SUPREME COURT OF QUEENSLAND

CITATION:	*R v McDonald* [2016] QCA 200
PARTIES:	**R** **v** **McDONALD, Allan David** (applicant)
FILE NO/S:	CA No 300 of 2015 DC No 88 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Gladstone – Date of Sentence: 19 November 2015
DELIVERED ON:	16 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	18 March 2016
JUDGES:	Margaret McMurdo P and Philippides JA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is granted;** **2. The appeal against sentence is allowed;** **3. The sentence imposed for count 1 at first instance is varied by reducing the term of imprisonment to nine months;** **4. The sentence imposed for count 2 at first instance is varied by ordering that the term of imprisonment be suspended after serving a period of nine months imprisonment; and** **5. The sentences imposed at first instance are otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of knowingly possessing child exploitation material and one count of distributing child exploitation material – where the applicant was sentenced to 12 months imprisonment for the possession count, to be released on probation for three years at the end of that term, and to three years and six months imprisonment on the distribution count, to be partially suspended after 12 months for an operational period of five years – where the distribution

count was based entirely on the applicant's admissions to police – whether the applicant was sentenced on a more serious factual basis than the evidence supported – whether the sentencing judge gave the applicant sufficient credit for the admissions made in relation to the distribution count

Criminal Code (Qld), s 207A, s 228C, s 228D
Penalties and Sentences Act 1992 (Qld), s 9

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, followed
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
R v Crouch; R v Carlisle [2016] QCA 81, cited
R v MBM (2011) 210 A Crim R 317; [2011] QCA 100, cited
R v Oliver [2003] 1 Cr App R 28; [2002] EWCA Crim 2766, followed
R v PW [2005] QCA 177, cited
R v Rooney; R v Gehringer [2016] QCA 48, cited
R v Ungvari [2010] QCA 134, cited

COUNSEL: M J Copley QC for the applicant
S J Farnden for the respondent

SOLICITORS: Bosscher Lawyers Toowoomba for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** This is a concerning example of possessing and distributing graphic and disturbing child exploitation material. The primary judge, however, gave insufficient weight to the mitigating features of the applicant's otherwise good standing; plea of guilty; and co-operation with the authorities, particularly the fact that the more serious charge of distributing came to light solely through his admissions to police.

[2] I agree with Burns J's reasons and proposed orders.

[3] **PHILIPPIDES JA:** For the reasons given by Burns J, I agree with the orders proposed by his Honour.

[4] **BURNS J:** On 19 November 2015, the applicant, Allan David McDonald, pleaded guilty in the District Court at Gladstone to one count of knowingly possessing child exploitation material[1] and one count of distributing child exploitation material.[2] On the possession count he was sentenced to a term of imprisonment for 12 months and ordered to be released on probation for three years at the end of that term. On the distribution count he was sentenced to three years and six months imprisonment, partially suspended after 12 months for an operational period of five years.

[5] The applicant seeks leave to appeal against these sentences and, to that end, contends that the sentencing process was attended by error: *first*, that he was sentenced on a more serious factual basis than the evidence supported and, *second*, that the learned sentencing judge failed to give him sufficient credit for the admissions he made to offending about which the investigating police were unaware. He argues that the term

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1 *Criminal Code* (Qld), s 228D.
2 *Criminal Code* (Qld), s 228C(1).

of imprisonment imposed for count 1 should be reduced to six months and the probation order set aside and, on count 2, that the period of actual custody should be reduced to six months imprisonment.

The circumstances of the offending

[6] The offences were committed between 27 February 2013 and 27 February 2015. They came to light on 25 February 2015 when the applicant was visiting his former partner and their young daughter. His former partner happened to open a laptop computer that the applicant had brought with him on the visit and saw a number of folders containing child exploitation material. That night, she copied a folder from the computer to a storage device and, two days later, took it to the police at Emerald. By this time, the applicant was en route to Biloela to visit his other daughter. He was intercepted by police who searched his vehicle. During the search, several electronic devices (including the computer) were located and seized.

[7] The applicant participated in a record of interview with police on 27 February 2015 during which he admitted possessing and distributing child exploitation material. He told police that, about four to six years previously, he chanced upon a child pornography video on a website and reported it to the police. According to the applicant, the police told him not to look at it again. Then, in approximately 2011, he returned to the same website. He downloaded a different search engine to the one he ordinarily used and, through a process of following a series of links to different websites, gained access to child exploitation material.

