SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCY* [2015] QCA 200
PARTIES:	**R** **v** **BCY** (applicant)
FILE NO/S:	CA No 143 of 2015 DC No 117 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Unreported, 25 June 2015
DELIVERED ON:	Orders delivered ex tempore 30 September 2015 Reasons delivered 23 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2015
JUDGES:	Margaret McMurdo P and Morrison JA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Orders delivered ex tempore on 30 September 2015:** **1. The application for leave to appeal is granted and the appeal against sentence is allowed.** **2. The sentence imposed at first instance is varied by suspending the sentence forthwith.** **3. The sentence imposed at first instance is otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – where the applicant pleaded guilty to two counts of taking an indecent photograph of a child under 16 years; four counts of indecently dealing with the child; and one count of making child exploitation material – where, on each count, the applicant was sentenced to a term of one year's imprisonment, the terms to be served concurrently; suspended after four months, for an operational period of two years – where the sentencing judge referred to evidence of uncharged conduct described in a Schedule of Facts – where the nature of the applicant's interest in the complainant, and that the conduct was not an "isolated lapse", is apparent from the subject matter of the counts – where there was a real prospect that a victim

impact statement described impacts that were, in part, not a product of the charged offences – where the charged conduct played a not insignificant role in the impacts described in the victim impact statement – whether the sentencing judge erred in considering evidence of uncharged conduct – whether the victim impact statement should be taken into account on sentencing

Penalties and Sentences Act 1992 (Qld), s 9

R v B [2003] QCA 105, discussed
R v Cooksley [1982] Qd R 405; (1982) 6 A Crim R 128, cited
R v D [1996] 1 Qd R 363; [1995] QCA 329, followed
R v Illin [2014] QCA 285, cited
R v Jobson [1989] 2 Qd R 464, distinguished
R v MBM (2011) 210 A Crim R 317; [2011] QCA 100, discussed
R v Roberts [2009] QCA 22, discussed
R v Rogers [2009] QCA 10, discussed
R v SCI; Ex parte Attorney-General (Qld) [2015] QCA 39, discussed
R v W [2000] QCA 321, discussed
R v Waszkiewicz [2012] QCA 22, discussed

COUNSEL: The applicant appeared on his own behalf
S J Farnden for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** For the reasons given by Peter Lyons J I joined in the orders of this Court on 30 September 2015 granting the application for leave to appeal, allowing the appeal and suspending the applicant's sentences forthwith.

[2] **MORRISON JA:** I have read the reasons prepared by Peter Lyons J. They reflect my own reasons for joining in the orders made on 30 September 2015.

[3] **PETER LYONS J:** On 25 June 2015, the applicant pleaded guilty to two counts of taking an indecent photograph of a child under 16 years; four counts of indecently dealing with the child; and one count of making child exploitation material. On each count, the applicant was sentenced to a term of one year's imprisonment, the terms to be served concurrently, and suspended after four months, for an operational period of two years.

[4] The applicant has applied for leave to appeal against these sentences. The ground stated in his application was that the sentences were manifestly excessive. He has sought leave to add a ground to the effect that insufficient weight was given to his rehabilitation over the lengthy period of time between the offending and the date of sentence, though it became unnecessary to determine whether leave should be granted. The primary focus of the applicant's submissions was his period of incarceration. He is self-represented.

[5] At the conclusion of the hearing of the application, orders were made granting the application, allowing the appeal, and suspending the applicant's sentences forthwith. These are my reasons for joining in those orders.

The offending behaviour

[6] In 2002, the applicant, then 22 years of age, and his wife, were living with his wife's family. They occupied a granny flat. The complainant is the youngest member of that family, and was then 12 years of age.

[7] As is referred to later in these reasons, there had been earlier occasions when the applicant entered the complainant's bedroom or came to the place where she was sleeping. However, the first count relates to an incident late in 2002, when she was asleep in her room. She was woken up by a flash and thought it might have been a thunderstorm or lightning, but later realised that it was from a camera[1].

[8] One or two nights later, the complainant again woke up to a flash going off. She saw the defendant in her room, and realised the flash was from a camera, and that the applicant was taking photographs. This is the basis for count 2. The Schedule of Facts records that, usually when the complainant woke up from the flash, she would have to pull her shirt down to cover her body[2].

[9] On another occasion, the date of which is uncertain, but when the complainant was between 12 and 15 years of age, the applicant lifted the complainant's pants. He used his other hand to touch her in the area between the top of her knickers and the top of her vagina, gently stroking this area with his fingers (the applicant never touched the complainant under her underwear, or directly on her vagina). This gave rise to count 3.

