SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sparrow* [2015] QCA 271
PARTIES:	**R** **v** **SPARROW, Ben** (applicant)
FILE NO/S:	CA No 23 of 2015 DC No 1515 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Unreported, 9 February 2015
DELIVERED ON:	11 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2015
JUDGES:	Gotterson and Morrison JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to a number of counts including two counts of using a carriage service to procure a person under 16 years of age to engage in sexual activity; five counts of indecent treatment of a child under 16 years; two counts of sodomy of a person under 18 years; and one count of unlawful carnal knowledge of a child under 16 years – where the applicant was sentenced to eight years' imprisonment, with a non-parole period of four years and six months in respect of the two counts relating to using a carriage service to procure a person under 16 years of age to engage in sexual activity and three years in respect of the remaining eight counts, to be served concurrently – where the applicant was 35 years old and the complainant was 12 years old – where the applicant communicated with the complainant via text message, Facebook, and telephone over three months – where the applicant told the complainant in explicit language of his sexual interest in her – where the applicant met with the complainant in a motel and he performed various sexual acts on her and asked the complainant to perform sexual acts on him – where the applicant and the complainant continued to exchange numerous sexually explicit

texts – where the complainant's mother discovered the Facebook exchanges between the applicant and the complainant – where the police were involved and the applicant was arrested – whether the sentence was manifestly excessive

Criminal Code (Cth), s 474.26(1)
Probation and Parole Act 1983 (NSW)

Cooper v The Queen [2012] VSCA 32, considered
Director of Public Prosecutions v Chatterton [2014] VSCA 1, considered
Director of Public Prosecutions (Cth) v Hizhnikov (2008) 192 A Crim R 69; [2008] VSCA 269, considered
Griffiths v The Queen (1989) 167 CLR 372; [1989] HCA 39, considered
Minehan v The Queen (2010) 201 A Crim R 243; [2010] NSWCCA 140, considered
R v Asplund (2010) 216 A Crim R 48; [2010] NSWCCA 316, considered
R v Engeln [2014] QCA 313, considered
R v Fuller [2010] NSWCCA 192, considered
R v Gajjar (2008) 192 A Crim R 76; [2008] VSCA 268, considered
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, considered
R v Nahlous (2013) 228 A Crim R 503; [2013] NSWCCA 90, considered
R v Poynder (2007) 171 A Crim R 544; [2007] NSWCCA 157, considered
Rampley v The Queen [2010] NSWCCA 293, considered
Tector v The Queen (2008) 186 A Crim R 133; [2008] NSWCCA 151, considered

COUNSEL: T A Ryan for the applicant
J A Wooldridge for the respondent

SOLICITORS: Cherry Family Lawyers for the applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Morrison JA and with the reasons given by his Honour.

[2] **MORRISON JA:** In November/December 2012 Ben Sparrow, then a 35 year old living in New South Wales, commented on a Facebook message left by P, a twelve year old girl in Brisbane. He sent a friend request and they started to communicate on Facebook. He told P he was 23; she told him she was 12, nearly 13.

[3] Between 1 January and 23 February 2013 he communicated with P by phone (text and voice calls) and Facebook, and told her in explicit language of his sexual interest in her, and his desire to engage in sexual intercourse with her.

[4] At the end of January 2013 Sparrow arranged to fly to Brisbane, and meet P. He did so on 23 February 2013, at about midday at a motel. Over the next 21 hours Sparrow

performed various sexual acts on P, including anal and vaginal intercourse, and digital penetration, and asked P to perform sexual acts on him. She told police that she was a virgin before she met Sparrow.

[5] When he left to return to New South Wales they exchanged numerous sexually explicit texts, discussing what had occurred and proposing to meet again. Sparrow suggested that she find a friend so they could have a threesome, and told P that he had "just hit on" another female.

[6] On 27 November 2014 Sparrow pleaded guilty to ten charges which can be summarised as follows:

- Counts 1 and 10 – Using a carriage service to procure a person under 16 years of age to engage in sexual activity;
- Counts 2, 5, 6, 7 & 9 – Indecent treatment of a child under 16 years;
- Counts 3 and 8 – Sodomy of a person under 18 years; and
- Count 4 – Unlawful carnal knowledge of a child under 16 years.

[7] On 9 February 2015 he was sentenced to: eight years' imprisonment, with a non-parole period of four years and six months, in respect of counts 1 and 10; and three years' imprisonment in respect of counts 2-9; with all sentences to be served concurrently.

[8] Sparrow challenges the sentence as being manifestly excessive, and raises four grounds of suggested error on the part of the learned sentencing judge:

1. over valuing the electronic communications with the complainant in determining the total effective sentence and the non-parole period;
2. deciding to impose the effective overall sentence on counts 1 and 10;
3. treating *R v Asplund*[1] as determinative of the sentence to be imposed; and
4. failing to give reasons explaining why the parole release date was postponed until after the midpoint of the sentence.

Nature of the offending

[9] A synopsis of the events appears above in paragraphs [1] to [5]. Given that one ground advanced is that the communications were overvalued by the learned sentencing judge, a fuller account is necessary. The following comes from the agreed statement of facts.[2]

[10] Sparrow and P met when he responded to a Facebook conversation P had with another Facebook friend. He sent a friend request, which she accepted. They did not communicate until he sent a personal message in January 2013.

[11] His first contact with P was when he wrote "when do I get to kiss your beautiful body?" They then began contacting each other regularly. P told him she was 12 (nearly 13), and he told her that he was 23. They started sending Facebook and text messages, and making phone calls. Sparrow would make the calls as P did not have phone credit.

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1 [2010] NSWCCA 316. (***Asplund***)
2 AB 38-45.

[12] After speaking for a few weeks Sparrow began telling P that he wanted to have sex with her. They discussed sexual fantasies, with P giving examples: he wanted to "tie me up and fuck me in the arse", "he wanted to skull fuck me", and "he wanted to smash my box, smash my arse and gag me". P also spoke with Sparrow's friend, K, on Facebook and she encouraged P to have sex with him. Sparrow sent pictures of himself to P.

[13] The second time P spoke to Sparrow on the phone, he asked her to "finger myself over the phone, but I never did it". Sparrow called P regularly ("pretty much every day"). During those calls he would encourage P to insert her fingers or objects into her anus "to loosen it up for me … so I can get in there". He told P to use "three fingers because that's probably how big my dick is". He told P that doing so was her "homework".