[8] The applicant also downloaded a social media application called Kik. It has a function that allowed the applicant to search for other users of Kik with the same interests as well as a messenger service to facilitate communications and file sharing between the applicant and other users. The applicant searched for other users by entering a number of key terms such as "trade", "jail bait" and "pre-teen". When he learned that "PTHC" indicated an interest in "pre-teen hard-core" material, he used that acronym to search for like-minded individuals. The messenger service also allowed the applicant to display "tags" on his user profile that were visible to other users. He used the same or similar terms to those he had used in his searches as his tags. He also used the tag, "rape". Other users who saw his tags then contacted the applicant to exchange messages about child exploitation material. They would also offer to trade such material with the applicant. This was usually achieved by the other user sending the applicant files or a link to an online storage facility and the applicant would then reciprocate with material he mostly stored online in a Dropbox account. The applicant would then view, download or delete the material or files he received. He told police that he "only actively went out and initiated trading with someone else on one or two occasions".

[9] When asked how often he would trade in child exploitation material, the applicant told police that, when he logged on to his computer, there might be immediate requests from people to trade. Sometimes, he said, it would be "three or four people in an hour", and "up to 10". On other occasions, he explained, it "might be that no one initiated [a] conversation". He said that, sometimes, there might be "a month or so" between occasions when he traded child exploitation material.

[10] The applicant told police that he started to trade in child exploitation material a few months after he started to view that material on Kik. He could not say when he last traded, but guessed that it may have been between two weeks and two months prior

to the date of the interview. He said that he had never traded to anyone he knew in "real life" and that he never received any commercial reward for trading. At times he traded child exploitation material when he was engaged in "role play". For example, on some occasions he would take on the role of a teenage girl and, on one such occasion, he sent a video file to another user which featured a girl aged 13 or 14 who was masturbating.

[11] The agreed basis for the applicant's plea of guilty to the distribution count was that he traded in the child exploitation material he stored online "often over a period of about 20 months of the two year period charged". This count was based entirely on the applicant's admissions in his record of interview with police. He also said that he sometimes received material that involved children who were toddlers or in the "0–3" category, but that he did not like that material.

[12] In addition to the child exploitation material he obtained through trading on Kik, the applicant also downloaded material from a website that had images of models aged eight to 17 years. The applicant told police that sometimes he would not access this website for a week and at other times he would look at the material "every day for a few days". The applicant said that he liked "teen material". His aim was to "get webcam pornography of girls [aged] from 16 to 20", but he would sometimes obtain "videos of pornography of girls as young as 10". He downloaded video files from another website which depicted children aged 10 to 16 years. He said that some of the children were stripping or masturbating with a brush. The applicant told police that he would sometimes download a single file which had "2,000 or 3,000 images in it".

[13] The applicant organised the child exploitation material in his possession into labelled folders on his laptop which were categorised by subject. These folders were then "backed up" onto several USB drives. The applicant told police that he did this so as to ensure that his collection would not be lost if his computer "crashed". He also said that he could use the USB drives to watch "videos on a big movie screen". He told police that his online Dropbox account (having a capacity of one gigabyte) was full. He was asked about a folder labelled "0–3" on his computer that contained seven video files. He claimed that he had created this folder so that he could "come back and delete the material later". The Crown did not accept this claim. Nor did the Crown accept the applicant's claim that he was "intending on taking the material to the police or getting rid of it".

[14] Lastly, the police asked the applicant why he looked at child exploitation material. The applicant said that he "didn't know, but thought it might be related to relationship break ups, drinking alcohol, having something wrong 'with his head' or getting 'caught in a loop'". He said that he thought it was "harmless fun". He claimed that he did not obtain any sexual gratification from looking at the child exploitation material and "only obtained such gratification from normal pornography". This claim, too, was not accepted by the Crown.