[10] As the complainant got older, she started to wear a crop top or bra to bed, which, the Schedule of Facts records, the defendant would move up before touching her on the breasts. Count 4 concerns an occasion when the complainant was 13 years of age. She wore a crop top to bed. The defendant entered her room and touched her breasts.

[11] In the month when the complainant turned 14 years of age (January 2004), there was an occasion when she woke to find the applicant moving her shirt up and exposing her bare chest and stomach. The applicant touched her around the nipples and on her breast with his fingers, poking her nipples (count 5).

[12] On another occasion, when the complainant was approximately 15 years old, she had worn a bra to bed. She woke up, as the applicant was lifting up her bra to view her breasts. She rolled on to her belly to protect herself. The applicant undid the latch on the bra; and then redid it "really tight" (count 6).

[13] On occasions, the number of which is not stated, though the indictment alleges they occurred between 3 April 2005 and 19 January 2006, the applicant entered the complainant's bedroom at night. He would move the complainant's clothing to view the top of her vagina for about 30 seconds to a minute, and he would then take photographs. She would roll from her back, or her side, to her stomach to try and protect herself. Sometimes the applicant would wait beside her bed; sometimes he would duck down; sometimes he would hide in the room; and on occasion he would run out of the room. When he remained in the room, he would wait until he thought the complainant had gone back to sleep, and would start moving her clothes again and taking photographs. The complainant stated that the flash was used approximately 50 per cent of the time that the applicant moved her clothing. These events formed the basis for count 7.

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1 The offending is described in a Schedule of Facts found at Appeal Record Book (*R*) 36.

2 R 37.

Additional context to the offending in Schedule of Facts

[14] On the night of 19 October 2002, the complainant's parents were away from the home, because relatives were in hospital. The complainant stayed in the granny flat with the applicant and his wife. She slept on the couch. She woke up to feel her clothes moving. She felt her T-shirt being pulled away from her body in front of her chin, a distance of four or five centimetres. She opened her eyes, and saw a man's hand moving away from her body. She then saw the applicant dart back into his bedroom. A short time later, at school, the complainant was involved in a discussion about inappropriate behaviour, in the course of which she was told what it was to be molested. She told a friend that she thought that it had happened to her, and the friend reported the matter to a teacher. The matter was then referred to the Department of Child Safety, and to the police. The complainant participated in an interview on 28 October 2002. She also told her parents, who said to her that it could be a misunderstanding. She said that she was not sure if the defendant had touched her, because she had been asleep; and she later said, "I'm not sure because I didn't see anything", by reason of the fact that it was dark. The matter was treated as unsubstantiated, and no further action was taken[3].

[15] About a week after the interview, the applicant came into the complainant's bedroom at night, but the complainant could not recall exactly what happened. One night about two weeks to a month after the interview, the applicant started to move the complainant's clothes whilst she was in bed. These things preceded count 1[4].

[16] Mr A was married to another sister of the complainant, and worked with the applicant. In about 2006 or 2007, he was assisting the applicant to redevelop a website. He had access to the applicant's computer. He knew that the applicant had pornographic images on the computer, and he decided to look at them. He found a folder named "E" within which there were subfolders with numbers (perhaps representing either the complainant's age, or the year that the photographs were taken). There were hundreds, and probably thousands, of photographs of the complainant, from the time she was 12 to the time she was 16 years of age. They showed the complainant sleeping, sometimes in her pyjamas. Many of the photographs showed the complainant's pyjama top up, so that her bare breasts were exposed; or the pyjama bottoms were down, so that the complainant's bare bottom was exposed. There were also photographs of the defendant's hands touching the complainant, on the side, on her breasts, and on her nipples[5]. Mr A was shocked by these photographs. He told his wife (the complainant's sister). Two to three weeks later, he decided to get evidence, and burnt the computer files of the photographs to a disc. The applicant's family, including the applicant, the complainant's family, and Mr A, were all active members of their Church. Mr A reported the matter to one of the Bishops of the Church. There was a meeting which involved the complainant's parents, the applicant's parents, and the Bishop. Mr A left the disc with the Bishop, and it was later destroyed by the applicant's father[6].

[17] A little later, the applicant and his wife moved out of the home of her family, though they still attended family gatherings. The complainant was strongly encouraged not to report the matter to the police. On 28 March 2008, Mr A disclosed the matter to

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3 R 37.
4 R 37.
5 R 39.
6 R 40.

the Department of Child Safety. The Department took the view there was not sufficient information to take the matter further[7].

