SUPREME COURT OF QUEENSLAND

CITATION:	*R v Daw* [2006] QCA 386
PARTIES:	**R** **v** **DAW, Zachary Charles** (applicant/appellant)
FILE NO/S:	CA No 195 of 2006 DC No 193 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Ipswich
DELIVERED EX TEMPORE ON:	5 October 2006
DELIVERED AT:	Brisbane
HEARING DATE:	5 October 2006
JUDGES:	Jerrard and Holmes JJA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**1. Application for leave to appeal against sentence allowed** **2. Set aside the sentence imposed below** **3. Impose in lieu a probation order for two years on the terms set out in s 93(1) of the *Penalties and Sentences Act 1992* (Qld) with the additional condition that the applicant undergo such medical, psychiatric or psychological testing and treatment as may be directed by a Corrective Services Officer** **4. The applicant must report within the next three business days to an authorised Corrective Services Officer at Ipswich** **5. A conviction should not be recorded**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – GENERALLY – applicant pleaded guilty to an ex-officio indictment charging him with knowingly

possessing child exploitation material – applicant sentenced to nine months imprisonment to be served by way of an Intensive Correction Order and a conviction was recorded – applicant downloaded 58 pornographic images of children from a website – downloads represented a very small quantity of total downloads on his computer – no commercial element to downloads – applicant had no previous convictions – whether sentence imposed was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON PLEA OF GUILTY – GENERAL PRINCIPLES – offending at low end of the scale – applicant was a young offender with no previous convictions – recording a conviction would jeopardise his career and chances of success – whether a conviction ought to be recorded having regard to s 12(2) *Penalties and Sentences Act 1992* (Qld)

Criminal Code 1899 (Qld), s 228D
Penalties and Sentences Act 1992 (Qld), s 9(2), s 12(2), s 93(1)

R v Clifford, unreported, Botting DCJ, DC No 833 of 2006, 3 May 2006, considered
R v Davies, unreported, Ryrie DCJ, DC No 217 of 2006, 9 March 2006, considered
R v Diaz, unreported, Wylie DCJ, DC No 1462 of 2006, 25 May 2006, considered
R v Finch; ex parte A-G (Qld) [2006] QCA 60; CA No 319 of 2005, 10 March 2006, considered
R v Hoch; ex parte A-G (Qld) [2001] QCA 63; CA No 337 of 1997, 26 February 2001, considered
R v Plunkett [2006] QCA 182; CA No 124 of 2006; 29 May 2006, considered

COUNSEL: S L Kissick for the applicant
T A Fuller for the respondent

SOLICITORS: Ryan and Bosscher for the applicant
Director of Public Prosecutions (Qld) for the respondent

JERRARD JA: I'll ask Justice Jones to deliver the first judgment.

JONES J: The applicant seeks leave to appeal against a sentence of nine months imprisonment to be served by way of an

Intensive Correction Order imposed by the District Court on the 29th of June 2006. The sentence followed the applicant's plea of guilty to an ex officio indictment charging him with knowingly possessing child exploitation material pursuant to section 228D of the *Criminal Code.*

The applicant was born on the 5th of August 1982. He was thus 23 years of age at the time of sentencing and 21 years of age when the events, which I will now describe, occurred.

In April 2004 the applicant downloaded 58 pornographic images from a web site established by the Federal Bureau of Investigation of the United States of America. He found the site through chat room contacts. The applicant did not pay for the download. He simply requested it. However, to access this site, it was necessary for a person to put up a pornographic image so that the electronic identifiers could trace the source of the request.

Thereafter the FBI apparently informed the Australian Federal Police who, on 14 August 2005, conducted a search of the appellant's residence and seized his computer. Examination of the computer revealed the images on its hard drive. The 58 images depicted young female children in various poses whilst naked or semi-naked. Two of the images depicted female children performing oral sex with an adult male.

It was this exploitation of children which properly engaged the attention of the learned sentencing Judge who was

conscious of the high level of community concern about this kind of offending. A major concern for the learned sentencing Judge was whether there was any commercial element. Further inquiries established that there was no such feature. The learned sentencing Judge also noted that between the time when the applicant downloaded these images and their being found in his possession the relevant maximum penalty for the offence had increased from two years to five years imprisonment.

The images apparently had not been dealt with by the applicant by cataloguing or by storing them in a lasting form. The applicant claimed he had downloaded the images out of curiosity. He did not refer to them again and in fact said he was personally disgusted by them. He simply forgot to delete the items. The applicant was a constant user of the internet and a frequent downloader of material. A comparison of the quantum of his downloads and the small size of this download and thereafter the apparent lack of any further dealing with it gives support to the applicant's claims about the effect this activity had upon him.

To the extent that his actions could be seen as "a feeding of the market for sexual exploitation", as the learned sentencing Judge found (R 23/42), I consider the offence to be at a very low level. This brings me to a comparison of the cases relied upon on this application and particularly the case of *R v Plunkett* [2006] QCA 182 which was most in the mind of the learned sentencing Judge at the hearing.

Plunkett was a 38 year old male who downloaded almost 17,000 images of girls, mostly aged about 10 years. Like the applicant he did not pay for the downloads. However he did engage in this activity over a substantial period of time and with some deliberation. He organised the images into labelled directories and folders, thus the images were regarded as being put into a lasting form. None of these features were present in the applicant's case. Plunkett was sentenced in May 2006 to 18 months imprisonment to be suspended after serving three months.