The nature and quantity of the material

[15] By reason of s 9(13) of the *Penalties and Sentences Act* 1992 (Qld), the applicant was a "child-images offender". When sentencing such an offender, the court must give primacy to the considerations specified in s 9(7) of the PSA including "the nature of any image of a child that the offence involved, including the apparent age of the child and the activity shown". Child exploitation material is defined by s 207A of the *Criminal Code* (Qld) to mean:

> "material that, in a way likely to cause offence to a reasonable adult, describes or depicts a person, or a representation of a person, who is, or apparently is, a child under 16 years –
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> (a) in a sexual context, including for example, engaging in a sexual activity; or
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> (b) in an offensive or demeaning context; or
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> (c) being subjected to abuse, cruelty or torture".

[16] As White JA observed in *R v MBM*,[3] such material is typically categorised in Queensland in accordance with the scale of seriousness formulated by the English Court of Appeal in *R v Oliver*,[4] as follows:

> "(1) images depicting erotic posing with no sexual activity;
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> (2) sexual activity between children, or solo masturbation by a child;
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> (3) non-penetrative sexual activity between adults and children;
>
> (4) penetrative sexual activity between children and adults;
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> (5) sadism or bestiality."[5]

[17] In this case, police located a total of 49,738 accessible images stored on the applicant's electronic devices, from which a sample of 12,471 was examined. Of that sample, the images satisfying the definition in s 207A of the *Criminal Code* (Qld) were categorised in accordance with the *Oliver* scale. The proportion of images in each category of the sample was then used to calculate the number of images stored on the applicant's devices in each category. Importantly from the point of view of assessing the degree to which the applicant cooperated with the administration of justice, he accepted that those calculations reflected the material in each category that he possessed. By doing so, he relieved the person or persons responsible in the police for categorising such material of the disturbing task of having to individually examine over 37,000 other images, approximately 30 per cent of which was child exploitation material. Following this methodology, it was calculated that the applicant was in possession of 14,477 child exploitation images. Of this number, 1,243 images were in category 4 (penetrative sexual activity between children and adults) and 99 images were in category 5 (sadism or bestiality).

[18] The police also located a number of video files on the applicant's electronic devices. There were 13,949 such files. Of those, 5,361 were unique with the balance being copies of a number of the files. A sample of 1,342 was examined and categorised in accordance with the *Oliver* scale. Approximately one half of these files consisted of child exploitation material. Following the same methodology as had been adopted in the case of the image files, it was calculated that the applicant had in his possession 6,737 child exploitation video files (including many which were copies of the same file), of which 2,106 were in category 4 and 98 were in category 5. Toddlers were depicted in at least one video file in each of categories 3, 4 and 5.

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3 (2011) 210 A Crim R 317 at 319-20 [8].

4 [2003] 1 Cr App R 28; [2002] EWCA Crim 2766.

5 [2003] 1 Cr App R 28 at 467; [2002] EWCA Crim 2766 at [10]. A sixth category for material depicting animated or virtual characters is also used by the Queensland Police Service.

Antecedents

[19] The applicant was born in 1974. He was 39 to 41 years of age at the time of the offences and 41 at the time of sentence.

[20] He had no prior criminal history, and pleaded guilty at an early stage. In addition to agreeing that the proportions derived from an examination of the samples taken of the image and video files were representative of the larger body of child exploitation material in his possession, the applicant also provided investigating police with the username and password for his online Dropbox account. He made full admissions and, as already mentioned, the distribution count was based entirely on those admissions. That was an important mitigating feature, as the prosecutor submitted,[6] the applicant's counsel emphasised[7] and the sentencing judge acknowledged.[8]

[21] The applicant had an unremarkable upbringing. He was educated to Year 10 level before undertaking a number of certificate courses to equip him to work in, primarily, the mining industry. He had been continuously employed since commencing work and, prior to being sentenced, the applicant had worked for the same employer as an excavator operator for the preceding seven years. He has two daughters from past relationships aged 13 and three years at the time of sentencing. Until he was sentenced, the applicant was providing a not insignificant level of financial support for both of his daughters, and was appropriately involved in their lives. However, since being charged with the subject offences, he had been prevented from having any face-to-face contact.

[22] In the court below, a letter under the hand of the applicant and addressed to the sentencing judge was tendered, along with a number of references. In his letter, the applicant expressed remorse and stated that he did not "know why [he offended] as it is something [he is] against". He was concerned about his children losing his emotional and financial support whilst he is in prison and demonstrated some insight into the suffering that had been inflicted on the children depicted in the images and video files that were in his possession. The references elaborated on his remorse and established that, his offending aside, the applicant had been a well-regarded member of the community with a reputation for hard work.