[18] The complainant married in 2010. She subsequently decided that she wished to make a complaint about the applicant's conduct. She participated in a pretext telephone call to the applicant on 1 November 2013. The applicant said he had been to counselling, and was told that he had a pornographic mind. He did what he did out of curiosity and opportunity. He denied deliberately touching the complainant, but accepted that he may have[8].

[19] Another pretext telephone call was made on 20 December 2013. In the course of it, the applicant said there were times he would not do anything for a week or a month; and other times he would do it a couple of or several times a week. He could only recall moving the complainant's clothing, but could not recall deliberately touching her; though if he did, it was the exception rather than the rule[9]. A subsequent search by police of the applicant's home located numerous storage devices, but none contained photographs of the complainant[10].

Additional matters relied on at sentence

[20] The applicant has no other criminal history.

[21] A report was tendered at sentence from Dr Jonathan Mann, a psychiatrist, with experience in the treatment of sex offenders[11]. In Dr Mann's opinion, the applicant has an obsessive-compulsive personality structure, and many of the signs and symptoms of an obsessive-compulsive personality disorder, although he did not meet the full diagnostic criteria for such a disorder. These personality traits appeared to have mellowed and become less distinct as the applicant has matured. Dr Mann did not diagnose paedophilia. He considered the applicant to represent "a very low risk of recidivism"[12].

[22] After the offending came to light, the applicant underwent psychological counselling on a monthly basis for about a year[13]. He also attended an addiction recovery programme run by his Church, directed to his compulsion to access pornography, over a period of about three years[14]. He was also "dis-fellowshipped" by his Church for a period of 12 months, which was said to mean in effect that he was ostracised[15].

[23] The applicant was a self-employed graphic designer. He and his wife have four children. A substantial number of supportive letters were tendered on his behalf at the sentence[16]. They spoke of the applicant's good character; his devotion to his family; and his substantial contributions to his Church community.

[24] The complainant, who was present at the sentence hearing, provided a victim impact statement[17]. She described how, as a result of the applicant's conduct, she became

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7 R 40.
8 R 40.
9 R 40.
10 R 40.
11 R 45.
12 R 51 and 52.
13 R 15, 19, and 68.
14 R 15 and 19.
15 R 15.
16 R 53-57, and 59-66.
17 R 42-44.

frightened, anxious and nervous; and developed low self-esteem. She felt guilt about the abuse she had experienced. She has nightmares about people not believing her, and no one standing up to protect her. On occasion, her husband has had to stay home from work because of her distraught state. Early in the marriage, there were difficulties with some forms of touching by her husband, and there are still times where she experiences flashbacks. She also feels anger towards her parents for not protecting her. Although she and the applicant's wife used to be very close, they have drifted apart. She has had some counselling.

Sentencing remarks

[25] The learned primary judge described the offending conduct. His Honour referred to the "hundreds, probably thousands" of photographs of the complainant between the ages of 12 and 16 years, setting out in some detail the descriptions of these photographs[18]. He noted the "devastating impact on the complainant" of the applicant's conduct[19], and referred to other matters raised in the victim impact statement. He later said that the applicant had "violated (the complainant) in her bed on many, many occasions"[20]. He took into account the timely plea of guilty. He referred to s 9(6) of the *Penalties and Sentences Act* 1992 (Qld) (*PS Act*), which required him, when sentencing an offender for an offence of a sexual nature committed in relation to a child under 16 years of age, to have regard primarily to a number of matters, and in particular to the effect of the offending on the child, the child's age, the nature of the offending, and the need to deter similar behaviour. He accepted the evidence of Dr Mann as to the very low risk of reoffending; and took into account the steps the applicant had taken with a view to self-rehabilitation, and the applicant's remorse. He also referred to the letters, but considered that one underplayed the effect of the offending on the complainant. The learned sentencing judge said there was a general rule in cases such as this that the offender must spend time in prison[21]. He considered the applicant's conduct involved a breach of trust. He stated that the delays between the offending and the prosecution of sentence were relevant, particularly by reason of the applicant's rehabilitation. He considered the sentences were "the lowest I consider I can taking into account the factors I've referred to including delay"[22].

Submissions on application

[26] The applicant contended that the sentence did not adequately allow for the delay of some 10 years from the time the offending ceased, to the sentence. Reference was made to relevant passages in *R v Illin*[23], where the significance of delay was discussed extensively. The applicant also relied on *R v B*[24]; *R v W*;[25] and *R v Roberts*[26] in relation to the sentences. He submitted that his sentence should be suspended immediately, primarily because of the delay, and his rehabilitation.

