SUPREME COURT OF QUEENSLAND

CITATION:	*R v Engeln* [2014] QCA 313
PARTIES:	**R** **v** **ENGELN, Daniel Arthur** (applicant)
FILE NO/S:	CA No 235 of 2014 DC No 267 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	16 October 2014
JUDGES:	Fraser JA and Mullins and Henry 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 refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to six Commonwealth sex offences involving the use of a carriage service and one State offence of knowingly possessing child exploitation material – where the applicant was sentenced to three years imprisonment with release after nine months – where the applicant appeals on the basis the sentencing judge erred by failing to properly determine the applicant's culpability for the Commonwealth offences, failing to comply with *Crimes Act* 1914 (Cth) ss 16 and 17 and *Penalties and Sentences Act* 1992 (Qld) ss 9 and 13 – where the applicant seeks reduction of sentence – whether there was inadequate discounting of the sentence having regard to the applicant's remorse and pleas of guilty – whether the sentence was manifestly excessive *Crimes Act* 1914 (Cth), s 16A, s 17A *Criminal Code* 1995 (Cth), s, 474.26, s 474.27 *Criminal Code* 1899 (Qld), s 228D *Penalties and Sentences Act* 1992 (Qld), s 9, s 13

Barbaro v The Queen; Zirilli v The Queen (2014) 88 ALJR 372; (2014) 305 ALR 323; [2014] HCA 2, cited
Cameron v The Queen (2002) 209 CLR 339; [2002] HCA 6, applied
Director of Public Prosecutions (Cth) v Hizhnikov (2008) 192 A Crim R 69; [2008] VSCA 269, distinguished
Matthews v R; Vu v R; Hashmi v R [2014] VSCA 291, applied
R v Fuller [2010] NSWCCA 192, distinguished
R v Gajjar (2008) 192 A Crim R 76; [2008] VSCA 268, considered
R v Gilles; Ex parte Attorney-General [2002] 1 Qd R 404; [2000] QCA 503, applied
R v Hickey [2011] QCA 385, applied
R v Nagy [2004] 1 Qd R 63, [2003] QCA 175, applied
R v Smith [2010] QCA 220, applied
R v Sykes [2009] QCA 267, applied
R v Verburgt [2009] QCA 33, applied
Rampley v R [2010] NSWCCA 293, considered
State of Western Australia v Collier (2007) 178 A Crim R 310; [2007] WASCA 250, applied

COUNSEL: A Boe for the applicant
M J Copley for the respondent

SOLICITORS: Benjamin & Leonardo Criminal Defence Lawyers for the applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Henry J and the order proposed by his Honour.

[2] **MULLINS J:** I agree with Henry J.

[3] **HENRY J:** The applicant seeks leave to appeal sentences imposed after his pleas of guilty to a District Court indictment charging him with six Commonwealth sex offences involving the use of a carriage service and one State offence of knowingly possessing child exploitation material.

[4] The practical aim of the application is to seek a reduction of the effective sentence of three years imprisonment with release after nine months to a sentence of two years and nine months imprisonment with immediate release on parole.

Charges and sentences

[5] The charges on the indictment and the concurrent sentences imposed were as follows:

Count 1

Using a carriage service to "groom" a person under 16 years of age, between 19 March 2012 and 28 February 2013, s 474.27 *Criminal Code* 1995 (Cth).

Sentence: Two years imprisonment released after nine months on a $500 three and a-half year recognizance order; 18 months probation.

Count 2

Using a carriage service to "groom" a person under 16 years of age, between 22 August 2012 and 3 March 2013, s 474.27 *Criminal Code* 1995 (Cth).
Sentence: As per count 1.

Count 3

Using a carriage service to transmit indecent communication to a person under 16 years of age, on or about 27 September 2012, s 474.27A *Criminal Code* 1995 (Cth).
Sentence: 12 months imprisonment released after nine months on a $500 three and a-half year recognizance order; 18 months probation.