[14] At the end of January Sparrow arranged to travel to Brisbane to meet P. He flew up on 22 February 2013, staying at a motel near to the house of P's mother.[3] He and P used Facebook to arrange the meeting, with Sparrow telling when he arrived and what room he was in, and that she should "hurry up n get here so I can eat ur pussy … I want that for dessert…".

[15] Just prior to meeting on 23 January, Sparrow called P and said "I'm going to tie you up … I'm going to make you cry … I'm going to smash your box … I'm going to make you come … I'm going to gag you". He also told P to finger herself before they met, and "I'm going to tie you up with these Velcro things that I use for the gym". P said "OK then" but she did not believe him.

[16] The phone texts, Facebook messages and phone calls to this point were the subject of count 1.

[17] P asked her mother if she could go to her friend's house - she did not tell her mother that the friend had moved. Her mother gave her a lift to a store where another of P's friends worked. She arrived at around 12.00 pm and went into the store and spoke with her friend. Sparrow walked in and bought some items while P was standing nearby. He left and returned to the motel, and P then left the store and walked to the motel.

[18] The complainant arrived at the motel and went into Sparrow's room. As soon as they were in the room, he undid P's pants and took them off. P told him to stop, and he did and began playing with his phone. They watched TV and he left and bought some food. During this time P was messaging Sparrow's friend, K, on Facebook. An hour later, P and Sparrow were lying on the double bed and he inserted two fingers into her vagina. This conduct was the subject of count 2.

[19] Sparrow asked P "do you want to try getting fucked in the arse" and P replied "yeah I guess". P was on her back on the bed and he tied her wrists and ankles together using black Velcro straps: "he tied my arms around my legs so I couldn't move". P was wearing her yellow shirt and bra. Sparrow took his pants off and was wearing a t-shirt. He used lubricant and inserted his penis into P's anus. He did not use a condom. After he inserted his penis, P "told him to stop because it really hurt". P said this repeatedly and he replied that he "was nearly finished". P began kicking him with her feet and told him "stop". He then withdrew his penis. This conduct was the subject of count 3.

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[3] P lived with her aunt.

[20] P was still tied and Sparrow said "I'm coming to try the front now", and P said "OK". He inserted his penis partially into P's vagina for about 20 seconds. P said it "felt like it was ripping apart … it wasn't all the way in but was like sort of a tiny bit". P said "stop, stop it really hurts". Sparrow stopped, said "whatever" and then slapped P with both hands and pulled her hair. This conduct was the subject of count 4.

[21] Shortly after Sparrow was lying on the bed and P was sitting on a chair. He asked her to come over to him and asked if she wanted to give him a blowjob. P said she really did not know how to, and he said he would teach her. P said "Okay". He then took his pants off and put his erect penis in P's mouth. He told P to suck his penis and not to use her teeth. He masturbated himself whilst P sucked his penis. After five minutes he ejaculated into P's mouth. This conduct was the subject of count 5.

[22] Afterwards Sparrow and P watched TV. He went to the shop and P went for a walk. P came back to the motel room at around midnight. At 2 am he asked P to give him another blowjob before he went to sleep. P said "Okay". He took his pants off and lay on his back on the bed. P was kneeling and he held her waist whilst she sucked his erect penis. P was also "wanking him at the same time" after being instructed by Sparrow. He did not ejaculate. This conduct was the subject of count 6.

[23] At 9 am the following day Sparrow woke P and went to the shop. After he came back P was lying on her stomach on the double bed. P was wearing a white shirt ("with a boob tube and a bra") and grey shorts. He took her shorts off and inserted one or two fingers, and a thumb, into P's vagina for two or three minutes. She was still wearing underwear at the time. This conduct was the subject of count 7.

[24] Sparrow then took P's underwear off and put his penis into her anus ("gave me anal"). He used lubricant before he inserted his penis, and did not use a condom. P was on her stomach and he was on top of her. She told him to stop because it hurt too much. He said his penis was not all the way in. P told him that it still hurt and he put his fingers, using both hands, into her mouth, and continued intercourse until he ejaculated in P's anus. This conduct was the subject of count 8.

[25] An hour later P asked Sparrow if they could do something fun. He asked P to give him "another blow job" and P said "okay". P lay on her stomach and he was on his side. P sucked his erect penis until he ejaculated into her mouth. P spat the semen onto a towel. This conduct was the subject of count 9.

[26] Sometime later P's mother made contact and told P she would be collected by her uncle. P walked round to the house of the friend with whom she was supposedly staying and her uncle picked her up.

[27] After leaving the motel P and Sparrow exchanged numerous Facebook messages about the sexual acts engaged in at the motel. Examples are:

- February 24; P: Yep haha my ass fucking hurts thanks:); Sparrow: Hahah whoops sorry.. admit it, u kinda liked it though.; P: I loved it!
- February 24; Sparrow: Haha what was so good about getting fucked in the ass the smorning? P: It didnt hurt as much as the first time and you were doing it faster. Sparrow: Oh ok so u like it when it's fast? P: Yep yep :) its hot. I cant sit up straight my ass hurts so much i have to sit on an angle;
- February 28; Sparrow: make you cry a little? P: Didn't you see a tear when you tied me up and fucked me in the ass? Sparrow: Nope .. did it hurt that much?

P: Yes only one tear tho. Sparrow: But I thought you liked it? P: I did the second time. Sparrow: Hahaha so u hated the first time? P: Yeap but feel in love with it the second time.

- March 4; Sparrow: I blow right down ur throat haha; P: noice last time you blowed in my mouth and I spat most of it out hehe; Sparrow: I know haha next time u have to swallow all of it haha.