[27] For the respondent, reliance was placed on the fact that the learned sentencing judge had specifically taken into account the opinion of Dr Mann as to the risk of reoffending, as

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18 R 30.
19 R 30.
20 R 32.
21 R 31.
22 R 33.
23 [2014] QCA 285, at [18]-[20].
24 [2003] QCA 105.
25 [2000] QCA 321.
26 [2009] QCA 22.

well as the steps the applicant had taken with a view to self-rehabilitation. His Honour correctly concluded that delay should not play a dominant role in the sentencing. The learned sentencing judge had not erred by failing to give sufficient weight to these matters. The sentence was the result of a careful balancing exercise carried out in accordance with guiding principles in sentencing. It was not manifestly excessive. The respondent referred to *R v Waszkiewicz*[27]; *R v SCI; Ex parte Attorney-General (Qld)*[28]; *R v Rogers*[29]; and *R v MBM*[30] as supporting the sentences.

[28] At the hearing a question arose as to whether the learned sentencing Judge had erred by taking into account the photographs referred to by Mr A, taken in the period from 2002 to 3 April 2005.

Other sentences

[29] In *W*, the appellant had been convicted after trial of three counts of unlawfully dealing with a female child. He was sentenced at first instance to 12 months' imprisonment. The appellant had no prior criminal history. He was 69 years of age; and apart from these offences was said to be of exemplary character and to have lived a long and highly useful working life. The complainant was his granddaughter. Count 1 occurred when the complainant was about five or six. The appellant rubbed his finger on the complainant's vagina "on top and also underneath". Count 2 occurred almost immediately after. The appellant, the complainant, and other family members were in a bed. The appellant rubbed the complainant in the area of her vagina, both inside and outside her pants. Count 3 was of a similar character. It was committed at some time prior to 31 December 1985, the complainant having turned eight years of age shortly before that date.

[30] There was a victim impact statement which ascribed quite serious consequences to the appellant's treatment of the complainant. However, because the statement did not discriminate between the offences of which the appellant was convicted and other conduct, alleged to be frequent, when similar things were done, no weight was given to it. The offending was accepted as being at "the lower end of the scale compared to other things the court sees". There had been no further offending over the long period since the offences were committed, and the offending was unlikely to occur again. The sentences were reduced to terms of six months, suspended after two months for an operational period of two years.

[31] The appellant in *B* had been convicted after a trial on two counts of unlawfully dealing with a child under the age of 12. The complainant was his step-daughter. He was sentenced to terms of imprisonment of 18 months. Count 1 occurred when the family was staying at the appellant's sister's house, and the appellant and the complainant slept in the same bed. The appellant touched the complainant on the vagina. The other count occurred somewhat later. The complainant was sleeping in her bedroom, but woke to find the appellant's hand under her underwear. The appellant was naked. He removed his hand. Then he said, "Let me lick your pussy for five minutes, I'll give you $10 tomorrow".

[32] This appellant was between 27 and 29 years of age when the offences were committed. His only previous convictions were for wilful destruction of property (in 1999) and

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27 [2012] QCA 22.
28 [2015] QCA 39.
29 [2009] QCA 10.
30 [2011] QCA 100.

assaults occasioning bodily harm (in 2001), for which offences he was fined. The complainant had become more apprehensive of contact with males. However, it was considered difficult to take this into account, since the appellant had been acquitted on other counts. The offending was described as being at the lower end of the scale, though, in the circumstances, the imposition of a term of imprisonment was justified. For the terms imposed by the sentencing judge, terms of 12 months were substituted on appeal.

[33] *Rogers* involved a count of making child exploitation material, and two counts of knowingly possessing such material. One of those counts attracted a sentence of three years' imprisonment, suspended after 10 months. The other possession count, and the count based on the making of such material, attracted sentences of 12 months' imprisonment, similarly suspended. The focus of the appeal was on the count attracting the term of three years' imprisonment. The extent and nature of the material make the sentence on that count of no relevance in the present case.

[34] The count of making child exploitation material resulted from the applicant having created still images of his 15 year old stepdaughter undressing. He had set up a web camera on top of his computer which was activated by movement. The girl kept clothes in a cupboard in the room where the computer was located. It was accepted that the films of her dressing and undressing were made inadvertently, no doubt by the automatic operation of the camera. However the applicant then deliberately created still images from the resulting footage. Even in the most explicit images, the complainant was wearing bicycle pants and a bra. The girl was unaware that she had been filmed. Given the absence of further detail, and the focus on one of the counts of possessing child exploitation material which was obviously far more serious, it is difficult to derive any assistance from this case for the present proceedings.

