SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wharley* [2007] QCA 295
PARTIES:	**R** **v** **WHARLEY, David Robert** (applicant)
FILE NO/S:	CA No 190 of 2007 DC No 535 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	14 September 2007
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2007
JUDGES:	Jerrard and Holmes JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal dismissed**
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 REFUSED – GENERALLY – where the applicant was convicted of knowingly possessing child exploitation material and sentenced to six months' imprisonment suspended after two months for an operational period of two years – whether the sentence imposed was manifestly excessive *Criminal Code 1899* (Qld), s 207A, s 228D *Penalties and Sentences Act 1992* (Qld), s 9(1), s 9(2) *Hutchins v The State of Western Australia* [2006] WASCA 258, cited *R v Carmichael*, unreported, Court of Criminal Appeal, Qld, CA No 160 of 1996, 19 July 1996, cited *R v Cook; ex parte Director of Public Prosecutions (Cth)* [2004] QCA 469; CA No 324 of 2004, CA No 329 of 2004, 3 December 2004, cited *R v Daw* [2006] QCA 386; CA No 195 of 2006, 5 October

2006, considered
R v Finch; ex parte A-G (Qld) [2006] QCA 60; CA No 319 of 2005, 10 March 2006, cited
R v Hamilton [2000] QCA 286; CA No 75 of 2000, 21 July 2000, cited
R v Jones (1999) 108 A Crim R 50, cited
R v Plunkett [2006] QCA 182; CA No 124 of 2006, 29 May 2006, considered

COUNSEL: A Moynihan SC for the applicant
M R Byrne for the respondent

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

[1] **JERRARD JA:** I agree with Philippides J, and with the order proposed by Her Honour.

[2] **HOLMES JA:** I have had the advantage of reading the reasons for judgment of Philippides J and agree with her Honour's conclusions. Once it was accepted, as counsel on appeal did accept, that imprisonment was warranted in this case, the real issue was whether a sentence involving actual custody was open, given the principle in s 9(2)(a)(ii) of the *Penalties and Sentences Act 1992* (Qld) that a sentence allowing the offender to stay in the community is preferable.

[3] There was, as Philippides J has observed, no error in the way in which the learned sentencing Judge approached the sentencing exercise by reference to the s 9(2) considerations. It seems to me not possible, then, to say that it was not open to the sentencing Judge in the exercise of his discretion, and having regard to the s 9(2)(a)(i) principle, to reach the view that it was necessary to impose a short period of actual imprisonment. I agree that the application for leave to appeal against sentence should be refused.

[4] **PHILIPPIDES J:** The applicant seeks leave to appeal against a sentence imposed upon the applicant's conviction on 31 July 2007, after a trial, pursuant to s 228D of the *Criminal Code 1899* (Qld) ("the *Criminal Code*") of knowingly possessing child exploitation material, namely a number of computer generated images, on the basis that it was manifestly excessive. The applicant was sentenced to six months' imprisonment suspended after two months for an operational period of two years. One day was declared as time already served.

The sentence

[5] The sentence was imposed in respect of the applicant's possession of 43 pornographic images of children which had been burned to a disk, the images in question being of children whose ages were estimated to be between six and 15 years. There were 28 images of children posing naked or in provocative poses, two images of children penetrating themselves digitally or with implements, six of children (including a child estimated to be as young as six years of age) performing oral sex on an adult, four of a child being penetrated by

an adult's penis and three images not within the former categories, including one of a child holding an adult man's erect penis.

[6] In sentencing the applicant, the learned sentencing judge had regard to the gravity of the offences. His Honour observed that the offence was not a victimless crime, but was one involving the abhorrent exploitation of children whose images were depicted through the medium of the internet and in circumstances where accessing the images could be seen as encouraging the market for such images. His Honour noted that the number of images involved in the offending was relatively small, but considered that factor was rendered less relevant given the nature of the images involved, which included images of penile penetration by adults and the performance of oral sex by young children.

[7] His Honour observed that the jury verdict indicated that the applicant knew that the images were on the disk and what they depicted. He stated that, whilst the applicant may not have looked at the images for some time, nevertheless he had kept them on the same compact disk which contained family or domestic-type images and that that at least implicitly indicated a wish to retain them. Further, the compact disk was a re-writable disk which permitted the images to be deleted or written over, but that had not occurred. They had been kept in a lasting form. His Honour accepted that there was no commercial aspect involved in the commission of the offence.

[8] His Honour had regard to the applicant's personal circumstances. The applicant was 43 years of age at the time of sentence with no previous convictions and had been fully employed since the age of 15. However, his Honour also observed that given the applicant's age he should have known the seriousness of his conduct. His Honour noted that, unlike the cases referred to in the schedule of comparatives which had been provided to the court, the applicant did not have the benefit of a plea of guilty or of having co-operated with the administration of justice. He found that there was no evidence of remorse.

