SUPREME COURT OF QUEENSLAND

CITATION:	*R v Riley* [2007] QCA 391
PARTIES:	**R** **v** **RILEY, William Edward** (applicant)
FILE NO/S:	CA No 279 of 2007 DC No 1833 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Orders delivered ex tempore on 2 November 2007 Reasons delivered on 16 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2007
JUDGES:	McMurdo P, Jerrard JA and Dutney J Judgment of the Court
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 – GENERALLY – where the applicant pleaded guilty to having knowingly possessed child exploitation material – where personal and public deterrence were emphasised at sentence – where rehabilitation was not given sufficient consideration – where the aspect of deterrence could have been sufficiently met by the imposition of a non-custodial sentence – whether the sentencing discretion miscarried *Child Protection (Offending Reporting) Act 2004* (Qld) *Criminal Code 1899* (Qld), s 207A, s 228D *Penalties and Sentences Act 1992* (Qld), s 9(2)(a) *R v Daw* [2006] QCA 386; CA No 195 of 2006, 5 October 2006, considered *R v Finch; ex parte Attorney-General (Queensland)* [2006] QCA 60; CA No 319 of 2005, 17 February 2006, considered *R v Plunkett* [2006] QCA 182; CA No 124 of 2006, 29 May 2006, considered *R v Richardson; ex parte Attorney-General (Queensland)* [2007] QCA 294; CA No 158 of 2007, 14 September 2007,

followed
R v Wharley [2007] QCA 295; CA No 190 of 2007, 14 September 2007, considered

COUNSEL: A W Moynihan SC for the appellant
R G Martin SC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director or Public Prosecutions (Queensland) for the respondent

[1] **THE COURT**: On 19 October 2007 Mr Riley pleaded guilty in the Brisbane District Court to two counts of having knowingly possessed child exploitation material on 2 July 2006. He was sentenced that same day on each count to six months imprisonment suspended after two months with an operational period of twelve months. Mr Riley applied for leave to appeal against that sentence. On 2 November 2007 this Court heard that application, gave leave to appeal, allowed the appeal and varied the sentence by suspending it immediately. The Court stated it would deliver its reasons later. These are the reasons for those orders.

[2] Mr Riley was 28 years old when he offended and 29 when sentenced. He had no criminal history. He was employed at the date of sentence and had been in that employment since January 2002. He occupied a senior role in the employing organisation and had a degree in Information Technology. He had worked in that field since graduating in 1997.

[3] The circumstances of the offences were as follows. On 2 July 2006 police executed a search warrant at Mr Riley's residence and located a laptop computer on a lounge room table and an IBM computer hard drive in a spare upstairs bedroom. The police seized both those items and examined them on 4 July 2006 and 21 November 2006. The prosecution informed the judge, without any challenge from Mr Riley's senior counsel, that that examination revealed 55 images and 21 videos containing child exploitation material.

[4] "Child exploitation material" is a term appearing in the *Criminal Code 1899* (Qld); and s 228D of that Code makes it an offence, carrying a maximum penalty of five years imprisonment, to knowingly possess child exploitation material. The term is defined in s 207A of the Code to mean:

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

[5] The prosecutor tendered to the learned sentencing judge a schedule describing the contents of those images and videos. The images on the laptop were described as being of females aged between 12 and 13 years old, usually naked, with some seven different girls being photographed. Sometimes one girl was engaged in a sexual act with a second or third girl. The videos on the laptop were of seven girls aged about 13 or 14 (one may have been over 16), mostly engaged in masturbation or fondling (or otherwise sexually dealing with) another girl. One depicted an apparently 13 or

14 year old girl engaged in vaginal and anal intercourse with an adult male, apparently consensual.

[6] The hard drive contained images of 12 girls, whose ages were described as between 11 and 13. One image depicted an adult male penetrating with his penis the vagina of a girl aged approximately 13 years. It was entitled:

> "Pedo Incest 13 Yr Girl Fucked by Daddy (pre-teen); incest kiddy suck) reel kiddymov pedo qwerty r@ygold underage child Lolita kiddy."

All other images would have satisfied the statutory definition of child exploitation material. The videos recorded in the IBM hard drive were described as recording three females, two of whom were estimated to be approximately 13 years old, engaged in masturbation. Two video files depicted the same footage of an underage girl having sexual intercourse with an adult male. One of these was entitled: "Dad Fucks his 2 Teen daughters. Pre-teen Kiddy Kiddie incest rape." Despite the title, the schedule records that the sexual intercourse was apparently consensual.

[7] The judge viewed a CD containing samples of the child exploitation material in closed court.

[8] Mr Riley told the police in an interview on 10 July 2006 that the images came from a website, or were downloaded during file sharing, and that he had seen some of the images. Most of the time he would look at an image before he downloaded it. The prosecuting counsel informed the court that the images were saved on either the laptop or in the IBM hard drive, in folders, located in the "My Documents" directory of the computer, and were accordingly in a lasting format. Mr Riley had downloaded the videos onto either the laptop or the IBM hard drive, in folders labelled "Shared Folders".