Reference is also made to *R v Finch; ex parte A-G (Qld)*[2006] QCA 60 where the sentence was determined on penalties prevailing prior to the April 2005 amendments. The relevance of that case was to point out the requirement that in cases of this kind regard must be had to s 9(2) of the *Penalties and Sentences Act 1992* (Qld). The offending in that case was so far more serious than the applicant's as not to be comparable. Whilst the sentence imposed there was under a different sentencing regime the penalty that was imposed was four months imprisonment followed by three years probation.

Each of the other cases referred to in the respondent's child exploitation schedule shows punishment in the form of sentences for imprisonment, wholly or partially suspended, or to be served by way of an Intensive Correction Order. It is sufficient comparison to consider those cases where the penalty was either wholly suspended or where an ICO was imposed.

In *R v Davies*, DC No 217 of 2006, the Court was concerned with the 53 year old defendant who had possession of 142 images of children engaging in sexual acts together. Some were of the adult males and children in various sexual activities described as erotic and obscene. There were 18 child abuse files and eight videos. The offender was charged also with additional offences of possession of objectionable computer games. For the main offence the offender was sentenced to 12 months imprisonment wholly suspended which suspension reflected his early plea, the fact that he had no previous convictions, his good character and the fact that he suffered a mental illness.

R v Clifford, DC No 833 of 2006, concerned a 21 year old who had no previous convictions and who was found to be in possession on his computer of 150 images, 30 videos, which included acts of penetrative sex and who admitted he had an interest in 12 year old girls. He was sentenced to nine months imprisonment wholly suspended.

In *R v Diaz*, DC No 1462 of 2006, the offender, whose age is not stated, was found to have on his computer 10 video clips depicting male children engaged in masturbation and homosexual activities. The children's ages ranged from 8 to 14 years. Five of the video clips had been downloaded on to another disk which contained 2400 pornographic pictures of male children aged five to 15 years in sexually explicit poses and of children having sex with each other and with male adults. The

offender admitted to being bisexual and he was under the active treatment of a psychiatrist. His sentence was for 12 months imprisonment to be served by way of an ICO.

During argument we were referred to the Court of Appeal decision, *R v Hoch; ex parte A-G (Qld)* [1997] QCA 337. This case concerned the possession of child abuse publications and photographs and a child abuse computer game. The offender was fined $2,000. The details of the offending, which fell to the "punished under the obsolete sentencing regime" do not need to concern us. The fact that the offender was 36 years of age and worked with disabled children makes its relevance less direct. The fact that a conviction was recorded was not surprising in those circumstances.

The circumstances of the applicant's offending here reveals significantly less serious conduct than any of these cases referred to. This feature is to be coupled with the fact that the applicant has no prior criminal conviction, that he has pleaded guilty on an ex officio indictment. Despite his having a troubled upbringing he nonetheless had made some achievements in his studies and in employment. In the result the making of a probation order was entitled to be given serious consideration.

A probation order was the penalty sought by the Prosecutor (R 8/20) and by the applicant's counsel (R 20/50).

The learned sentencing Judge's response to these submissions was to indicate that her choice lay between an ICO or a wholly suspended sentence. Her rationale appears to be based on the desire to have a conviction recorded (R 21/22-30).

An important consideration in the sentencing of a young offender is whether a conviction should be recorded. Section 12(2) of the *Penalties and Sentences Act* identifies some considerations to which a Court must have regard - the nature of the offending, the offender's character and age, the impact on economic and social well-being or the chances of employment.

I have addressed the nature of the applicant's offending. He has a background of troubled family relationships. One of his uncles committed suicide, another has bipolar disorder. His mother drinks heavily and engages in conversations with her deceased brother. The applicant's stepfather is ill and unable to work and this adds to the family's burdens. Despite these matters the applicant has undertaken causes at the Bremer Institute of TAFE studying hospitality and visual arts. He apparently has some gift for art work and design. He wishes to pursue a career in this area.

The recording of a conviction of this kind would jeopardise his employment and his prospects of success generally. He is presently in full-time employment in a factory setting and that too may be jeopardised by his having to fulfil the requirements of an intensive correction order, although a

court report tendered in respect of his involvement pursuant to the order so far, has indicated that he has complied with the requirements and he is said to present as being suitable to be placed on further community-based orders.

Mr Peter Perros, psychologist, sets out details of the applicant's emotional lability with attitudes which may "vary from states of pessimism and self-doubt to periods of relative self-confidence and self-satisfaction". Importantly Mr Perros did not elicit any overt evidence of deviant paedophilic tendencies.

To my mind the gravity of the applicant's offending was at the lowest level for this kind of offence. It is unlikely that the applicant will himself offend again and the issue of general deterrence is not particularly assisted by heavy penalty in this type of case. Of greater significance is the impact of any penalty upon the applicant's rehabilitation which, in my view, would be better enhanced by a reasonably lengthy period of probation.

Weighing all these matters, I am of the view that the sentence imposed below is manifestly excessive and ought to be set aside. In exercising the sentencing discretion anew, for my part, I would impose in lieu a probation order of two years on the terms set out in s 93(1) of *the Penalties and Sentences Act* with the additional condition that the applicant undergo such medical, psychiatric or psychological testing and treatment as may be directed by a Corrective Services officer.

The applicant would be required to report within the next three business days to an authorised Corrective Services officer at Ipswich. I would direct also that a conviction not be recorded.

JERRARD JA: I agree.

HOLMES JA: I agree.

JERRARD JA: The orders described by Justice Jones will be the orders of the Court, that is the application and appeal are allowed and the orders described by Justice Jones will be substituted for the orders made.