Count 4

Using a carriage service intending to procure a person under 16 years of age to engage in sexual activity, on or about 7 November 2012, s 474.26 *Criminal Code* 1995 (Cth).
Sentence: Three years imprisonment released after nine months on a $500 three and a-half year recognizance order; 18 months probation.

Count 5

Using a carriage service intending to procure a person under 16 years of age to engage in sexual activity, on or about 18 January 2013, s 474.26 *Criminal Code* 1995 (Cth).
Sentence: As per count 4.

Count 6

Using a carriage service intending to procure a person under 16 years of age to engage in sexual activity, on or about 24 January 2013, s 474.26 *Criminal Code* 1995 (Cth).
Sentence: As per count 4.

Count 7

Knowingly possess child exploitation material on or about 4 March 2013, s 228D *Criminal Code* 1899 (Qld).
Sentence: 12 months imprisonment suspended after four months for an operational period of three and a-half years.

Background

[6] Counts 1 to 6, the Commonwealth offences, came to light through separate investigative activity by the Queensland and New South Wales police. In each investigation the police pretended to be a 14 year old girl while engaging in internet communications with the applicant, who was aged 33 to 34.

[7] The relevant Queensland police officer pretended to be a 14 year old girl from Brisbane called Cilla. The relevant New South Wales police officer pretended to be a 14 year old girl from Sydney called Gemma. Each officer is referred to hereafter under the pseudonym each adopted.

The Cilla offences (counts 1, 4 and 5)

[8] Within a day of Cilla joining a web chat site she was contacted online by the applicant who told her he was interested in incest and bestiality. Between 19 March 2012 and 28 February 2013 the applicant initiated 52 communications online with her. The online conversations were calculated at establishing a relationship, trust and rapport and included multiple sexual references. This conduct, obviously calculated at making it easier for the applicant to procure Cilla to engage in sexual activity with him, gave rise to count 1.

[9] It ought be noted in passing that in charging the offence of "using a carriage service to 'groom' persons under 16 years of age" counts 1 and 2 both alleged the offence was committed between dates separated by many months. In each instance multiple communications throughout those lengthy periods were referred to in the facts said to constitute the offence. The parties elected not to argue whether reliance on all of the communications as constituting a single offence was duplicitous, apparently accepting the point was of no consequence in this application.[1]

[10] On 7 November 2012 in online communications with Cilla the applicant wrote, inter alia:

> "You are 14...I wouldn't expect you to do anything you don't want to do...I would like to kiss you though...I would like to give you a cuddle and kiss because on first meeting and talking...that's what I would like to do to say hello."[2]

This conversation, evidencing an intention to procure Cilla to engage in sexual activity with him, gave rise to count 4.

[11] The police officer's communications with the applicant ceased towards late 2012. The applicant apparently retained an interest in communicating with Cilla because he then adopted his own pseudonym and contacted Cilla online pretending to be an 18 year old lesbian called Katalina. Acting as Katalina he suggested to Cilla that Katalina could come to Brisbane to meet her and if they wanted to go further, could go to a hotel room where Katalina could touch, rub and feel Cilla and kiss her nipples. He went on to suggest:

> "We wuld make luv to each other naked bodies...We culd shower together and let me tuch u down there while kissing u."[3]

[12] This conversation gave rise to count 5 on the basis that he was by this conduct intending to procure Cilla to engage in sexual activity with him. The fact that the conversation appeared to be calculated at persuading Cilla to engage in sexual

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1 The reference in the heading of section 474.27 to "grooming" apparently purports to describe the intent element of the offence rather than a behavioural progression because the wording of the section refers to seemingly singular conduct, namely use of a carriage service "to transmit a communication to another person". It would be prima facie duplicitous for multiple communications to be charged in the one count. While "a communication" might arguably involve more than one transmission where it takes the form of an on-line conversation with transmissions to and fro, the force of that argument would diminish where transmissions occur over many weeks in a series of on-line conversations, as occurred here. The potential duplicity argument was apparently not pursued by the applicant here because the earlier communications were in any event relevant as evidence shedding light on the intent with which the latter communication was transmitted and there was no uncertainty about the level of criminality for which the applicant was sentenced. Cf *R v Garget-Bennett* [2013] 1 Qd R 547.