[28] From 24 February to 15 March 2013 Sparrow continued messaging and contacting P via phone and Facebook. He sent sexually explicit messages and they discussed meeting again. Sparrow also sent numerous Facebook messages to P, encouraging her to find a friend that they could have a threesome with. Examples are:

5. February 24; P: Yep sure can haha no im not gonna turn into a slut:) haha when are you coming up next?? seedy face; Sparrow: Haha u want to do it again ? Um next month after my cousins wedding.. But I'll stay somewhere different next time. P: Haha okay coolio and yeah i do want to do it again;

6. February 28; P: Awwww come back to Queensland;); Sparrow: Haha yeah, u just want to rape me again; P: Haha yeah rape you hardcore; Sparrow: What did u like better.. Being tied or untied?; P: Untied r;

7. February 28; Sparrow: Tounge in ur asshole while u have a dick stuffed balls deep in ur mouth. P: Yep i want that to happen next time you come? Sparrow: Ok we will do that .. start working on ur little asshole so u get use to it quicker:) three fingers in there from now on..kgo!;

8. March 8; Sparrow: Well then ima get u on ur hands n knees tie ur hands behind ur back push ur face into the pillow so u can't scream n then just smash ur ass till I'm done .. even if u beg me to stop ill just tell u to shut up, smack ur ass n qo harder :p;

9. March 10; Sparrow: Oh ok .. so which friend are u guna get for a threesome? Just get ur asshole wet n stick it in n the fuck ur ass with it hard .. u like pain remember so fuck it hard.;

10. March 13; Sparrow: U both should suck my dick. P: Haha I will volenteer. Sparrow: I just hit on Chelsea hahaha.;

11. March 15; Sparrow: Just tell people it never actually happened then .. P: Okay. were not gonna do it again? ??? Sparrow: Not for a while .. wait till all this shit dies down. P: Okay so how long do you rekon?? Sparrow: I don't know .. when people stop talking about it I guess.

[29] The above conduct was the subject of count 10.

[30] The offending came to light when P's school principal heard that P had sex with a 23 year old on a weekend when she was supposed to be staying with a friend. That was passed to P's aunt and then to P's mother, who brought in the police.

Communications over valued?

[31] The contention was that too great an emphasis was placed on the communications between Sparrow and P, in that without regard to them a sentence of no more than three-four years was warranted for counts 2-9. Therefore, it was said, the conduct in the communications did not warrant that the total effective sentence at least doubled the sentence for counts 2-9.

[32] I am unable to accept that contention for a number of reasons.

[33] First, the communications were the means by which all the offending in counts 2-9 was able to be committed. Sparrow lived in New South Wales and P was in Brisbane. The communications were the very essence of setting up the other offences which took place when physical contact was made.

[34] Secondly, the very nature of the communications warranted the focus they received. Sparrow knew from the outset that P was only 12 or 13. The communications consisted of explicit sexual grooming of a vulnerable child, in a course of conduct designed only for the exploitation of that child for Sparrow's peculiar and depraved sexual gratification.

[35] Thirdly, the communications were initiated by Sparrow when he discovered a message from P on Facebook. Once contact was made the communications took several forms, Facebook messages, texts and phone calls. The calls could only have emphasised, if it need emphasising, that P was a child, as she could not call him because she had no phone credit. So it was Sparrow pursuing contact with P.

[36] Fourthly, Sparrow used the communications to perpetrate a falsehood. He was 35 at the time but lied about his age, no doubt in an effort to assist in maintaining the contact and persuading P to comply with his announced wishes.

[37] Fifthly, the communications were part of Sparrow's imposing control over P. Many conversations had elements of domination or forceful sex in them: tying her up, making her cry, gagging her, anal sex described as "smash my arse", and vaginal sex described as "smash my box".

[38] Sixthly, the communications continued over a protracted time, spanning the start of January to 15 March.

[39] Seventhly, the communications continued after the conduct in counts 2-9, with the evident purpose of continuing the grooming for further unlawful sexual activity. However, there were some other features about those particular communications that should be noted:

- Sparrow immediately rejoiced in the criminal conduct he had just committed;
- he immediately proposed more such conduct, but he was going to stay somewhere else;
- over the next three weeks he repeatedly proposed further unlawful sexual activity, including anal sex, rape, and tying P up;
- he also wanted P to find a friend so he could have a "threesome";
- he said he had "just hit on Chelsea"; it was not revealed who that was but it may have been another child; and
- he used the communications to persuade P to lie about what happened, "Just tell people it never actually happened then".

[40] Eighthly, the nature of the communications, and the age of P, demonstrate that Sparrow was not only a deviant and violent sexual predator, but had no insight whatever into the harm he was causing to P, and absolutely no remorse for what he did.

[41] In my view, it is incorrect to approach a review of the sentencing exercise in the way this contention does, by examining what sentence may have been imposed in the absence of the communications. They were an integral part of the overall offending, and contribute to the nature and seriousness of the total offending.

[42] Counsel for Sparrow at the sentencing hearing urged that he should receive a global sentence rather than cumulative sentences,[4] a position mirrored in the Crown's submissions also.[5] That was done with global sentences being imposed for counts 1 and 10, and lesser sentences for counts 2-9.[6]

[43] The learned sentencing judge must be taken to have included the communications when he said:[7]

> "You groomed and you exploited this young lady for your own sexual gratification and you did so in quite a depraved way.
>
> Determining a sentence for you requires that I should have regard, importantly, to matters of general deterrence. This sort of offending is to be strongly deprecated, and there must be a clear message to others who might be minded to behave in a similar way, that lengthy periods of imprisonment will ensue."

[44] I do not consider that this ground succeeds.

Imposing the effective sentence on counts 1 and 10

[45] The contention is that the learned sentencing judge erred by setting a non-parole period at greater than the mid-point of the sentence, rather than at one third to recognize the plea of guilty and remorse evidenced by Sparrow's willingness to undergo treatment programmes in prison. The submission proceeds: having adopted the approach in *R v Nagy*,[8] his Honour selected the Commonwealth offences in counts 1 and 10 as those to which the highest sentences would be affixed, with the "collateral consequence … that [Sparrow] was then required to serve a longer period in custody before being eligible for parole and was being doubly punished for offences that formed part of the same continuing course of conduct".[9]

[46] In *Nagy*, Williams JA stated the following in relation to sentencing where there are a number of distinct but unrelated offences:[10]

> "[39] In my view all the authorities to which reference has been made, with the exception of *Hammoud* and *Lemene*, can be reconciled. Where a judge is faced with the task of imposing sentences for a number of distinct, unrelated offences there are a number of options open. **One of those options is to fix a sentence for the most serious (or the last in point of time) offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality. But that approach should not be adopted where**

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4 AB 21.
5 Crown outline on sentencing, paragraphs 27-29, AB 51-52.
6 AB 24 line 26.
7 AB 24.
8 [2004] 1 Qd R 63. (***Nagy***)
9 Outline, paragraph 13.1.2.
10 *Nagy* at [39]. Emphasis added.

