SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sykes* [2009] QCA 267
PARTIES:	**R** **v** **SYKES, Trent Wesley** (applicant)
FILE NO/S:	CA No 157 of 2009 DC No 191 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	11 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	14 August 2009
JUDGES:	Holmes JA, Mullins and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – appeal by convicted persons – when refused – particular offences – other offences – where applicant convicted of one count of using a carriage service to access child pornography material and one count of possession of child exploitation material – where applicant sentenced to 15 months' imprisonment to be released after serving six months upon entering into a recognizance subject to conditions in relation to the accessing offence – where applicant sentenced to 12 months' imprisonment to be suspended after serving a period of four months' imprisonment with an operational period of two years in relation to the possession offence – where applicant accessed a modest number of images but on more than one occasion – where largest proportion of images were category 1 images but where some were of extremely young children – where applicant made an early plea of guilty, had a good prior work history and no prior criminal history – where minimal evidence before sentencing judge of applicant's prospects of rehabilitation – whether the sentences requiring six months in actual custody were outside the range that could be imposed in the sound exercise of the sentencing discretion – whether the sentences were manifestly excessive

Crimes Act 1914 (Cth), s 17A
Criminal Code (Cth), s 474.19(1)
Criminal Code (Qld), s 228D
Penalties and Sentences Act 1992 (Qld), s 9(6A), s 9(6B)

R v Gent (2005) 162 A Crim R 29; [2005] NSWCCA 370, considered
R v Gordon; ex parte Cth DPP [2009] QCA 209, considered
R v Jones (1999) 108 A Crim R 50; [1999] WASCA 24, considered
R v Oliver [2003] 1 Cr App R 28, considered
R v Mara [2009] QCA 208, cited
R v Richardson; ex parte A-G (Qld) (2007) 175 A Crim R 244; [2007] QCA 294, cited
R v Salsone; ex parte A-G (Qld) [2008] QCA 220, cited
R v Verburgt [2009] QCA 33, considered

COUNSEL: C L Morgan for the applicant
G R Rice for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Mullins J and with the order her Honour proposes.

[2] **MULLINS J**: The applicant pleaded guilty on 11 June 2009 to two counts on an *ex officio* indictment. Count 1 was the offence of using a carriage service between 5 August 2007 and 16 May 2008 to access child pornography material and was brought under s 474.19(1) of the *Criminal Code* (Cth). The applicant was sentenced for that offence to imprisonment for a period of 15 months to be released after serving six months of that sentence upon entering into a recognizance in the sum of $2,000, on condition that the applicant be of good behaviour for a period of two years and be subject to the supervision of a probation officer for a period of two years. The other count was the offence of knowingly possessing child exploitation material (CEM) brought under s 228D of the *Criminal Code* (Qld). For that offence the applicant was sentenced to imprisonment for a period of 12 months to be suspended after serving a period of four months' imprisonment, with an operational period of two years.

[3] The applicant applies for leave to appeal against the sentences on the basis that they are manifestly excessive.

Circumstances of the offences

[4] In August 2007 a Croatian astronomy website was "hacked" and used to store covertly images of child pornography. Access to that website could be gained via links from other child pornography websites. An international investigation revealed that an IP address registered to the applicant's father-in-law was recorded as having downloaded 31 pornographic images from the Croatian website on 6 August 2007. The matter was referred to Australian police.

[5] On 16 May 2008 the police executed a search warrant at the applicant's father-in-law's address. Contact was made with the applicant who attended the address and he admitted to having used his father-in-law's computer to access child pornography by using search terms such as "kids" and "porn".

[6] Police found 89 images of CEM in a temporary folder on the computer which were analysed as 42 category 1 images, 11 category 2 images, 16 category 3 images and 20 category 4 images. The most recent creation date applying to the images located in the temporary folder was 11 May 2008. One of the category 4 images depicted a baby aged between three months and nine months performing oral sex on an adult male. The categorisation of the images is based on that endorsed in *R v Oliver* [2003] 1 Cr App R 28 where category 1 is at the less serious end of the scale of seriousness of images and category 5 is at the more serious end. Category 4 images involve sexual activities between adults and children that include penetration.

[7] Police then attended the applicant's address where they located an external hard drive that contained 20 images, of which 15 were in category 1, one was in category 2 and four were in category 3. The earliest creation date applying to these images was October 2004.