[9] Counsel for the prosecution made the following submissions to the learned sentencing judge. Although there had been a committal hearing, the matter was never listed for trial. The guilty plea was timely. Because the material did demonstrate genuine sexual abuse of a child by an adult, the material recorded approached the worst kind. Emphasising this Court's recent decision in *R v Wharley*,[1] the prosecutor submitted a head sentence of 12 months imprisonment should be imposed, adding that it would be open to order that Mr Riley serve some of that period in actual custody.

[10] In *Wharley* this Court dismissed an application for leave to appeal against a sentence of six months imprisonment suspended after two months with an operational period of two years imposed after a trial. Wharley was convicted of an offence against s 228D *Criminal Code*. He had in his possession 43 pornographic images of children which had been burned to a disk, the images being of children whose ages were estimated at between six and 15 years. There were 28 images of children posing naked or in provocative poses; two 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 penis; and three other images, including one of a child holding an adult male's erect penis. Wharley was 43 years old when sentenced and had no prior convictions. He had been fully employed since age 15. The

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1 [2007] QCA 295; CA No 190 of 2007, 14 September 2007.

sentencing judge found no evidence of Wharley's remorse and he did not have the benefit of a plea of guilty or of having cooperated with the administration of justice.

[11] The principal judgment in *Wharley* was given by Philippides J. Her Honour made the following observations. There was no question that the sentencing principle in s 9(2)(a) *Penalties and Sentences Act 1992* (Qld) applied to Wharley so that a sentencing court must have regard to the principles that imprisonment is to be imposed only as a last resort and that a sentence that allows an offender to stay in the community is preferable.[2] *R v C*[3] and *R v Hamilton*[4] recognise that short periods of imprisonment are undesirable. The sentencing judge was correct in observing that Wharley's offence could not be characterised as a victimless crime. Given the sentencing judge's findings of lack of remorse, the judge was correct in placing some emphasis on the importance of deterrence and denunciation. It was conceded by Wharley's counsel that a term of imprisonment, either wholly suspended or served by way of an intensive correction order, was within range. This concession was borne out by a schedule of comparable decisions and by this Court's decision in *R v Daw*.[5] 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, personal and public deterrence, denunciation and issues relevant to mitigation, including rehabilitation.

[12] Mr Riley's counsel submitted that either a very substantial fine or a fully-suspended head sentence of up to six months imprisonment should be imposed, relying on *Daw*.

[13] In *Daw*, this Court allowed an appeal against a sentence of nine months imprisonment, originally ordered to be served by way of an intensive correction order, and ordered instead that Mr Daw be admitted to probation for two years. Daw pleaded guilty to an ex-officio indictment charging him under s 228D *Criminal Code* with the offence of knowingly possessing child exploitation material. He was 23 when sentenced and had no prior convictions. His offending conduct was committed in April 2004 when he downloaded 58 pornographic images from a website that had been established by the Federal Bureau of Investigation of the United States of America. He did not pay for the download, but had requested it. To access the site, it was necessary for the person doing so to put up a pornographic image, so that electronic identifiers could trace the source of the request. In August 2005 the Australian Federal Police conducted a search of Mr Daw's residence and seized his computer. The 58 images were found on its hard drive. Those images depicted young female children in various poses while naked or semi-naked, and two of those showed those children performing oral sex with an adult male. Mr Daw had not stored or catalogued the images, and it was said on his behalf that he had personally been disgusted by them and had simply forgotten to delete them.

[14] The judgment of the Court in *Daw* was delivered by Jones J who made the following observations. The gravity of Daw's offending was at the lowest level for that variety of offence. It was unlikely that he would offend again. Of greater significance than general deterrence was the impact of any penalty upon his

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2 The other members of the Court agreed with Philippides J (Jerrard and Holmes JJA) in this respect.
3 [1996] QCA 234; CA No 160 of 1996, 19 July 1996.
4 [2000] QCA 286; CA No 75 of 2000, 5 July 2000.
5 [2006] QCA 386; CA No 195 of 2006, 5 October 2006.

rehabilitation which would be better enhanced by a reasonably lengthy period of probation. The respondent's schedule of cases showed that sentences of imprisonment, wholly or partially suspended, or to be served by way of an intensive correction order, had been imposed. Jones J reviewed a number of matters in which District Court judges had ordered imprisonment which was either wholly suspended or to be served by way of an intensive correction order, including *R v Davies*,[6] *R v Clifford*[7] and *R v Diaz*.[8]

