SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hickey* [2011] QCA 385
PARTIES:	**R** **v** **HICKEY, Darryl James** (applicant)
FILE NO/S:	CA No 257 of 2011 DC No 66 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2011
JUDGES:	Margaret McMurdo P, Chesterman JA and Mullins J 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 refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to possession child exploitation material – where applicant in possession of 552 videos of child exploitation material of which almost 88 per cent were in the worst categories showing child/adult penetration and sadism/bestiality – where applicant was sentenced to 18 months' imprisonment suspended after six months for an operational period of two years – whether sentence was manifestly excessive *Criminal Code* 1899 (Qld), s 228D *Penalties and Sentences Act* 1992 (Qld), s 9(6A), s 9(6B) *R v MBM* [2011] QCA 100, considered *R v Plunkett* [2006] QCA 182, considered *R v Vantoosten* [2009] QCA 54, considered *R v Verburgt* [2009] QCA 33, considered
COUNSEL:	D R Wilson for the applicant S P Vasta for the respondent

SOLICITORS: Russo Mahon Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The sentence imposed on the applicant, a mature offender who had pleaded guilty and had no prior criminal history, was a heavy one but I am not persuaded it was manifestly excessive. I agree with Mullins J's reasons for refusing the application for leave to appeal against sentence.

[2] **CHESTERMAN JA:** I agree with Mullins J.

[3] **MULLINS J:** The applicant pleaded guilty to one count of possessing child exploitation material (CEM) in breach of s 228D of the *Criminal Code* 1899 (Qld) and was sentenced on 19 August 2011 by the learned District Court judge to imprisonment for a period of 18 months suspended after six months for an operational period of two years. He applies for leave to appeal against the sentence on the ground that it was manifestly excessive.

The circumstances of the offence

[4] A search warrant was executed at the applicant's premises on 2 September 2009. The police seized 14 hard drives which all contained large quantities of adult pornography, but on nine of those hard drives there were videos classified as CEM. There was a total number of 552 videos of CEM located.

[5] For the purpose of the sentence the CEM was categorised according to categories developed from *R v Oliver* [2003] 1 Cr App R 28, as expanded by Queensland Police to include category 6 involving animated or virtual characters. Over 80 per cent of the videos fell within the worst categories in that 378 videos (or 68.5 per cent) were in category 4 (child/adult penetration) and 67 videos (or 12.2 per cent) were in category 5 (sadism/bestiality). The CEM was moving images, rather than still images. Apart from the categorisation of the videos and the identification of the dates of the contents of each of the hard drives containing CEM, there was no further material put before the sentencing judge as to the length or nature of the videos.

[6] The applicant cooperated with the police investigation and was interviewed by police on 26 September 2009 when he admitted to having an obsession or compulsion about downloading pornography and that he had downloaded large quantities of pornography through file-sharing programs, without necessarily knowing that there was CEM included in the downloads. He had an enormous collection of pornography of which the CEM was only about one per cent. He admitted that he looked at the material at a subsequent time and was aware that CEM had been downloaded and that was not deleted by him. There was no commercial element, as the applicant did not purchase any of the images that he possessed.

[7] There was a full hand up committal. The indictment was presented on 27 January 2011 and a plea of guilty was entered on 1 April 2011, when the matter was then listed for sentence.

The applicant's antecedents

[8] The applicant was 49 years old at the time he committed the offence and was 51 years old when he was sentenced. He had a good employment history and no prior criminal history.

The sentencing

[9] The prosecutor before the sentencing judge submitted that the appropriate range was imprisonment for 12 months to 18 months, as most of the videos fell within the worst categories of CEM. The submission was made that general deterrence and denunciation were the most important considerations for an offence of the nature committed by the applicant.

[10] Mr Douglas Wilson of counsel who appeared both before the sentencing judge and on this application accepted before the sentencing judge that the range of head sentence submitted by the prosecutor was correct, but submitted that it was also within range to wholly suspend the sentence of imprisonment that was imposed.

[11] In the sentencing remarks, the sentencing judge noted the maximum term of imprisonment of five years that applied to the offence and referred to the categorisation of the 552 videos containing CEM and that the overwhelming number of them were in categories 4 and 5. The sentencing judge noted the effect of the 2008 amendment to the *Penalties and Sentences Act* 1992 (Qld) (the Act) that inserted s 9(6A) and s 9(6B) that had the effect of removing the application of the principle that a sentence of imprisonment should only be imposed as a last resort to an offence under s 228D of the *Code* and specifying the factors that are primarily relevant to sentencing for such an offence. The sentencing judge referred to the following matters:

> "I take into account your plea of guilty to the offence; your cooperation thereby with the administration of justice; the fact that you have no criminal history, and I take into account particularly what your counsel has said, but I must also take into account the gravamen of the offending to which I have referred and the fact that without people like you there would be no currency in such filth, degradation and the exploitation of innocent children."