[35] The appellant in *Roberts* was convicted by a jury of two offences of indecent treatment of a child under 12 years of age. For each offence he was sentenced to a term of nine months' imprisonment, with eligibility for parole after four months. The offences were committed at about 4.30 am on 21 December 2007. The appellant and a friend had been drinking heavily, and using cannabis. At about 2 or 3 am, they returned to the friend's house, where the friend fell asleep in the lounge room. The friend's daughters, aged nine and eight years respectively, were asleep in their own room. The appellant attempted to remove the pyjama pants of one of these girls as she lay on her bed. She gave evidence that she said, "Get your hands off me" and ran to her stepmother. The appellant then pulled the pants of the other girl down to her thigh or knees. She woke up and said, "What are you doing?"; and he said "shh".

[36] The appellant was 25 years of age at the time of the offending. He had previous convictions for drug offences, wilful damage to property, and offences of dishonesty. At the time of the relevant offences, he was on probation for drug offences. The offending was accepted as being at the lower end of the scale. The applicant had been beaten by the father and stepmother of the complainants, shortly after the offending. It was said that this, together with other mitigating factors, might have justified not requiring the appellant to spend time in prison. Nevertheless the sentences were held not to be manifestly excessive.

[37] The applicant in *MBM* had pleaded guilty to one count of knowingly possessing child exploitation material, and one count of making child exploitation material. On each count he was sentenced to a term of two years' imprisonment, to be suspended after eight months, with an operational period of two and a half years.

[38] This applicant was 37 years of age at the time of sentence. There had been a full hand up committal, and an early indication of a plea of guilty.

[39] The count of making child exploitation material was constituted by the applicant's making five homemade movies of his 14 year old niece showering. She appeared to be unaware of the filming.

[40] Strong mitigating factors were identified as being the applicant's previously unblemished history; his excellent work history; his strong family support; his good prospects of rehabilitation; and his pleas of guilty. While the sentence for possessing such material was reduced, the sentence for the making of child exploitation material was held not to be manifestly excessive. Reference was specifically made to the fact that the applicant was a mature man; that he engaged in the conduct on five occasions; and that, while he was not in a position of trust, he had betrayed the protection which the child was entitled to expect in the home of her extended family.

[41] Though relied upon for the respondent in these proceedings, *Waszkiewicz* was accepted by the prosecutor at first instance to be an example of far worse conduct, at least in relation to two counts of indecent treatment of a child[31]. That applicant had pleaded guilty on the morning of trial to four counts of making child exploitation material, one count of possessing child exploitation material, and two counts of indecent treatment of a child under the age of 16 years. The applicant was aged between 38 and 41 at the time of the offending. He suffered from a debilitating condition and was confined to a wheel chair. The complainant was a boy aged between 11 and 13 at the time of the offending, and was the son of a family friend of the applicant, the applicant and the boy's mother having had a short relationship at some time in the past. The complainant's mother had forbidden the complainant to see the applicant, but he used to spend nights at the applicant's place, often with the applicant in his bed. The applicant used to give the complainant money or gifts in return for the complainant taking photographs of his own penis and providing those photographs to the applicant; or allowing the applicant to take a photograph of the boy naked. The counts of indecent treatment involved the applicant's putting the complainant's penis into his mouth (and taking a photograph of the act); and the applicant performing oral sex on the complainant until the complainant ejaculated. There was a history of the complainant staying at the applicant's house almost every weekend, during which the applicant supplied him with alcohol which made him very drunk. The applicant also gave the complainant money, cigarettes, clothing, Play Station consoles, games and mobile phone credit, in order to get the photographs. The applicant had sent to the complainant hundreds of text messages containing express declarations of sexual love for the complainant. The applicant had asked adult boarders at his house to lie to the police if questioned about the complainant's visits. He had also offered money to the complainant if he would withdraw his statement to the police. Of particular significance was the applicant's continuing association with the complainant after the applicant was released on bail, contrary to the bail conditions. The five counts relating to child exploitation material arose out of the taking of photographs previously mentioned (the applicant providing the complainant with money or gifts); and the continued possession of those photographs. The two counts of indecent treatment related to the acts previously described. For the offences relating to the child exploitation material, the applicant was sentenced in each case to a term of 12 months' imprisonment wholly suspended. On the two counts of indecent treatment, he was sentenced to two years' imprisonment, with a parole eligibility date fixed effectively after serving 10 months, allowing for pre-sentence custody. The application focused on whether a parole eligibility

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31 See R 13.

date should have been fixed, or the sentence suspended. It was held that there was no error in the sentences.