[15] Mr Moynihan SC on behalf of Mr Riley in this Court submitted that the primary judge did not give proper consideration to the principles set out in s 9(2)(a) *Penalties and Sentence Act* and to the principle that non-custodial deterrent sentences for offences of this type can be imposed: *R v Richardson; ex parte Attorney-General (Queensland)*.[9] Mr Moynihan emphasised that the downloaded images were not organised or indexed within a directory and none fell within the worst category of material. Mr Riley neither created nor acquired the material commercially and nor did he distribute it. While some images were stored on the computer hard drive, they were not burnt to disk. There were no images of children younger than 10 years. The images did not include patent force or brutality. Mr Riley co-operated with the authorities, entered an early plea of guilty and had demonstrated remorse. Accordingly, Mr Moynihan submitted that the learned sentencing judge had erred in concluding that: "this is a matter in which personal deterrence and general deterrence, are in my view, more than ordinarily important"; and in then imposing a custodial sentence. The judge instead should have recognised that deterrence in this case could be achieved with a sentence of fully suspended imprisonment. This sentence would have complied with s 9(2)(a) and balanced both the deterrent and rehabilitative aspects of sentencing. He urged this Court to set aside the sentence and to resentence Mr Riley by immediately suspending his imprisonment.

[16] The cases of *Daw*, *Wharley* and *Richardson* demonstrate that the sentence imposed was not manifestly excessive. There is, however, some force in Mr Moynihan's assertions of judicial error. In *R v Finch; ex parte Attorney-General (Queensland)*[10] this Court determined that offences under s 26(3) *Classification of Computer Games and Images Act 1995* (Qld) were not within the scope of operation of s 9(5) *Penalties and Sentences Act*.[11] It followed that s 9(2)(a) *Penalties and Sentences Act* required a sentencing court to have regard to the principles that a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable. In *R v Plunkett*[12] the Chief Justice, with whom Williams and Holmes JJA agreed on this point, applied that reasoning to the like offence of knowingly possessing child exploitation material under s 228D *Criminal Code*. As noted earlier, *Wharley* also followed that approach. This Court is bound by the approach taken in those cases unless persuaded that this weighty and consistent body of precedent has been clearly wrongly decided. Mr Martin SC for the respondent did not seriously contend that this Court should depart from that approach although he left open the prospect of

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6 Unreported, Ryrie DCJ, DC No 217 of 2006, 9 March 2006.
7 Unreported, Botting DCJ, DC No 833 of 2006, 3 May 2006.
8 Unreported, Wylie DCJ, DC No 1462 of 2006, 25 May 2006.
9 [2007] QCA 294; CA No 158 of 2007, 14 September 2007.
10 [2006] QCA 60; CA No 319 of 2005, 17 February 2006.
11 Above, [19]-[20].
12 [2006] QCA 182; CA No 124 of 2006, 29 May 2006.

arguing the question in the future. For the moment we should proceed on the basis that s 9(2)(a) applied to the present case.

[17] The learned sentencing judge did not refer to s 9(2)(a) in his sentencing remarks. His Honour correctly referred to the importance of personal and general deterrence when sentencing for offences of this kind. *Richardson* emphasised that the sentencing principles requiring personal and public deterrence for offences against s 228D could sometimes be met without requiring a period of actual imprisonment to be served[13] because of the element of public shaming and the onerous eight year reporting requirements under the *Child Protection (Offending Reporting) Act 2004* (Qld). Although his Honour was referred to *Richardson* as a comparable matter, the transcript of the sentencing proceedings does not suggest his Honour was cognisant of this important aspect of that case.

[18] The maximum penalty for each offence was five years imprisonment. Here the offender was relatively young, had no previous convictions, had an excellent employment record and had, in the scheme of things, relatively few images in his possession. Although they were unquestionably depraved paedophilic images, unlike in *Richardson* they were not patently brutal. There was no suggestion of dissemination of the material to others. The learned primary judge proceeded on the basis that the images had not been purchased so that the aggravating aspect of commerciality was absent. Mr Riley also pleaded guilty in a timely fashion. Rehabilitation was in these circumstances an important consideration. Deterrence is always an important consideration when sentencing for offences of this kind. The evil and exploitive industry of child pornography is fed by those like Mr Riley who download it from the internet. Others who might be similarly tempted should know they are likely to be detected, charged with a criminal offence, have a conviction recorded with all that ensues from it, be publicly shamed and risk being sentenced to a period of actual imprisonment, even if first offenders. In addition, any employment involving children and young people will be closed to them and they will have onerous reporting conditions for many years. But in the light of s 9(2)(a) *Penalties and Sentences Act* the primary judge erred in not considering whether the aspect of deterrence could be satisfactorily met in the present case by the imposition of a non-custodial sentence as in *Richardson*. As a result, the sentencing discretion miscarried and this Court was required to re-exercise it. Mr Riley had served 15 days actual imprisonment at the date of the hearing of this application. In the circumstances, the appropriate sentence on each count was six months imprisonment suspended forthwith with an operational period of 12 months.

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13 *Richardson* [4], [41]-[42].