The sentencing remarks

[23] When sentencing the applicant, the judge summarised the nature of the image and video files in question, as follows:

> "The material is extremely graphic. It illustrates significant sexual abuse of children aged from infancy through to teenage years. It includes offensive images of children engaging in all sorts of sexual activity, activity that they should not need to be exposed to in their tender years. It includes images of bondage and sadism. The children are not only engaged in passive sexual activity involving exposure of their genitalia, but also images of children being subject to penetration and the performing of oral sex and other sex acts upon adults. It is, in summary, grossly offensive. It offends every instinct, I think, in any normal human being."[9]

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6 AR 12, 16.
7 AR 26, 27, 29.
8 AR 30, 31, 35, 36.
9 AR 33.

[24] After recounting the circumstances of the offences that I have outlined above and noting that the applicant told police that his "preference [was for] older children", the sentencing judge observed that "the fact remains there was a significant volume of younger infant children material on [the applicant's] machines".[10] His Honour remarked that the way in which the "material was organised" was "a very troubling feature" and considered that this suggested efforts on the applicant's part to "review the material in a more leisurely way and/or to engage in trading".[11] His Honour also found it troubling that "material was found on USBs [to enable the applicant] to watch videos on a big movie screen",[12] and later remarked that the large number of image and video files in categories 4 and 5, the active distribution of the material and the period over which the offences occurred were "aggravating features of the offending".[13]

[25] In addition to doubting the applicant's statement to police that he was only interested in material involving "older children", the sentencing judge rejected a number of other specific claims the applicant made during his record of interview. These were:

(a) that the applicant created the folder containing seven video files and labelled "0–3" so that he could "come back and delete" the material later;[14]

(b) that the applicant did not obtain any sexual gratification from looking at the material;[15]

(c) that the applicant intended to take the material to police;[16] and

(d) that the applicant "only actively went out and initiated trading" with other users of Kik on "one or two occasions".[17]

[26] When rejecting the claim referred to in (d) above, the sentencing judge said:

> "Not content with being in possession of this material you did in the course of your interview to police inform them that you traded the CEM with other users using an instant messenger service. It was plain that you were contacted because of the tags you had on your profile and you would be sent material or Dropbox would be used for this purpose. You would reciprocate by either sending material back or providing links to your Dropbox. You said that you only actively went out and initiated trading with someone on one or two occasions, but that does not seem to be entirely consistent with the matters recorded in your record of interview, although I do accept that to some it was plainly a case where this was often initiated by contact."[18]

[27] The sentencing judge took account of the applicant's early plea of guilty, the feature that the distribution count was solely based on the applicant's admissions and his cooperation in the administration of justice by agreeing to the calculation of the image and video files in his possession by reference to the sampled proportions. His Honour also considered that the applicant was genuinely remorseful and had, since being

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10 AR 34.
11 Ibid.
12 Ibid.
13 AR 35.
14 AR 34.
15 Ibid.
16 Ibid.
17 Ibid.
18 AR 34-35.

charged, demonstrated "some insight into [the] harm" caused to the children who were depicted in the image and video files.[19] Otherwise, the factors personal to the applicant such as the absence of any prior criminal convictions, the support of his wider family and his good work history were taken into account.

[28] Then, referring to the principle to be derived from *AB v The Queen*[20] to the effect that an offender who confesses to what was an unknown crime may merit special leniency,[21] the sentencing judge said:

> "It seems to me … that the *AB v The Queen* factor affords me some latitude in sentencing in this case and that, with the benefit of that, I'm able to deal with the offending in a manner which I would not customarily do. But the *AB v The Queen* factor permits me, I think, in accordance with proper sentencing principles, to address the manner in which your period of incarceration on [the distribution count] will be directed such that I can afford you, I think, a longer-term rehabilitative program in respect of [the possession count]".[22]

[29] His Honour then imposed the sentences that are the subject of this application.

Consideration

[30] In order to succeed on this application, it must be positively demonstrated that there has been an error in principle or that the sentences imposed were "unreasonable or plainly unjust".[23] Here, it was not contended that the head sentences imposed were manifestly excessive. Rather, it was argued that errors of fact were made by the sentencing judge that resulted in his Honour proceeding on the basis that "the applicant's culpability was greater or more extensive than was supported by the evidence or argued by the parties"[24] and, further, that his Honour "wrongly constrained his discretion to only extending some latitude"[25] in a case where greater leniency was required.