> **it would effectively mean that the offender was being doubly punished for the one act, or where there would be collateral consequences such as being required to serve a longer period in custody before being eligible for parole,** or where the imposition of such a sentence would give rise to an artificial claim of disparity between co-offenders. That list is not necessarily exhaustive. Such considerations may mean that the other option of utilising cumulative sentences should be adopted."

[47] The reference to "collateral consequences" in that passage is a reference to consequences of the kind referred to in *Griffiths v The Queen*,[11] discussed earlier in *Nagy*.[12] In *Griffiths* amendments to the *Probation and Parole Act* 1983 (NSW) came into force, affecting some of the offences in question in that case. The effect of the amendments was that for those offences a non-parole period of 75 per cent of the sentence had to be served unless exceptional circumstances were found. The sentencing judge in *Griffiths* had missed the amendments, and imposed a head sentence of 12 years with a four and a half year non-parole period. The Court of Criminal Appeal re-sentenced, imposing a head sentence of 15 years for the most serious offence and ordering that the lesser sentences for the other offences be served concurrently. The Court of Criminal Appeal held there were no special circumstances and fixed a non-parole period of 11 years and three months.

[48] In *Nagy* the Court said, referring to the outcome in *Griffiths*:

> "…there will from time to time be situations in which sentencing by adopting the totality approach will produce a result which cannot be supported. *Griffiths* is a good example of that."[13]

[49] Even though adopting the approach of imposing the higher sentence on certain offences would produce the sort of consequences seen in *Griffiths*, the High Court said that did not mean that a court could not do so in an appropriate case:[14]

> "The effective sentence which a court determines to be appropriate punishment for a series of offences can be framed, in most cases, either as sentences for the several offences to be served concurrently, or as cumulative sentences or as sentences which are in part cumulative and in part to be served concurrently. If, with full awareness that s. 20A applied only to those serious offences which were committed after 1 January 1988, the Court of Criminal Appeal chose to impose the head sentence of fifteen years for the armed robbery committed on 8 January 1988 and to impose lesser sentences for all the other offences to be served concurrently with the fifteen-year sentence, the sentences so imposed are not open to objection … The true thrust of the applicant's argument must be that, in a case where s. 20A applies to some serious offences in a series but not to others in the series, it is wrong to impose the full effective head sentence on the serious offence or offences to which s. 20A applies. We would agree that the differing application of s. 20A warrants consideration of the appropriateness of imposing the

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11 (1989) 167 CLR 372. (***Griffiths***)
12 *Nagy* at [30]-[34].
13 *Nagy* at [38].
14 *Griffiths* at 378, per Brennan and Dawson JJ; referred to in *Nagy* at [32].

> full effective sentence on the offence or offences to which s. 20A applies, but no error of principle appears merely from the Court's having chosen that course."

[50] Counsel for Sparrow at the sentencing hearing urged that he should receive a global sentence rather than cumulative sentences,[15] a position mirrored in the Crown's submissions.[16] By doing so the course adopted by the learned sentencing judge, that of imposing the higher sentence on the more serious counts,[17] was really invited by both sides. That being so, it cannot be said that the learned sentencing judge was in error to take that approach.

[51] It is apparent from the sentencing remarks that the learned sentencing judge treated the Commonwealth offences (counts 1 and 10) as being very serious. His Honour was right to do so, as the conduct in count 1 was the very means by which the opportunity to commit counts 2-9 was created. Count 10 was also very serious as it is obvious that it was part of an attempt to set up another opportunity to commit further offences, this time involving an additional child. So much is evident in his Honour's statement:[18]

> "You, of course, made subsequent contact with her after the offending in counts 2 to 9. Indeed, in count 10, you were attempting to procure further sexual activity. You groomed and you exploited this young lady for your own sexual gratification, and you did so in quite a depraved way."

[52] In oral argument counsel for Sparrow accepted that it was open to the learned sentencing judge to select counts 1 and 10 as the ones upon which to impose the higher sentence.[19] However, it was submitted that his Honour should not have done so because that "appears to have led him to error in thinking that he ought to have then or was constrained to then impose a non-parole period greater than the halfway point".[20] The contention was that his Honour applied the approach in *Asplund*, where the non-parole period was longer than the halfway point, and should not have done so.

[53] The contention cannot be accepted. As conceded, it was open, as a matter of sentencing discretion, to select counts 1 and 10 as the offences to which the higher penalty would be applied. However there was no compulsion to set the non-parole period at the one third point, or any particular point. Counsel for Sparrow made the point that there "is no requirement under the provisions of the Commonwealth sentencing law that a non-parole period had to be imposed beyond the mid-point of the total effective sentence".[21] Counsel also rightly accepted that under those provisions it was open to set the non-parole period at less than the halfway point.[22] Therefore the setting of that period was ultimately a matter of discretion.

[54] That being so, the question is whether the learned sentencing judge felt constrained to follow *Asplund* in setting the non-parole period at slightly more than halfway. There is no reason to reach that conclusion. It is true that in the course of the sentencing remarks his Honour said:[23]

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15 AB 21.
16 Crown outline on sentencing, paragraphs 27-29, AB 51-52.
17 AB 24 line 26.
18 AB 24.
19 Appeal transcript T 1-10 lines 14-36.
20 T 1-10 lines 22-24.
21 Outline paragraph 13.3.2.
22 T 1-10 lines 26-29.
23 AB 24.

> "I received particular assistance from the case of Asplund [2010] NSWCCA 316, to which reference has been made during the course of submissions. True it was that Asplund was convicted after a trial, but true also is it that Asplund had not made physical contact with the child involved, and the maximum penalty the court was there considering is less than the maximum penalty for counts 1 and 10 here."