[42] *SCI* was an Attorney-General's appeal. The respondent, having pleaded guilty, was placed on a two year probation order in respect of a count of making child exploitation material, and was sentenced to two years' imprisonment, suspended in its entirety for a period of three years, on a count of distributing child exploitation material. The respondent was, at the relevant times, 37 or 38 years old. She was the mother of the complainant, a 12 year old girl. On five different occasions, she took photographs of the girl. Six or eight of the photographs showed the girl's vaginal area, one with the child holding her labia open. The respondent told the complainant that the latter photographs were needed to show a doctor. Occasionally, the respondent tried to entice the complainant to co-operate, by promising her money or books.

[43] The respondent, although living with her husband, the complainant and a younger son, was having a sexual affair with another man. The photographs were sent to this man on three occasions.

[44] There were complexities to the respondent's background. Between the ages of eight and 10 years, she had been sexually abused by her brother. She married at the age of 21, but the marriage had become unhappy and involved some violence. The respondent had become a director of a child care centre. In April 2009 she was dealt with in the Magistrates Court for an offence of obtaining financial advantage and was released on a two year good behaviour bond, with an order that she make reparation of some $4,000. The offences the subject of the appeal were committed during the period of this bond. She was then in financial difficulty, and subsequently commenced to steal from the childcare centre. As a result, in April 2013, she was sentenced to a term of imprisonment of three and a half years, suspended after 12 months, with an operational period of five years. The last of the offences involving her daughter had been committed in 2011; and a complaint was made shortly afterwards; but the respondent was not charged until late 2013. By the time of the sentence she had completed the time she was required to spend in custody for the stealing charge.

[45] In the period leading up to these offences, the respondent had been using tranquilisers heavily. The offending was said to have occurred during a period of emotional and psychological turmoil, associated with her unhappy marriage, and loneliness and depression, probably related to her family background of childhood sexual abuse, and the development of psychological symptoms after her daughter's birth. She had undertaken substantial steps towards her rehabilitation.

[46] The sentencing judge decided not to require the respondent to spend further time in custody, by reason of the steps taken towards rehabilitation, and the fact that the respondent had recently served 12 months in custody.

[47] The appellant accepted the relevance of the totality principle, but submitted that the sentences failed to result in further punishment for the respondent, a result which would have been unlikely had she been sentenced for these offences at the same time as the stealing. That submission was accepted. It resulted in an increase of the operational period specified for the offences. Holmes JA (as her Honour then was), with whose reasons the other members of the Court agreed, said,[32]

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[32] *SCI* at [21].

> "While in the ordinary course, an offence involving such a serious breach of trust would attract a custodial term, it was open to the sentencing judge in the exercise of the sentencing discretion in these particular circumstances to tailor a sentence which kept the respondent in the community while ensuring supervision of her and facilitating her continuing treatment."

[48] It is plain that her Honour was significantly influenced both by the respondent's relatively recent imprisonment, and her efforts at rehabilitation; and the fact that the success thus far achieved was likely to be defeated by further incarceration[33].

Discussion

[49] Count 7 is restricted to a period of some nine and a half months. It is apparent from the summary of the evidence of Mr A that the photographs were taken over a much lengthier period. The evidence from Mr A would suggest the period was four years[34]; but if the conduct ceased at the end of the period specified in count 7, then the photographs were taken over a period of about three years and three months. The learned sentencing judge referred to the totality of these photographs, and the total period over which the photographs were taken[35], immediately prior to his consideration of the effect of the applicant's offending on the complainant. It might also be noted that the Schedule of Facts records conduct of the applicant, prior to the commission of count 1; and the fact that no action was taken as a result of the complainant's complaint. There is a real prospect that some aspects of the impacts referred to in the victim impact statement, and particularly the lack of trust and the concern about not being believed, are in part the product of these matters.

[50] The approach taken by the Court to the utility of the victim impact statement in *W*, and the analogous approach in *B*[36], pose a real question about the use made by the learned sentencing judge of the victim impact statement.

[51] When these matters were raised by the Court, Ms Farnden of Counsel acknowledged that there had been an error in the sentencing process; and submitted that the Court should re-exercise the sentencing discretion. That had the consequence that it became unnecessary to consider the ground raised in the application; or the application for leave to add a further ground.

[52] However, Ms Farnden submitted that, like allegations of sexual misconduct on other occasions in a case where a person is charged with rape or some other form of sexual offending, the uncharged occasions on which the applicant took photographs of the complainant over the period from 2002 to 2005 were nevertheless relevant to the sentencing process, for the purpose of demonstrating that the offending did not occur on an isolated occasion.

[53] That submission may be supported by reference to the judgment of Thomas J in *R v Jobson*[37]. His Honour there said[38]

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33 *SCI* at [21].
34 R 39-40.
35 R 30.
36 *B* at [40].
37 [1989] 2 Qd R 464, at 466-467, citing Street J in *R v H*. See also the judgment of McPherson J in *R v Cooksley*; and in the same case per Andrews SPJ at 407 (with whom Kelly J agreed).
38 *Jobson* at 467.