2 AR 41.

3 AR 42.

activity not with the applicant, but with an 18 year old lesbian, attracted the attention of the learned sentencing judge in the course of submissions. His Honour noted there was not compelling evidence of the element of intent in the absence of the concession of that element constituted by the guilty plea.[4]

The Gemma offences (counts 2, 3 and 6)

[13] Within minutes of the New South Wales police officer joining a web chat site pretending to be Gemma, the applicant initiated online communications with her. Between 22 August 2012 and 3 March 2013 he engaged in communications with her, mentioning various sexual topics, obviously intending to make it easier to procure Gemma to engage in sexual activity with him. This conduct gave rise to count 2.

[14] On 27 September 2012, while the applicant was chatting online to Gemma, he transmitted images recorded by a web camera of him masturbating his erect penis. This conduct gave rise to count 3.

[15] From 27 August 2012 the applicant's discussions with Gemma included reference to the prospect of him travelling to Sydney to meet Gemma. On 24 January 2013 in an online chat with Gemma he remarked that he was being cautious about such a meeting because she was 14 and he said, prophetically:

> "You hear in the media about older guys meeting younger girls and the police are there waiting to arrest the older guy because the girl is underage."[5]

[16] On 24 January 2013, in an online discussion with Gemma of the prospect of meeting her, the applicant said inter alia:

> "Well I won't do anything you don't want me to okay. I wold be more than happy just to cuddle you, kiss you and see you naked lol...But don't feel pressured to have sex because I would be just as happy to not have sex then to have sex. Like I said, we are meeting up as friends and yeah, I wouldn't mind cuddling, kissing and seeing you naked if that's okay with you...I will most likely get an erection...If you wanted to touch it that's fine."[6]

This conduct by the applicant evidenced an intention to procure Gemma to engage in sexual activity with him and gave rise to count 6 on the indictment.

[17] The applicant eventually travelled to Sydney and booked into a hotel believing Gemma would be meeting him there. On 4 March 2013 Gemma telephoned and arranged to meet him in the hotel foyer. He was there arrested by police. A pink teddy bear and a packet of condoms were found in his hotel room.

Child exploitation offences

[18] On the same day police conducted a search of the applicant's home in Queensland and seized three digital storage devices containing 308 accessible movie files depicting child exploitation with a total run time of almost 66 hours.

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4 AR 13 L13.
5 AR 42.
6 AR 43.

[19] The files predominantly depicted pre-pubescent male and female children apparently aged between five and 12. They involved a full array of categories of seriousness. A significant proportion depicted female children engaged in penetrative sexual activity with adult males. A number of files depicted a 10 year old female engaged in sexual and oral intercourse with an adult male and a dog. Another file showed a female child, bound, wearing a collar and engaging in oral sexual activity with a dog.

[20] The files were scaled by reference to a schema known as the Child Exploitation Tracking System. Of the 308 files, 197 were in the category (level 4) assigned to penetrative sexual activity between children or between children and adults.

Applicant's personal circumstances

[21] The applicant declined to be interviewed by police about any of the offences. His pleas of guilty were indicated when the indictment was first presented.

[22] He was 35 years old at the time of sentence. He had no previous convictions and had a good employment history. He was supported at the time of sentence by the presence of his mother and brother, who each provided references.

[23] The applicant was described as a shy and quiet individual who had limited social interaction with females. His only relationship of any duration with a female partner was for about 10 months when he was 24 years old. He became interested in pornography in 2006. His curiosity in respect of unusual sexual activity and his use of peer networking programs gradually increased.