[9] His Honour expressed the purposes of the sentence imposed in terms of the considerations of imposing a punishment which was just in all the circumstances, deterring the applicant and others from committing similar offences and making it clear that the community acting through the court denounced conduct of the type involved, these being the purposes referred to in s 9(1)(a), (c) and (d) of the *Penalties and Sentences Act 1992* (Qld) ("the Act"). His Honour concluded that, in view of the serious nature of the offence, and despite the applicant's personal circumstances, there was no reasonable alternative to a term of imprisonment in order to achieve the purposes of personal and general deterrence and the community's abhorrence for the type of offending involved.

Submissions on the hearing of the application

[10] Before this court, the applicant submitted that the learned sentencing judge erred in failing to give sufficient weight to the sentencing principles in s 9(2)(a) of the Act. It provides:

> "In sentencing an offender, a court must have regard to –
>
> (a) principles that –
>
> (i) a sentence of imprisonment is to be imposed only as a last resort; and

(ii) a sentence that allows the offender to stay in the community is preferable;"

[11] Counsel submitted that in the circumstances of the present case, the learned sentencing judge erred in concluding that there was "no reasonable alternative to a term of imprisonment" to achieve the purposes referred to by him, being those in s 9(1)(a), (c) and (d) of the Act. In making this submission, counsel for the applicant emphasised the applicant's good work record and that he was 43 years of age with no criminal history. Counsel also submitted that the applicant "had only possessed the material for a day" and had not imported, purchased or exposed it to others or sold the images. Further, the images were not collated or catalogued in any fashion that evidenced a systematic collection and dissemination of material for commercial purposes.

[12] Citing the recent decision in *R v Daw* [2006] QCA 386, and the authorities reviewed therein, it was submitted that applying the sentencing principle in s 9(2)(a), "probation or sentences of imprisonment, either wholly suspended or served by intensive correction in the community, are 'reasonable alternatives' in the case of a mature first offender with no criminal history, who is convicted of the applicant's level of offending on the single occasion." Reference was also made to decisions of this court which have recognised that short periods of imprisonment are undesirable: see *R v Carmichael* unreported, Court of Criminal Appeal, Qld, CA No 160 of 1996, 9 July 1996, 19 July 1996 and *R v Hamilton* [2000] QCA 286. It was submitted that his Honour ought to have wholly suspended the six month term of imprisonment or required that it be served by intensive correction in the community. Given that the applicant had served one month in jail, it was submitted that this Court should suspend the six month sentence imposed so as to require no further period of custody to be served.

[13] The respondent contended that the sentence imposed did adequately take into account the sentencing principles in s 9(2) of the Act. It was submitted that notwithstanding s 9(2) the sentence imposed was in accordance with relevant sentencing principles and could not be said to be outside the appropriate sentencing range. With respect to the applicant's submissions, it was observed that the applicant was convicted of possession of the material on a specific day and not with possession of it for one day. It was contended that the applicant's lack of remorse meant that the early suspension of the sentence (albeit by one month) was an unduly favourable order.

Relevant issues

[14] Section 228D of the *Criminal Code*, which commenced on 4 April 2005, provides that a "person who knowingly possesses child exploitation material" commits an offence carrying a maximum penalty of five years' imprisonment. "Child exploitation material" is defined in s 207A as meaning "material that, in a way likely to cause offence to a reasonable adult, describes or depicts someone who is, or apparently is, a child under 16 years ... in a sexual context …" The provision, which replaced s 26(3) of the *Classification of Computer Games and Images Act 1995* (Qld), was introduced against a background of criticism of the two year maximum penalty provided for under s 26(3) of the *Classification of Computer Games and Images Act 1995* (Qld) as being inadequate when it came to an offence involving possession of serious pornographic material and that its

terms were not apt to cover the situation where a person had possession of serious pornographic material, particularly depicting young children involved in depraved acts: *R v Finch; ex parte A-G (Qld*) [2006] QCA 60 at [15]; *R v Plunkett* [2006] QCA 182 at 1, *R v Cook; ex parte A-G (Qld); R v Cook; ex parte Commonwealth DPP* [2004] QCA 469 at [23].

[15] There is no question that the sentencing principles in s 9(2)(a) of the Act apply to the present case: *R v Plunkett*. Nor can it be doubted that the learned sentencing judge was alive to the application of that section. It formed an important part of the submissions by the applicant's counsel before the sentencing judge and was implicit in his Honour's reference in his sentencing remarks to there being "no reasonable alternative" to a term of imprisonment. The question therefore is whether in the circumstances of the present case that conclusion and the sentence imposed was reached applying an erroneous principle or was outside the sound exercise of the sentencing discretion.