> "It has never been suggested that a sentence should reflect the criminality of prior acts. That principle is not infringed if a sentencing judge hears evidence of prior acts, and then uses them when passing sentence to rebut the notion of 'isolated lapse', and to place the act charged in appropriate context of a sexual relationship".

[54] His Honour then went on to point out the limitations on the admission of such evidence:

> "This is far from saying that the court should always admit the whole history (of the sexual activity between a complainant and a defendant). Indeed … in the sentencing process it should be admitted and used *only to the extent necessary to allow the act to be understood in its true context*." (emphasis added)

[55] The question was also considered by Ryan J in *Jobson* (with whose reasons Connolly J agreed[39]). His Honour said[40],

> "It is wrong, in sentencing a person who has pleaded guilty to an indictment containing a single count, to act on the basis that he had committed other offences of which he has not been convicted. But it is proper for a judge in deciding upon the seriousness of the offence to which a prisoner has pleaded guilty to have regard to the circumstances in which the offence was committed in order to determine what is an appropriate sentence. It would be wrong, after thus ascertaining those circumstances, to impose a higher sentence than was warranted for the offence charged, since that would amount to the imposition of a greater sentence by reason of the commission of other offences than the one charged. But it would be permissible to have regard to them in deciding whether any leniency should be shown to the prisoner, for example because it was a 'wholly spur of the moment lapse' … or that it was 'some casual act in a moment of temptation'." (references omitted)

[56] In *R v De Simoni*[41] Gibbs CJ (with whose reasons Mason and Murphy JJ agreed[42]) said

> "However, the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted."

[57] In *R v D*[43] the principles identified in *De Simoni* were expressly adopted. The other passages from judgments of Courts in this State, set out above, were referred to with apparent approval.

[58] There is no reason to think that the photographs from the period the subject of count 7 were materially different to the other photographs seen by Mr A; or that his description (save as to the complainant's age) did not indicate the nature of the photographs taken in the period identified in the count. The nature of the applicant's interest in the

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39 *Jobson* at 465.
40 *Jobson* at 473.
41 (1981) 147 CLR 383, at p 389.
42 *De Simoni* at p 395.
43 [1996] 1 Qd R 363, at 403.

complainant is apparent from the subject matter of the count, including the description of the applicant's conduct in the Schedule of Facts[44], and Mr A's description of the photographs. If further confirmation of the nature of that interest were necessary, it is apparent from the other counts; and the applicant's admissions in the pretext calls[45]. Reference to the earlier photographs, not referred to in the counts, is unnecessary to demonstrate it.

[59] A case where conduct is alleged to have continued over a period of nine and a half months, involving the relatively regular taking of photographs which qualifies as making child exploitation material, could not rationally be said to be a case where the conduct might be regarded as an "isolated lapse", or the result of some momentary yielding to temptation. In any event, as I have said, additional context is provided by the applicant's pleas of guilty to counts 1 to 6. Such considerations do not justify the reception of the evidence of the uncharged conduct of the applicant in the present case, nor reliance on it for the purpose of the sentence.

[60] It follows that criminal conduct of the applicant constituted by the taking of an indecent photograph of the complainant, outside the period specified in count 7, could not be relied upon for the purpose of determining sentence, unless it was the subject of a specific charge, as was the case with counts 1 and 2. Indeed so much was implicit in the concession that the sentencing process had miscarried at first instance. Accordingly, in my view, the uncharged conduct of the applicant should be disregarded for the purpose of re-exercising the sentencing discretion.

[61] That conclusion gives rise to a difficulty as to the relevance of the victim impact statement. It is apparent that the statement refers to the conduct of the applicant, commencing on 20 October 2002[46]. Reference is made to abuse which "continued over the next 5 years"; and the fact that the applicant "continually made bad choices after bad choices"[47]. No attempt is made to distinguish between the consequences of the charged conduct, and the consequences of the uncharged conduct, referred to in the victim impact statement.

[62] Ms Farnden contended that full effect could be given to the victim impact statement, relying on *R v Evans*; *R v Pearce*[48] and *R v Major ex parte A-G (Qld)*[49]. The effect of what was decided in *Evans* may be identified in the judgment of McMurdo P where her Honour said[50] that "… sentencing courts may accept allegations of fact in victim impact statements which are admitted or not challenged … If the allegation is not admitted or is challenged, the judicial officer may act on it if satisfied on the balance of probabilities it is true …". The effect of the passage from the judgment of Fryberg J in *Major*[51] is not materially different.