[55] However, nothing in those remarks betrays that his Honour felt so constrained. It would be surprising if he did, given that the setting of the period is a matter of discretion, as was conceded in submissions on the sentence.[24]

[56] One must note, as well, that counsel for Sparrow accepted that a non-parole period set at the one third point was not really a realistic option, and submitted that three years was appropriate if the head sentence was seven years.[25]

[57] In the sentencing remarks the learned sentencing judge referred to the matters that justified setting the non-parole period at greater than the halfway point:[26]

> "You, of course, made subsequent contact with her after the offending in counts 2 to 9. **Indeed, in count 10, you were attempting to procure further sexual activity. You groomed and you exploited this young lady for your own sexual gratification, and you did so in quite a depraved way.**
>
> Determining a sentence for you requires that I should have regard, importantly, to matters of general deterrence. **This sort of offending is to be strongly deprecated, and there must be a clear message to others who might be minded to behave in a similar way, that lengthy periods of imprisonment will ensue**.
>
> … For the reasons I have indicated, **given the gravity of your offending, I consider that the only appropriate sentence here is one which involves a lengthy term of imprisonment**.
>
> **Weighing all of these matters**, in respect of counts 1 and 10, I sentence you to periods of eight years imprisonment. In respect of those sentences of imprisonment, I fix a single non-parole period of four years and six months."

[58] In my view, although his Honour did not say so expressly, it is apparent that it was the overall gravity of the conduct, involving sexual grooming of a child, depraved sexual exploitation of that child, and attempts to procure further unlawful sexual activity, which was the basis upon which the non-parole period was set.

[59] I do not consider that it has been demonstrated that there was error in the learned sentencing judge's approach to setting the non-parole period.

Treating *R v Asplund* as determinative?

[60] Sparrow contends that the learned sentencing judge was considerably influenced by *Asplund*, overlooked significant differences between his case and that in *Asplund*, and

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24 Counsel for Sparrow, AB 22.
25 AB 22 lines 17-26.
26 AB 24. Emphasis added.

was not referred to a number of comparable cases that show that a much lower sentence was warranted on a plea of guilty.[27]

[61] The learned sentencing judge referred to *Asplund* in the course of the sentencing remarks: see paragraph [54] above.

[62] It was said that the factors in *Asplund* that were overlooked were: (i) the offender there had demonstrated a complete lack of insight into the seriousness of his conduct; (ii) he sought to avoid responsibility by implicating others; and (iii) the level of his manipulation of the complainant warranted condign punishment.[28]

[63] Assuming those matters to be correct I am not persuaded they constitute anything that would have made a material difference or serve to distinguish *Asplund*.

[64] First, Sparrow revealed a complete lack of insight into the seriousness of his conduct. He knew from the start that P was only 12, yet he embarked on a campaign of grooming, culminating in his performing numerous depraved sexual acts on and with her, then encouraged her to participate on a further occasion, and with another child. His plea of guilty does not demonstrate much in the way of remorse, in my view, given that the police had his Facebook communications, in which he proposed to engage in unlawful sexual acts with a child, then admitted doing so and exulted in that fact, and proposed more of the same and with another child. Nor does his statement of willingness to undergo treatment programmes in prison carry much weight in my view. Some of them were compulsory in any event. The rest was too little and too late to signify anything of substance.

[65] Secondly, whilst he did not seek to implicate others in what had happened, Sparrow did try to persuade P to lie about what happened, while at the same time proposing to continue and expand the unlawful activity in the future.

[66] Thirdly, the texts, Facebook messages and phone calls all exhibit a considerable degree of manipulation and control of P, such as would warrant condign punishment.

[67] *Asplund* involved an offender who was convicted, after a trial, of two counts of using the internet and a phone over a period of two months, to groom a child to engage in sexual activity. The maximum penalty for each offence was 12 years. The girl was 13 but pretended to be 14. He was 61 but pretended to be 27. Asplund had no prior criminal convictions, and was a spontaneously generous man with a history of community service. Both sides appealed the sentence of three years and six months.

[68] After initial contact was made there were 44 phone calls over a 61 day period, and 640 text and media messages. One image sent was a picture of his erect penis, sent within six days of their first contact. He sent her some money, totalling about $2,500. He "bombarded her with SMSs and multimedia messages", and over the 61 days he engaged in "an unrelenting pursuit of her". At his request she sent an explicit picture of her vagina and of her breast. Asplund never actually met the girl.

[69] Asplund tried to put the blame for the conduct, at least in part, on his 15 year old son. The jury rejected that. The sentencing judge identified the indicia of objective criminality: the level of persistence in using the services for grooming; the nature of

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27 Outline paragraph 13.2.1.
28 Outline paragraph 13.2.1.

the indecent material; the extent to which the intent to future sexual activity is exposed and developed; the nature of the sexual activity intended; the age and power difference between offender and victim; the nature of any prior relationship between them; the offender's level of awareness and indecency and deliberateness in communicating.

[70] The Court reviewed a number of comparable cases, some involving a plea of guilty, however they are unhelpful in terms of Sparrow's case because: (i) none were cases where the offender actually met the victim; (ii) some were communications with an undercover operative so a meeting was never going to happen; and (iii) some were very short periods of communication (e.g. one day).

[71] The Court allowed the Crown's appeal and substituted a total sentence of seven years with a non-parole period of four years. In doing so the Court referred to the significant factors as:[29]

- there was a determined and continuous history of communications designed to procure the complainant and have her engage in sexual activity;
- the offences were made more serious by the respondent forwarding money to the complainant;
- he sent images of his penis and encouraged the complainant to send him images of her when she was naked;
- the offending involved a high level of criminality; the offending conduct over a significant period of time placed his offending in the more serious category of offences;
- his conduct was a bombardment of the victim, with indecent suggestions, and graphic sexual images, and soliciting from her the same, all the while remaining anonymous from the authorities and hidden from those who had the child's best interests at heart;
- the criminality in the conduct was the interference with the child's privacy, her right to a healthy psycho-sexual development, by requiring her to feed into and gratify his sexual titillation and fantasies, with a long-term view of having her submit to sexual activity with him;
- there was an abuse of power and the formulation of a destructive relationship;
- he showered her with money, bombarded her with communications and toyed with and manipulated her in the internet exchanges;
- the transference of intimate personal photographs was designed to break down conventional social barriers;
- the abuse of power in grooming her must have had some corrosive impact on her, so that she forwent the normal sexual mores accepted by society and became compliant with unhealthy demands and an interest in prurient suggestion; she was a victim in the sense that her psycho-sexual development and emotions attached to them were traumatised;
- he pleaded not guilty and had not given any indication that he accepted responsibility for his offending; indeed he sought to deflect the responsibility for the offences to his son.

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29 *Asplund* at [47]-[49] per McClellan CJ at CL, Latham and Price JJ concurring.