[8] The images that were the subject of the accessing offence were the 89 images in the temporary folder on the computer and the 31 images that were downloaded on 6 August 2007 which made a total of 120 images. The possession offence related to the 20 images on the external hard drive.

The applicant's antecedents

[9] The applicant was 28 years old when sentenced. He had no prior criminal history. He was married at the time of the offending, but his marriage subsequently failed. He had an excellent work history, but as a result of being charged and the resultant publicity, he had to relocate, lost two jobs and suffered public humiliation.

[10] After being charged, the applicant consulted a psychologist on a couple of occasions and was referred to a counsellor whose letter was tendered at the sentence which noted that the applicant had presented for interpersonal counselling on three occasions between June and August 2008 when he asked for assistance in understanding his thoughts which resulted in his offending behaviour and ways to manage that behaviour. The letter did not disclose the applicant's response to the counselling.

Submissions at the sentence

[11] The prosecutor tendered at the sentence hearing copies of some of the worst images found in the applicant's possession. The prosecutor emphasised the need for general deterrence and denunciation. The prosecutor submitted that the appropriate sentence for the accessing offence was 15 months' imprisonment with release being ordered after the applicant had served five months of that sentence and with the release placing the applicant on a term of probation. In relation to the possession offence, the submission was made that the applicant should be sentenced to a sentence of imprisonment equivalent to the time required to be served under the sentence for the Commonwealth offence.

[12] The applicant's counsel who appeared for him at the sentence had prepared written submissions on tariff and sentence that were handed to the learned sentencing judge,

but were not marked as an exhibit and were therefore not transmitted to the Court of Appeal, when the application for leave to appeal against sentence was filed. It is apparent from the oral submissions at sentence that they were made in conjunction with the content of the written submissions. It is important that any written submissions tendered at a sentence hearing should be preserved, so that there is a complete record of the submissions put before the sentencing judge. The marking of written submissions as an exhibit facilitates this objective.

[13] The applicant's counsel summarised the aspects of mitigation as plea of guilty to an *ex officio* indictment with full cooperation, good character, absence of any criminal history, excellent work history, imprisonment as last resort as the operative sentencing principle, counselling sought and obtained, lower end of offending and summary punishment of great significance (loss of marriage, loss of reputation, relocation, loss of two jobs, public humiliation, sex offender register).

[14] That applicant's counsel on sentence submitted that the applicant should be sentenced for the accessing offence to a term of 12 months' imprisonment to be wholly suspended. These submissions were focused on achieving sentences that did not require time spent in actual custody. The applicant's counsel suggested that if the sentencing judge were not persuaded by the submission in support of a wholly suspended sentence, the sentences would achieve the requisite punishment if the applicant were also sentenced to an intensive correction order for count 2.

[15] Both the prosecutor and the applicant's counsel referred the sentencing judge to a number of sentences imposed by District Court judges throughout Australia for comparable offences, some of which required actual imprisonment and some of which did not.

Sentencing remarks

[16] The sentencing judge referred to the respective statutory maximum sentences of imprisonment of 10 years and five years for the accessing offence and the possession offence. The sentencing judge described the offences in these terms:

> "The offences involve the exploitation and degradation of children, including babies as young as three months old, in respect of the Commonwealth offence. It is as inconceivable as it is abhorrent to imagine what sick and evil mind could derive some warped, sadistic pleasure from viewing such images. You and your ilk deserve only the contempt and condemnation of our society, together with the full impact of the law, not only as a punishment, but to deter others from such vile conduct."

[17] The sentencing judge noted that under s 17A(1) of the *Crimes Act* 1914 (Cth) a term of imprisonment could be imposed only where no other sentence was appropriate, but that the imposition of a term of imprisonment as a last resort no longer applies to an offence under s 228D of the *Criminal Code* (Qld), but consideration must be given to the factors set out in s 9(6B) of the *Penalties and Sentences Act* 1992 (Qld). The sentencing judge expressly noted the plea of guilty at an early stage to an *ex officio* indictment, the applicant's cooperation thereby with the administration of justice, the report that was tendered from the counsellor and the submissions of the applicant's counsel. The sentencing judge had also taken into account "the gravamen of the offending; the ages of the children exploited and the fact that without people like you there would be no currency in such filth and degradation."

