behaviour for a period of two years. In respect of the other counts, I would grant leave to appeal against sentence, order that the appeal be allowed, order that the sentences imposed below be set aside and that:

Count 16: The applicant be released under the supervision of an authorised corrective services officer for a period of two years and comply with the requirements set out in s 93(1) of the *Penalties and Sentences* Act 1992 and report within 24 hours to an authorised corrective services officer at a designated location.

Counts 1 to 4: The applicant be imprisoned for a period of one month and that he be released forthwith upon his giving security by recognizance to be of good behaviour for a period of two years.

Counts 5 to 14: The applicant be imprisoned for a period of six months and that he be released forthwith upon his giving security by recognizance to be of good behaviour for a period of two years.

[46] I would order that all sentences be served concurrently and direct that the applicant's legal advisors give to the applicant the explanations required by s 95 of the *Penalties and Sentences Act* 1992 and s 16F of the *Crimes Act*.

[47] **ATKINSON J:** I agree with the sentences proposed by Muir JA and with his Honour's reasons for imposing them. The anomaly demonstrated by this case is

that notwithstanding the fact that Australia signed the United Nations Convention on the Rights of the Child in 1990 and ratified it on 17 December 1990, only in Queensland, and in no other jurisdiction in Australia, are 17 year old offenders dealt with as if they were adults. There appears to be no justification in principle for a criminal justice regime which punishes a 17 year old in Coolangatta differently from a 17 year old in Tweed Heads for precisely the same offence against Commonwealth law. I endorse the remarks regarding this unsatisfactory situation made by McMurdo P in *R v Loveridge* [2011] QCA 32 at [5]-[7] and *R v GAM* [2011] QCA 288 at [50]-[51].