[72] The Court said in relation to offences of this kind:[30]

> "The offences of which the respondent was convicted have the potential to do great damage to young persons in the community. They are hard to detect and general deterrence is of particular significance when sentencing. The need to protect children and young persons from predators using electronic facilities has been recognised by the Parliament in providing for these offences and must be enforced by the courts with sentences of appropriate severity."

[73] In my view, the learned sentencing judge was right to place weight on *Asplund*.

[74] It is true that the offender in *Asplund* did not plead guilty but, as I have mentioned, Sparrow's plea does not signify much in the way of true remorse or insight into the seriousness of the offending or the damage to P. It is also true that it was a Crown appeal that succeeded, but the need for restraint on the part of this Court when dealing with Attorney-General appeals is not applicable in New South Wales. The Court in *Asplund* held that the original sentence was manifestly inadequate and re-sentenced.

[75] Further, with a few exceptions the list of important matters in paragraph [71] above apply to Sparrow's case. However, Sparrow's case is, in my view, decidedly worse than *Asplund* in that Sparrow actually achieved his aim of engaging in depraved and violent unlawful sexual activity with his child victim. Worse still, he was intent on furthering the activity and expanding it to include an additional child victim. Further, it must be borne in mind that Sparrow's head sentence took into account the overall criminality involved in his many counts of offending conduct.

[76] The description of the communications in *Asplund* revealed that they were milder than those of Sparrow, who expressed his desire, in explicit terms, for violent and degrading sexual activity. Further the victim in *Asplund* was older than P, by some two years.

[77] Asplund had no prior convictions and a history of community service, unlike Sparrow. Sparrow's criminal history consisted of a significant number of relatively minor but varied offences between 1998 and 2013, for none of which had he been sentenced to actual imprisonment. Only one was comparable with this offending, a charge of filming a person's private parts without consent in 2013, for which he was fined. Further, it must be borne in mind that the maximum penalty in *Asplund* was 12 years, whereas in Sparrow's case it was 15 years. This was a feature not missed by the learned sentencing judge.

Sentence manifestly excessive

[78] The nature and seriousness of the offending has been set out above, and the applicability of *Asplund* has also been examined above.

[79] Sparrow relied on several comparable cases for the contention that the appropriate sentence on counts 1 and 10 was "no greater than three years imprisonment".[31] They are *Director of Public Prosecutions (Cth) v Chatterton*,[32] *Cooper v The Queen*,[33] *R v Fuller*[34] and *R v Engeln*.[35] All were said to involve offences against s 474.26(1) of the *Criminal Code* (Cth), the same section as that applying to Sparrow.

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30 *Asplund* at [50].
31 Outline paragraph 13.2.4.
32 [2014] VSCA 1. (***Chatterton***)
33 [2012] VSCA 32. (***Cooper***)
34 [2010] NSWCCA 192. (***Fuller***)
35 [2014] QCA 313. (***Engeln***)

[80] *Chatterton* involved a plea of guilty by a 36 year old to communication over an eight month period with three boys who the offender believed to be 14-15 years old. He communicated with a view to engaging in masturbatory type activity, then he met two of the boys and engaged in sexual activity. Chatterton had a previous conviction for using a carriage service to groom a child aged under 16, using a carriage service to transmit child pornography and possession of child pornography. After he was arrested, he made full admissions to the police, including to activity with one boy who had refused to make a statement to police.

[81] When Chatterton met two of the boys he paid them for sexual conduct, including him sucking the boys' penises, the boys sucking his penis, and one of the boys penetrating his anus.

[82] He was originally sentenced, on each of the Commonwealth offences, to three months imprisonment and a three year Community Corrections Order. They and other sentences for the individual acts were to be served concurrently. The Crown appealed.

[83] Psychological evidence was tendered that showed Chatterton suffered from a form of paraphilia, had limited empathy and insight, and urgently needed to undergo treatment for his paraphilia. The evidence suggested that it was imperative, in the interests of protecting the community, that he be given such treatment, and that it be provided as soon as possible.

[84] The Court re-sentenced, but approached all sentences on the various State and Commonwealth charges separately. It imposed a total effective sentence of 15 months' imprisonment for the two Commonwealth offences. Then in respect of the State charges the sentences were cumulative in part and concurrent in other parts. A total effective sentence of four years' imprisonment was imposed in respect of the State charges, with a non-parole period of two years and six months. The individual sentences were adjusted down because Chatterton was required to serve the balance of a previous sentence, namely 11 months owing on a suspended sentence.

[85] The foregoing synopsis is sufficient to show that Chatterton is not of much assistance when reviewing the sentence imposed on Sparrow, particularly because of the different factual scenario which is well removed from that of Sparrow, and also because of the way in which the Court approached the task of resentencing.

[86] *Cooper* involved a plea of guilty by a 25 year old to use of the internet to persuade boys (aged 14 and 15) to masturbate so he could record them online. Other charges were of downloading and transmitting child pornography, and grooming. There was a total effective sentence of seven years' imprisonment, with a non-parole period of five years. Cooper appealed.

[87] Cooper had six previous convictions for grabbing or groping four different children in public places. He did not arrange to meet the victims of this charge, but engaged in the conduct with the aim of persuading the boys to masturbate, and they complied on four occasions.

[88] The comparable cases put up related to cases where the offender did not meet the victim or involve the committing of penetrative offences or indecent acts against a child. The Court held that the sentence imposed did not adequately reflect the age of the offender at the time the offences occurred, and the fact that the offending covered by these charges was at the lower end of the scale. It said: "The appellant's intention was to procure the boys to masturbate on-screen. There is no evidence that

he attempted to persuade them to meet him. He did not attempt to initiate the boys into other sexual activities. Nor did he offer to pay them for what they did. Repellent as these offences were, there is no evidence that the victims were harmed by them."[36]

[89] That is sufficient to demonstrate that *Cooper* is of no assistance in this case. It is well removed factually and in terms of the nature and seriousness of the offences.

[90] *Fuller* involved a plea of guilty to 13 online communications by a priest with a person supposed to be a 13 year old girl, but was in fact an undercover operative. He initiated sexually explicit topics and encouraged her to masturbate. He sent live videos of himself masturbating. Having proposed a meeting, Fuller went to the agreed location but, of course, did not meet the girl. The sentence was six months' imprisonment. The Crown appealed on the basis that the sentence was manifestly inadequate.