Comparable authorities

[12] A sentence of 18 months' imprisonment suspended after three months for an operational period of 18 months was not disturbed in *R v Plunkett* [2006] QCA 182. The offender had downloaded 16,685 images of girls aged 10 to 16 years old posing naked or provocatively, but there were no images involving adults or other sexual acts. Although there were a great number of images, they were in the least serious categories.

[13] The offender in *R v Vantoosten* [2009] QCA 54 pleaded guilty to two counts of possessing CEM and was sentenced to 12 months' imprisonment on each account with a parole eligibility date set after four months. The first count related to CEM found on the offender's computer hard drive and on four compact disks. On the hard drive there were three child exploitation picture files and two child exploitation text files. The images were of girls around six to nine years old. Count 2 related to five compact disks that contained 33 child exploitation video files. Muir JA (with whom the other members of the court agreed) stated at [19]:

> "In this case it is sufficient to note that the quantity of offending material was substantial. In my view the quality of material rather than its quantity will often be more determinative of the gravity of the offending conduct. At least as a general proposition, the greater the cruelty, degradation and corruption depicted and the more the material offends against community values, the more reprehensible the offending conduct."

The sentencing judge had noted that some of the images depicted torture, sadism, masochism or bestiality. The sentence was not disturbed.

[14] *R v Verburgt* [2009] QCA 33 was a much less serious example of the offence, because so few images were involved. The offender was sentenced to 12 months' imprisonment with a release after three months on recognizance for the Commonwealth offence of using a carriage service to access child pornography material and a sentence of 12 months' imprisonment with a fixed parole date after four months for an offence under s 228D of the *Code* of knowingly possessing CEM. The first offence related to the downloading of four images that were CEM from a Croatian website and the State offence related to six other images that were still held on the computer. The offender was 39 years old with no criminal history. As a parole eligibility date should have been fixed rather than a parole release date, the offender had to be re-sentenced by the Court of Appeal for the State offence. The sentencing judge had failed to refer to s 17A of the *Crimes Act* 1914 (Cth) and the State offence was committed before the commencement of the 2008 amendment to the Act. Because of the errors in both sentences and the fact that the offender had spent in excess of two months in custody before the appeal was heard, the sentences were set aside and on the State offence the offender was sentenced to six months' imprisonment suspended forthwith with an operational period of two years.

[15] The offender in *R v MBM* [2011] QCA 100 pleaded guilty to possessing CEM and making CEM. The latter is a more serious offence and the sentence of two years' imprisonment to be suspended after eight months with an operational period of two and a half years was not disturbed. The sentence for possessing CEM was reduced to 12 months' imprisonment to be suspended after serving three months with an operational period of two years. There were fewer images involved for that offender than for the applicant and overall the categorisation of the images was not as serious as for the applicant. There were 17 individual category 4 images of children aged three to five years. There were 139 category 6 images involving childlike cartoon characters and an unspecified number of movies which from their description were in category 4, but not category 5.

Whether sentence is manifestly excessive

[16] Care has to be taken when considering the comparable authorities, because of the effect of the 2008 amendment to the Act on the approach to the imposition of a sentence of imprisonment and the designation of relevant factors for sentencing for this type of offence.

[17] On the hearing of this application Mr Wilson of counsel resiled from the submissions that he had made before the sentencing judge and submitted that the head sentence should have been in the range of nine months to 12 months.

[18] It is not unusual for a mature offender who has pleaded guilty to possessing CEM to have a good work history and no prior criminal history. The fact that the applicant's

CEM was a small fraction only of his total pornography collection is immaterial to the commission of the offence of possession of CEM.

[19] The quality of the CEM in the sense of the seriousness of the categorisation of the images is relevant to determining the applicant's criminality for the purpose of this offence. That justified the range of head sentence that was put before the sentencing judge of imprisonment between 12 months and 18 months. Although the sentencing judge opted for the higher end of the range, the head sentence was not outside the range.

[20] In the circumstances, the sentencing judge's decision to require some part of the sentence of imprisonment to be served was not outside the sound exercise of the sentencing discretion. Once the conclusion is reached that it was within range to require the applicant to serve some part of the sentence in custody, it is not possible to conclude that the requirement to serve one-third of the sentence was manifestly excessive.

Order

[21] The following order should be made:
Application for leave to appeal against sentence refused.