[18] The sentencing judge's explanation for imposing a sentence of imprisonment for the accessing offence and the conclusion that no other sentence was appropriate for that offence in the circumstances was that:

> "…the images depicted involved children as young as three months and a sentence must be imposed which will not only punish, but which may act as some general deterrence to the community from engaging in such criminal conduct and where the sanctity of the welfare of the children must be preserved."

Whether sentences are manifestly excessive

[19] The statement that was made by Kennedy J in *R v Jones* (1999) 108 A Crim R 50, 52 [9] is repeated in many of the sentences and appeal decisions involving child pornography, as it highlights why deterrence is such an important factor for this type of offending:

> "The production of child pornography for dissemination involves the exploitation and corruption of children who are incapable of protecting themselves. The collection of such material is likely to encourage those who are actively involved in corrupting the children involved in the sexual activities depicted and who recruit and use those children for the purpose of recording and distributing the results. The offence of possessing child pornography cannot be characterised as a victimless crime. The children, in the end, are the victims. In my opinion, a sentence of immediate imprisonment was called for."

[20] In *R v Gent* (2005) 162 A Crim R 29, 49 [99], Johnson J (with whom the other members of the court agreed) listed factors that bear upon the objective seriousness of an offence of possession or importation of child pornography including:

> "(a) the nature and content of the pornographic material – including the age of the children and the gravity of the sexual activity portrayed;
>
> (b) the number of images or items of material possessed by the offender;
>
> (c) whether the possession or importation is for the purpose of sale or further distribution;
>
> (d) whether the offender will profit from the offence."

[21] It was expressly acknowledged in *R v Mara* [2009] QCA 208 at [21] that those factors were also apt in sentencing for the offences committed by the offender in that matter which included accessing offences.

[22] As was recognized by the submissions made by the applicant's counsel before the sentencing judge, it was clearly open for the sentencing judge to conclude that, in respect of the accessing offence, no other sentence but imprisonment was appropriate in the circumstances for that offending by the applicant. The real difference between the approach taken by the prosecution and the applicant before the sentencing judge was whether the offending was such that all the circumstances

required a sentence incorporating a component of actual custody. The issue on this application, however, is different. It is a question of whether the sentences that were imposed that required six months in actual custody were outside the range of sentences that could have been imposed in the sound exercise of the sentencing discretion.

[23] One basis on which Ms Morgan of Counsel for the applicant argued that the sentencing discretion had miscarried was that the sentencing judge placed excessive weight on the image that involved a baby as young as three months. Apart from the category 4 image involving the baby as young as three months, there was express reference made in the course of submissions to the sentencing judge to a category 3 image involving a female infant aged between two years and four years and another category 4 image depicting a female infant aged between two years and four years. The sentencing judge used the instance of the images involving young children to convey the gravamen of the offending and why it was abhorrent to the community. In the context of sentencing remarks that also carefully enumerated the factors in favour of the applicant for the purpose of the sentencing, it does not follow that the several references by the sentencing judge to the image of the child as young as three months was given undue weight.

[24] The decision in *R v Gordon; ex parte Cth DPP* [2009] QCA 209 (*Gordon*) confirms that a sentence of imprisonment which did not involve a period of actual custody was not precluded for offences of the type and seriousness for which the applicant was sentenced. The offender in *Gordon* was sentenced to 12 months' imprisonment with immediate release upon a recognizance in the sum of $100, conditioned on good behaviour for three years in respect of two accessing offences and sentenced to 12 months' imprisonment wholly suspended for an operational period of three years in respect of one possession of CEM. *Gordon* was concerned with the Commonwealth Director of Public Prosecutions' application for extension of time within which to appeal against the sentence. The delay was six days. The DPP failed to show that there was good reason to grant an extension. The offending in *Gordon* was of a more serious kind than in the applicant's case. Keane JA (with whom the other members of the court agreed observed at [43]):

> "It may be accepted that the 'paramount' need for deterrence requires that a sentence of imprisonment be imposed for offending of the present kind, and even that such a sentence would usually involve a period of actual custody. Reference may be made here to the decision of the Court of Criminal Appeal of the Supreme Court of New South Wales in *James v The Queen* [2009] NSWCCA 62 at [1], [7]-[8] and [11]. But this Court has recognised that strong mitigating factors of the kind which are present in this case may warrant the immediate release of an offender on his own recognisance Cf *R v Salsone; ex parte A-G (Qld)* [2008] QCA 220 at [31]. It may be noted that Ms Abraham QC did not refer this Court to any decision of the High Court or of an intermediate Court of Appeal in Australia which excludes a non-custodial sentence of imprisonment from the range of punishments appropriate to the contraventions of the Commonwealth Code." (*footnotes inserted*)

[25] The DPP was unsuccessful in *Gordon* in obtaining the extension of time to appeal against the sentence, because there was no satisfactory explanation for the DPP's

delay in filing the appeal and it was not a case where there was such a disparity between the sentence which was imposed and the sentence which might be imposed on appeal that a decision not to allow the offender to be re-sentenced would perpetuate a serious injustice or to undermine public confidence in the administration of criminal justice (*Gordon* at [39]-[40] and [44]).