[91] Those circumstances immediately demonstrate why *Fuller* is of no assistance in Sparrow's case.

[92] *Engeln* involved a plea of guilty to six charges of using a carriage service and one of possessing child exploitation material. The offender was 35 with no prior convictions. He sought a reduction of the effective sentence of three years imprisonment with release after nine months, to a sentence of two years and nine months imprisonment with immediate release on parole.

[93] Over about a year Engeln had 52 communications with one girl (a police operative), which were calculated at establishing a relationship, trust and rapport and included multiple sexual references. The communications with the other girl (also a police operative) lasted about seven months. During one conversation he transmitted images recorded by a web camera of him masturbating his erect penis. He arranged a meeting and travelled to Sydney to meet the girl.

[94] None of the conversations were of the explicit nature of those of Sparrow. Engeln did not meet the girls. The focus of the application was on the question whether the sentence should have been one where it was immediately suspended.

[95] The circumstances in *Engeln* are so far removed from those here that it is of no assistance.

[96] At the commencement of the hearing in this Court counsel for Sparrow provided a schedule of cases which, it was said, demonstrated the "relevant sentencing pattern … for offences under section 474.26 of the Commonwealth Criminal Code".[37] The cases also showed, it was contended, that "in this area of the law of sentencing … matters of insight, acceptance of responsibility and prospects of rehabilitation loom particularly large".[38]

[97] In addition to those cases referred to above the schedule listed: *R v Poynder*,[39] *Tector v The Queen*,[40] *Director of Public Prosecutions (Cth) v Hizhnikov*,[41] *R v Gajjar*,[42] *Rampley v The Queen*,[43] *Minehan v The Queen*,[44] and *R v Nahlous*.[45]

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36 *Cooper* at [31].
37 T 1-2 line 36.
38 T 1-3 line 27.
39 (2007) NSWCCA 157. (***Poynder***)
40 [2008] NSWCCA 151. (***Tector***)
41 [2008] VSCA 269. (***Hizhnikov***)
42 [2008] VSCA 268. (***Gajjar***)
43 [2010] NSWCCA 293. (***Rampley***)
44 [2010] NSWCCA 140. (***Minehan***)
45 [2013] NSWCCA 90. (***Nahlous***)

[98] *Minehan* involved offences by a 38 year old former police officer, by using carriage services in an offensive manner and to groom, and possessing and disseminating child pornography. He had a mental illness, including depression and being Bipolar. The offending involved: (i) counts 1-3, under s 474.17(1): phone calls with schoolboys over a period of five days, in which masturbation was discussed; and some text messages to a 14 year old, on one day, describing a sexual attraction to adolescent boys; these counts received a nine month sentence; and (ii) count 9, under s 474.27(1): online communication with a boy (actually a police operative) proposing a meeting for sexual activity; this count received a three year sentence.

[99] In *Minehan* the closest offence to that in Sparrow's case was count 9, but it was a different offence for which the maximum penalty was (and still is) 12 years, unlike the 15 year maximum here. There was an error as to the maximum sentence for the possession of pornography offences. That meant that the CCA had to decide if some other sentence should have been passed on those offences.[46] Thus a large part of the Court's discussion concerned the pornography offences. As to the rest the Court concluded merely that the sentences were not manifestly excessive.

[100] The approach to the sentences in *Minehan* was different from that of the learned sentencing judge in this case, where the more serious offences were selected for the greatest sentence. That, and the different offences, makes *Minehan* of little utility.

[101] *Gajjar* involved an offence under s 474.26(1), as here. He was 28. The sentence was two and a half years, to serve eight months. The offending involved chatting on an internet chat room on two days with someone who claimed to be 14 (it was a police operative). Gajjar pretended to be a 20 year old female. He offered to buy her a train ticket so they could meet. He intended a sexual encounter. The sentence took into account the limited duration of the contact, the age difference, and the admissions immediately made upon discovery.

[102] The Court rejected the contention that the sentence was manifestly excessive, saying:[47]

> "[42] In our view, the sentencing judge did not fail to give these factors[48] appropriate weight. Using the internet to procure children for sexual purposes must be regarded as a most serious offence, carrying as it does a maximum penalty of 15 years imprisonment. We do not accept the submission that a first offender of the appellant's age, who committed an indecent act or sexually penetrated a child below the age of 16, would have received a lesser sentence than that imposed upon the appellant. We would expect, in the case of sexual penetration, a much longer sentence than the two years and six months imposed in this case."

[103] Given the limited duration and nature of the contact, *Gajjar* does not advance the contention that Sparrow's sentence was manifestly excessive.

[104] *Hizhnikov* was a Crown appeal in a case of an offence by a 25 year old, under s 474.26(1). He chatted in a chat room to someone he thought was a 14 year old girl (it was a police operative). The sentence was 22 months, with immediate release on a recognizance.

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46 *Minehan* at [70]-[72].

47 Gajjar at [42].

48 Mitigating factors including that there was no actual child victim, entrapment by the police, the plea, remorse and prior good character.

The chatting occurred on two days, and included explicit sexual references and emailing pornographic images. They arranged to meet, where he was arrested. He immediately sought psychiatric treatment. Medical evidence was tendered showing he had a major depressive illness, and was "very unlikely" to re-offend. Because it was a Crown appeal the Court did not increase the sentence, even though it said that if they had been sentencing "he would almost certainly have been required to serve a term of actual imprisonment".[49]

[105] The limited nature and duration of the contact compared to that here, and the fact that it was a Crown appeal, makes *Hizhnikov* of no real assistance on the issue here.

[106] *Nahlous* was a Crown appeal against a sentence of 18 months, wholly suspended, imposed for one offence under s 474.27 and five under s 474.27A. The offender was a 31 year old who used Facebook to communicate with a 14 year old girl, over a period of six days. There were 1,712 communications over that time. They each revealed their true age, and the conversation turned from social matters to sexual innuendo over time. He asked her to keep it secret. He did not attempt to set up a meeting, and they never met.

[107] Medical evidence revealed that he had chronic anxiety and depression stemming from the failure of his marriage, and adjustment issues. The sentence took into account the relatively short period of intense interchange, the escalation in sexual innuendo in the conversations, and the lack of any talk of pursuing sexual activity.