The factual basis for the sentence

[31] The applicant contended that two factual errors were made by the sentencing judge.

[32] The first concerned the rejection of the applicant's claim that he "only actively went out and initiated trading" with other users of Kik on "one or two occasions".[26] It was argued that the distribution count was based on the applicant's admissions in his record of interview and that the relevant admissions were precisely to the effect of the rejected claim. It was submitted that the prosecutor in the court below did not attempt to put those admissions in issue, despite submitting that the applicant had been "on some occasions actively initiating the sharing".[27] In this regard, it was submitted that the prosecutor had only been concerned to distinguish the applicant's case from that of a passive distributor and was not otherwise challenging the reliability of the claim made by the applicant.

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19 AR 35.
20 (1999) 198 CLR 111.
21 Ibid at 155 [113] per Hayne J.
22 AR 36.
23 *Hili v The Queen* (2010) 242 CLR 520 at [58]-[59].
24 Applicant's submissions at p 5.
25 Ibid at p 6.
26 AR 34.
27 AR 15.

[33] It was certainly an agreed fact that the applicant made the rejected claim in his record of interview but, like the other claims that met the same fate,[28] his Honour was not bound to accept it. Indeed, there was good reason not to do so when regard was had to the other admissions the applicant made to police. The applicant searched for other users of Kik who were interested in child exploitation material. By means of the tags he appended to his user profile he also promoted his interest in that material to other users along with his preparedness to "trade" in it. The applicant conducted himself in these ways over a period that occupied about 20 months of the period charged, and it was an agreed fact that he traded material "often"[29] during that time. In order to do so, the applicant communicated with other users of Kik via the messenger service, provided links to his Dropbox account and on some occasions emailed files. Given these facts, the applicant's claim to have only initiated trading on one or two occasions was a most unlikely proposition. This is no doubt what the sentencing judge meant when he said that the applicant's claim did not seem to be "entirely consistent with the matters recorded in [his] record of interview".[30]

[34] Furthermore, immediately before acknowledging that the prosecutor had "placed the facts with respect to the trading or the distribution fairly before the court", the applicant's counsel made this submission:

> "He thinks that over the period of time that he's charged with or charged for that there's about six or seven months where there was no use whatsoever of the computer for this purpose, that when he was trading it, when he was trading the child exploitation material, it was *more often than not* that requests came to him, and in order to complete the trade per se, he would send off a video or a picture file. It wasn't the case that he was sending off bulk files in any one time".[31] [Emphasis added].

[35] Thus, not only did the prosecutor submit that the applicant had been "actively initiating the sharing" on some occasions, but the clear implication from his own counsel's submissions was that the applicant initiated trading on considerably more occasions than the one or two he claimed in his interview with police. The sentencing judge was right to reject that claim.

[36] The other contended error may be dealt with more concisely. The schedule of facts established that the applicant was in possession of 6,737 child exploitation video files. However, during the sentencing remarks, his Honour said that the applicant had "about six and a half thousand videos"[32] and, later, that the applicant had "about seven and a half thousand videos".[33] The latter statement was obviously a slip, as his Honour's earlier, and correct, statement makes clear. In any event, even if his Honour proceeded by reference to the higher figure, that would not have had any material effect on a proper assessment of the applicant's criminality so far as the possession count was concerned.

[37] I am therefore unpersuaded that the sentencing judge proceeded on a view of the facts that resulted in his Honour assessing the applicant's culpability at any higher level than it actually was.

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28 See above at [21] and [22].
29 AR 46.
30 AR 35.
31 AR 23.
32 AR 33.
33 AR 34.