[63] While these judgments demonstrate that matters which appear in a victim impact statement may have probative force, they do not demonstrate that everything which appears in a victim impact statement is relevant to the sentence.

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44 R 38-39.
45 R 40.
46 See R 42; and R 36.
47 R 42.
48 [2011] QCA 135 at [7], [15], [18] and [31].
49 [2011] QCA 210 at [102].
50 At [7].
51 At [102].

[64] Both in *W* and in *B*, the description of impact was not taken into account, where the impacts were the combined result of conduct resulting in convictions, and other conduct. However, neither case contains an authoritative statement of principle.

[65] Ms Farnden pointed out that in both cases, the defendant had been acquitted of charges relating to the other conduct; whereas that is not the case here. That submission is correct, so far as it goes. However, it does not seem to me to follow that the impact of the uncharged conduct in the present case can be taken into account in determining the sentence. That would have the effect of punishing the applicant "for an offence of which he has not been convicted"[52].

[66] The convictions in the present case relate to conduct extending back to late 2002; and a further five occasions extending up through to January 2006. In addition, count 7 covers a course of conduct over a period of about nine and a half months. This represents about a quarter, or perhaps a fifth, of the total period of the conduct of the applicant, referred to in the victim impact statement and the Schedule of Facts. The applicant's description of the frequency with which he would "do it" would suggest there may have been something in the order of 50 occasions in this period. Mr A's broad description of the number of photographs would suggest that, for the period the subject of count 7, the range may have been from 50 photographs to several hundred and perhaps a thousand.

[67] Acknowledging the imprecision of the evidence, it is nevertheless difficult to think that the conduct in respect of which the applicant has been convicted did not play a material, and indeed significant, role in relation to the impacts described by the complainant. It is clear that the complainant suffered throughout the whole period of the abuse, and did not in any way become habituated to or accepting of the applicant's conduct. Even if the only abuse which the complainant suffered was that with which the applicant has been charged, it is unlikely that her difficulties with her family would not have occurred. In the circumstances of this case, it seems to me that it would not be correct entirely to disregard the complainant's description of those impacts.

[68] Nevertheless, some matters should be noted. The impacts are the product, not only of the conduct the subject of the convictions, but of other conduct. The period over which photographs were taken, which were not the subject of any charge, is substantially greater than the period to which the convictions relate (even taking into account counts 1 and 2). The material is relatively uninformative about whether the applicant indecently dealt with the complainant (other than in connection with taking photographs) except on the occasions the subject of counts 3 to 6. While it would be speculation to attempt to determine the extent to which the complainant would have suffered impacts only from the charged conduct, it seems to me sufficient to conclude that that conduct played a not insignificant role in the impacts described by the complainant.

[69] In the present case, little attention has been paid to the age of the applicant at the time of the offending. Yet relative youth is a factor frequently taken into account to moderate sentences. Although the applicant was both married, and at least by the time of sentence, self-employed, at the time of the offending he was still a student[53]; and he and his wife had not then established an independent household. It seems to me that his relative youth remains a relevant consideration, particularly when considering other sentences.

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52 *De Simoni* at 389.

53 R 22.

[70] Although the complainant in *W* was substantially younger than the present complainant, there were only three counts. The case was treated as one where the Court considered it could not act on the evidence of the effect of the defendant's conduct on the victim. The defendant was convicted after trial, and was plainly a mature man. *B* also involved a younger child; though there were only two counts. Breach of trust was of greater significance. This defendant was also somewhat older than the applicant. The offending in *Roberts* involved two children, both somewhat younger than the present complainant. The other cases do not provide much assistance.

[71] In the present case, significant features are the age of the complainant; the fact that she was in her own home and usually in her own bedroom when the offences were committed; the period of time over which the offending occurred; the persistence and frequency of offending conduct the subject of count 7; and the contribution of the offending conduct to the impacts described by the complainant. Apart from the applicant's relative youth, particularly when the offending began, and his timely pleas of guilty, significant mitigating features are the absence of any criminal history; the strong evidence of substantial efforts to rehabilitate himself; the very low risk of recidivism; the absence of any subsequent offending conduct over a period of more than nine years; the punishment inflicted by his Church; his remorse; his contributions to his Church community; and the fact that in the years subsequent to his offending he has established a business likely to be adversely affected by a period of incarceration. The circumstances may well have justified sentences which did not require him to spend time in prison, notwithstanding s 9(5) of the PS Act. They certainly justify, in my view, the orders made at the hearing of this application.

Conclusion

[72] For these reasons I support the orders made at the hearing.