[16] The learned sentencing judge was correct to observe that the offence in question cannot be characterised as a victimless crime. In *R v Cook; ex parte A-G (Qld); R v Cook; ex parte Commonwealth DPP*, Williams JA at [26], adopting the remarks of Kennedy J in *R v Jones* (1999) 108 A Crim R 50, made the following observations:

> "It appears from comments during the course of submissions that the learned sentencing judge regarded possessing child pornography as a significantly less serious offence than producing such pornography or importing quantities of it for commercial distribution. He apparently saw the latter offences as involving a greater degree of exploitation of children. To an extent that is a valid distinction, but possession of child pornography for personal gratification is none the less a serious offence because without people wanting to possess it there would be no market for the product. The production and distribution of pornographic material depends upon there being a market for it, that is persons wishing to possess the product for their own gratification."

[17] Given the learned sentencing judge's finding as to the applicant's lack of remorse, a finding which was not challenged in this Court, he was correct to place some emphasis on the importance of deterrence and denunciation in sentencing the applicant. The sentencing purposes of deterrence and denunciation have been emphasised as having particular significance in offending of the kind in question not only in decisions of this Court (*R v Plunkett* at [1], *R v Cook; ex parte A-G (Qld); R v Cook; ex parte Commonwealth DPP* at [32]) but represent a common theme in sentencing for such offences across jurisdictional boundaries (for example see *Hutchins v The State of Western Australia* [2006] WASCA 258). The learned sentencing judge was also correct to consider as an aggravating factor that many of the images the subject of the offence were of young children, the victims of abhorrent sexual abuse and depicting explicit sexual activity.

[18] I should add that a submission was made by counsel for the applicant that the learned sentencing judge erred in failing to refer to the sentencing purpose of rehabilitation in imposing sentence. His Honour was entitled to identify the sentencing purposes in s 9(1) which he considered to have primacy in this

particular case and it cannot be concluded that his failure to specifically mention the purpose of rehabilitation in that context means that he had no regard to it at all as a consideration in imposing sentence.

[19] It was conceded by counsel for the applicant that a term of imprisonment, either wholly suspended or by way of an intensive correction order, was within range, a concession borne out by the schedule of comparatives. Terms of imprisonment have been commonly imposed for similar or lesser offending (see *R v Daw* at pg 5). The imposition of a term of imprisonment was therefore an available sentencing option in the circumstances of this case, notwithstanding the sentencing principle in s 9(2)(a) that it ought only be imposed as a last resort. The real complaint raised on behalf of the applicant centred on whether a sentence ought to have been fashioned such that the applicant was allowed to stay in the community, by wholly suspending the sentence or requiring the term to be served by way of intensive correction in the community.

[20] Sentencing judges retain a broad discretion as to whether a non-custodial sentence is preferable in the circumstances of any particular case. Matters of significance in the exercise of that discretion will include the seriousness of the possession in question, considerations of personal and public deterrence and of denunciation and issues of mitigation and rehabilitation of the particular case.

[21] The decision in *R v Plunkett* demonstrates that the sentence imposed in the present case cannot be said to be outside the sentencing discretion. A sentence of 18 months imprisonment suspended after three months was imposed on Plunkett, a 38 year old offender with no previous convictions. As in the present case, there was no commercial aspect to the possession. While a very large number of images was involved, none of the images included adults or depicted actual sexual activity. Further, the offender had pleaded to an ex-officio indictment and had undertaken psychological counselling prior to sentencing.

[22] *Daw*'s case, which was relied upon by both the applicant and respondent in support of their respective submissions, was a case where an appeal against a nine month term of imprisonment to be served by way of an intensive correction order was allowed and a two year probation order imposed in lieu of it. However, there are features which distinguish that case from the present case. The offending there, although involving the possession of a much greater number of images, only concerned two of the images of children engaged in sexual activity (oral intercourse) and unlike the applicant's case, the 23 year old offender, who also had no criminal history had in addition the benefit of youth and a plea to an ex-officio indictment.

[23] Given the nature of the offending in the present case, which involved the possession of images burnt onto a disk and therefore available in a lasting format and which included images of very young children the subject of serious sexual abuse, including penile penetration and oral intercourse, the applicant's lack of remorse and the unavailability of any moderation to take into account a plea or other cooperation with the administration of justice, I am not persuaded that the sentencing judge's discretion was so confined by s 9(2)(a)(ii) that the sentence imposed requiring that two months of the six month term of imprisonment be actually served was either contrary to principle or manifestly excessive.

[24] I would refuse the application for leave to appeal against sentence.