Special leniency

[38] It is well established that an offender who pleads guilty to a crime is to be treated more leniently than an offender who does not but, as Hayne J observed in *AB v The Queen*,[34] an offender who brings an unknown crime to the attention of the authorities, and then confesses to that crime, may "properly be said to merit special leniency".[35] In such a case, the offender's confession may well be seen as "not motivated by fear of discovery or acceptance of the likelihood of proof of guilt; such a confession will often be seen as exhibiting remorse and contrition".[36] In addition, cooperation of this kind can have a "dual relevance"[37] because, not only should it serve to moderate the sentence that would otherwise have been appropriate because of savings to the administration of justice, but it may also mean that considerations of personal deterrence take on less importance than the offender's rehabilitation.[38]

[39] It cannot be doubted that the sentencing judge recognised the need to accord to the applicant a measure of special leniency to reflect his cooperation in the administration of justice by confessing to what became the distribution count when the police would otherwise not have known of that offending and by accepting that the proportions derived from the sampled image and video files was an accurate representation of the proportions that existed in the wider body of material. What was in issue on the hearing of this application was whether his Honour made a sufficient allowance in this regard.

[40] For the applicant, it was argued that an order suspending the sentence of imprisonment on the distribution count "only two months earlier than the one-third point"[39] of that sentence was quite insufficient to reflect his special cooperation, his early pleas of guilty and his genuine remorse. In that respect, the submission was made that, "generally, the one-third mark … is seen as an appropriate starting point to recognise pleas of guilty".[40] However, as McMurdo P recently observed in *R v Crouch; R v Carlisle*,[41] whether a sentence "warrants mitigation reflected in a parole eligibility, a parole release date or a suspension set after one third of the sentence, or at some other time, will always turn on the particular circumstances of the individual case".[42] Be that as it may, it was submitted that the applicant's special cooperation, pleas of guilty and remorse would be appropriately reflected by reducing the term of imprisonment imposed on the possession count to six months, setting aside the probation order that was made with respect to that count and suspending the term of imprisonment imposed on the distribution count after six months.[43] This, it is to be observed, was effectively the same submission that had been made on the applicant's behalf in the court below so far as the terms of imprisonment were concerned.[44]

[41] The proposition that the applicant does not need probation cannot be sustained. It was the applicant's counsel who suggested the making of such an order in the court

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34 (1999) 198 CLR 111.
35 Ibid at 155 [113].
36 Ibid.
37 *R v PW* [2005] QCA 177 at 8 per Keane J.
38 Ibid 7-8.
39 Applicant's submissions at p 7.
40 Ibid citing *R v Ungvari* [2010] QCA 134 at [30] per White JA, but see *R v Rooney; R v Gehringer* [2016] QCA 48 at [17] per Fraser JA (with whom Gotterson JA and McMeekin J agreed).
41 [2016] QCA 81.
42 Ibid [29].
43 Applicant's submissions at pp 7-8.
44 AR 28-9.

below in the event that the sentencing judge considered there was a need to keep a "watchful eye" on the applicant.[45] Plainly, his Honour did consider that the applicant required supervision. The offences were committed over a long period, their commission revealed a perverse interest in images and video files of a most depraved kind, when interviewed by police he attempted to minimise the extent of his criminality in a number of respects and there was nothing before the court below to suggest that he had sought, or intended to seek, any psychological or psychiatric treatment despite his admission that he knew what he was doing was wrong but continued to offend nonetheless.

[42] As to the submission that the sentence imposed on the possession count and the suspension point of the term of imprisonment imposed on the distribution count should be reduced, it does appear that the sentencing judge failed to make sufficient allowance for the applicant's special cooperation, early pleas of guilty and remorse. Also, it should not be overlooked that the applicant had led a productive life, had no previous convictions and had demonstrated a level of insight into his offending. I am therefore of the respectful view that the sentencing judge fell into error and, for that reason, it is necessary to consider what sentence should be imposed on a re-sentencing of the applicant.

[43] In that regard, I cannot agree that a reduction to what would be one seventh of the head sentence on the distribution count can be justified in the circumstances of this case. In my opinion an appropriate allowance for the factors I have outlined, including special leniency, would be to reduce the sentence imposed on the possession count and the suspension point of the term of imprisonment imposed on the distribution count to nine months in each instance. If the Court agrees, the applicant will be released on probation on 19 August 2016 rather than 19 November 2016.

Disposition

[44] I propose the following orders:

1. The application for leave to appeal is granted;
2. The appeal against sentence is allowed;
3. The sentence imposed for count 1 at first instance is varied by reducing the term of imprisonment to nine months;
4. The sentence imposed for count 2 at first instance is varied by ordering that the term of imprisonment be suspended after serving a period of nine months imprisonment; and
5. The sentences imposed at first instance are otherwise confirmed.

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45 Ibid.