[26] In *R v Verburgt* [2009] QCA 33 (*Verburgt*) the offender was sentenced to 12 months' imprisonment, with release after three months on recognizance, for the Commonwealth accessing offence in respect of downloading four images of CEM from a Croatian website and a sentence of 12 months' imprisonment with an order for release on parole after four months for an offence under s 228D of the *Criminal Code* (Qld) of knowingly possessing CEM that related to six images. The offender was 39 years old, had suffered learning difficulties and was subject to panic attacks and depression. He had no prior criminal history and had cooperated with police when they searched his house. He also pleaded guilty to an *ex officio* indictment. Errors made by the sentencing judge in failing to advert to s 17A of the *Crimes Act* 1914 (Cth) in respect of the accessing offence and in fixing a parole release date in respect of the possession offence (which was not permitted because the offender was convicted of a sexual offence) required the offender to be re-sentenced. Because the offender had already spent in excess of two months in custody at the time his application for leave to appeal against sentence was heard, he was re-sentenced for the possession charge to six months' imprisonment, suspended forthwith (effectively after two months) with an operational period of two years. In respect of the accessing offence, he was released upon his giving security by recognizance to be of good behaviour for a period of two years. It was emphasised in each of the judgments in *Verburgt* (at pp 6, 7 and 8) that s 9(6A) and s 9(6B) of the *Penalties and Sentences Act* 1992 (Qld) did not mean that any person convicted of an offence under s 228D of the *Criminal Code* (Qld) must be sentenced to actual imprisonment.

[27] Because of the small number of images involved in *Verburgt*, it was a less serious instance of offending than that of the applicant.

[28] The applicant had accessed a modest number of images only, but that occurred on more then one occasion over a period of some months. The possession offence involved only a small number of images. Although the largest proportion of the images involved in the applicant's offending were category 1 images, some of those images were of extremely young children. As Mr Rice of Counsel for the respondent pointed out, images in all categories involve the exploitation and degradation of children and deterrence remains the paramount consideration for the sentencing.

[29] The applicant relied on many factors in his favour that were also present in many of the comparable decisions: early plea of guilty to the offences on an *ex officio* indictment (indicative of both remorse and cooperation with the administration of justice), a good prior work history and no prior criminal history. There was minimal evidence before the sentencing judge, however, of the applicant's prospects of rehabilitation. The applicant had undergone limited counselling after being charged and the letter from the counsellor did not offer any insight into the benefits the applicant gained from that counselling or his future prospect for successful rehabilitation: cf to *R v Richardson; ex parte A-G* (Qld) (2007) 175 A Crim R 244, 246 [3], 249 [29] and *R v Salsone; ex parte A-G* (Qld) [2008] QCA 220 at [26].

[30] On the material that was before the sentencing judge, it was open to the sentencing judge to require the applicant to serve some of his sentences of imprisonment in actual custody. The sentences that were imposed were not beyond the sound exercise of the sentencing discretion.

[31] An additional observation should be made, however, about the disparity between the actual custody required under the sentence for the accessing offence and the actual custody required to be served for the possession offence, before that sentence was suspended.

[32] The submission of the prosecutor before the sentencing judge was practical in proposing that the proportion of the sentence imposed for the accessing offence to be served in actual custody then determine the term of imprisonment to be imposed for the less serious possession offence. Under the sentences that were imposed, the applicant will serve six months' imprisonment in actual custody. Practical effect will therefore not be given to the suspension of the sentence imposed for the possession offence after four months. This is not an error in the sentencing as such, but an anomaly that could have easily been avoided.

Order

[33] It follows that the application for leave to appeal against sentence should be dismissed.

[34] **PHILIPPIDES J**: I have had the advantage of reading the reasons for judgment of Mullins J. I agree with the reasons of her Honour and with the proposed order.