[108] The Court referred to *Asplund*, *Fuller* and *Rampley*. It held that Nahlous' conduct was atypical for such cases because: the victim knew who he was and where he lived when she invited him to be a Facebook friend; he referred to the need to wait because of her age; he did not refer to any sexual conduct of his own, nor send any images; he used his actual name and age; he rebuffed the victim's suggestions that they meet.[50] There was evidence of deep remorse and contrition. Ultimately the Court rejected the Crown's appeal.

[109] *Nahlous* is of no assistance on the issue as to the sentence here. None of the conversations were remotely like those of Sparrow and P, apart from sexual innuendo there was nothing explicit, the duration was far shorter, they never met and in fact he rebuffed any suggestion that they do meet.

[110] *Rampley* involved offences under s 474.27 and therefore a lower maximum penalty than that under s 474.26. The offender, 33 at the time, was sentenced to two years and nine months, to serve one year and six months. He communicated over the internet with a 12 year old girl (a police operative), over three and a half months. The conversations were sexually explicit, and included his instructing her how to masturbate and how to achieve an orgasm. On one occasion he sent a link to a video of people engaging in sexual intercourse and fellatio. He knew the girl was 12. He had formed no positive intention to meet her, and no meeting was arranged. The Court rejected the challenge to the sentence.

[111] Though the period of communications was longer than in Sparrow's case, the content of the communications was far milder, and lacked the aspects of domination and violence that permeated Sparrow's expressions. In my view, it is a very different case

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49 *Hizhnikov* at [28].

50 *Nahlous* at [80].

factually, and a lesser maximum penalty, which makes it of little utility in assessing whether Sparrow's sentence was manifestly excessive.

[112] *Poynder* was a Crown appeal against a sentence, imposed on a plea of guilty, of three years with a non-parole period of one year and three months. The offences were two counts under s 474.26, and two under s 474.17 (using the telephone service in an offensive way). The offender, aged 50, used a chat service to proposition a 15 year old boy, arranging to meet for sex, and taking the boy's phone number. The meeting did not occur as he had written the number wrongly. The offender then used the chat service to speak to a 15 year old girl (a police operative). He offered her money if she performed fellatio on him and more for sexual intercourse. He arranged to meet and was arrested.

[113] Poynder was a legal practitioner who was sentenced on the basis that the charges would result in his being struck off. He had a sexual addiction, seeking sexual stimulation in various ways, including fantasising about taboo sexual conduct (in which he did not, in fact, participate) and having paid sex with prostitutes. The Court accepted that his loss of the right to practise as a lawyer, and therefore loss of his livelihood, was a proper matter to take into account, calling it "severe extra-curial punishment".[51] As well, the risk of re-offending was low, and there was genuine contrition. The Court refused the Crown's appeal, emphasising that its decision to do so was the product of applying the principles governing Crown appeals.[52]

[114] The facts involved in *Poynder* are distinctly different from those here, and it was the dismissal of a Crown appeal. That is sufficient to demonstrate that it has no utility on the present question.

[115] *Tector* was a case where a 41 year old offender was convicted at trial of three offences under s 474.26, and sentenced to 11 years, with a non-parole period of seven years. The offender used internet and telephone services over a six week period. He used a chat line service at an internet café to proposition a 12 year old boy in person, offering him money to have the boy play with Tector's penis. A week later the boy's mother, posing as the boy, engaged in email correspondence with Tector, during which Tector sought the boy's phone number.

[116] Eight days later he phoned the boy, and he spoke again about the prospect of the boy playing with Tector's penis. Some days later, Tector phoned him again, and a conversation occurred about touching the boy, and whether he would permit that for money. Later still police assumed the boy's identity and conversed online, during which time Tector expressed a desire to meet the boy, but was reluctant to do so until the boy confirmed his identity by a phone call.

[117] Tector had previous convictions for sexual misconduct with children, and had been sentenced to imprisonment for those offences. At the trial he gave evidence denying the offences. Medical evidence was tendered at sentencing, showing he had paedophilic orientation, and needed treatment programmes for sexual offending. There was, however, no demonstrated commitment to receiving treatment or rehabilitation. The sentencing judge regarded the offences as being of "extreme seriousness", as Tector had no significant prospects of rehabilitation. The offences occurred over a short period, and arose out of the one transaction, and for that reason the sentencing judge imposed a sentence that "will reflect what I regard as the overall criminality of all three [offences]".[53]

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51 *Poynder* at [86].
52 *Poynder* at [89].
53 *Tector* at [28] and [30].

[118] The Court reduced the sentence to eight years with a non-parole period of five years. It said that the offence was "an objectively serious one", and that "although the offences fall short of what would be considered to be the most serious type of offence under s 474.26(1), they are nonetheless offences involving grave criminality".[54] The factors that led to that conclusion were identified by the Court as:[55]

> "[94] I consider that, in addition to the nature of the sexual activity proposed by the applicant, the following matters were relevant to the determination of the sentence in this case:
>
> (1) The fact that a monetary offer was made by the applicant by way of inducement in his communication to the recipient on 15 July 2006 (count 1).
>
> (2) The invitation on 15 July 2006 to the recipient to engage in sexual activity with the applicant.
>
> (3) The applicant's persistence in pursuing the recipient in telephoning him from a public telephone on 30 July 2006 and on 5 August 2006 in which he asked the recipient if he was interested in engaging in sexual activity with him.
>
> (4) The fact that the recipient was significantly below the age of 16 years, namely, 12 years of age.
>
> (5) The extent of the age differential between the applicant (54 years at the date of the offences) and the recipient.
>
> (6) The steps taken by the applicant to preserve his anonymity — the use of a false name "Dan", the anonymous use of email addresses and the use of public telephones."

[119] A number of the determinative factors in *Tector* apply to Sparrow, specifically the invitation to engage in sexual activity, the persistence of the pursuit, the age difference, and the fact that P was significantly below 16 years. Further, Sparrow's offending communications enabled him to achieve the object of physical contact with P, and the sexual acts that followed. In my view, his offending is worse than that dealt with in *Tector*. On that basis *Tector* supports the sentence imposed, rather than demonstrating it is manifestly excessive.

Failure to give reasons as to the parole eligibility date

[120] This ground has been dealt with above in paragraphs [54] to [58] above.

Conclusion

[121] For the reasons given above I would refuse the application.

[122] **DOUGLAS J:** I also agree with the reasons of Morrison JA and the order proposed.

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54 *Tector* at [108].
55 *Tector* at [94].