[24] A psychologist's report tendered on sentence noted the applicant's exposure to the legal system subsequent to his arrest had been an intimidating and negative experience which may assist as a future deterrent. The psychologist opined the applicant was at low risk of reoffending, particularly having regard to:

> "[H]is personality (i.e. not psychopathic or highly antisocial), contextual factors (i.e. no substance abuse, no mental health concerns, stable employment), and his aversive response to the consequences..."[7]

[25] On the other hand, the psychologist also noted:

> "While Mr Engeln did not dispute any of the charges and acknowledged his behaviour as wrong, he does seem to lack awareness or insight into the intent behind his behaviour, reporting that he was seeking friendship, regardless of the evidence.
>
> When reflecting on his offending, Mr Engeln appeared to generally minimise his behaviour…"[8]

[26] The psychologist went on to opine the applicant would benefit from engagement with a psychologist who could assist him in enhancing his insight into his offending behaviour, cognitions and risk factors.[9]

The sentence proceeding

[27] The learned sentencing judge took account of the applicant's absence of criminal history, excellent antecedents, good employment history and his pleas of guilty and the savings thereby occasioned.

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7 AR 69.
8 AR 65.
9 AR 69.

[28] His Honour accepted the applicant was deeply embarrassed by his conduct but did not accept that genuine remorse played any part in the pleas of guilty.

[29] His Honour noted the applicant's tendency to minimise his behaviour when speaking with the psychologist but accepted that the risk of reoffending was low, especially with professional intervention. He accepted the legal process had been intimidating for the applicant and the sentences to be imposed would be a genuine deterrent against further offending by him in the future.

[30] The sentencing judge noted that count 5 would have been difficult to prove but that otherwise there was plainly a strong Crown case.

[31] His Honour noted the low level of sexual activity contemplated in relation to count 4. On the other hand, it was noted that the grooming offences involved numerous communications with what the applicant believed were two 14 year old girls in a determined pursuit over a lengthy period. It was further noted the applicant intended procuring the girls for sexual activity and went to some trouble to achieve that end in respect of Gemma. His Honour noted general deterrence was plainly an important consideration.

[32] His Honour concluded in respect of the Commonwealth offences that sentences of imprisonment were the only appropriate sentences to impose.

[33] In respect of the offence of knowingly possessing child exploitation material, his Honour highlighted some of the more extreme and deviant features of the depiction of sexual activity involving children. He concluded the conduct was a serious example of this type of offence.

Grounds of appeal

[34] The appellant appeals his sentence on the following amended grounds:

1. The learned sentencing judge erred in the imposition of sentence by:
   - 1.1 failing to properly determine the applicant's culpability for the Commonwealth offences;
   - 1.2 failing to properly comply with s 17A *Crimes Act* 1914 (Cth);
   - 1.3 failing to properly comply with s 16 *Crimes Act* (Cth) and ss 9 & 13 *Penalties and Sentences Act* (Qld).
2. The resultant overall sentence was manifestly excessive.[10]

Alleged failure to give special weight to the plea of guilty to count 5 (Ground 1.1)

[35] The applicant's counsel submits there was inadequate discounting of the sentence to allow for the real value of the plea of guilty to count 5, given the absence of or weakness of evidence of the requisite element of intent in respect of that count but for the plea of guilty. The argument that there was weak evidence of intent is stronger than the argument that there was no evidence of intent but for the guilty plea.

[36] It is emphasised on the applicant's behalf that in pretending to be Katalina he could not have intended to procure a lesbian sexual liaison with Cilla because he is not a woman. It was submitted that s 476.26 of the *Criminal Code* 1995 (Cth) requires the sexual activity mentioned in the communication transmitted by the carriage service to be the sexual activity the sender intends to procure the recipient to engage in with the sender.

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[10] Amended Notice of Appeal 4/9/2014.

[37] The section contains no such requirement. True it is s 476.26 requires that the transmission be done with the intention of procuring the recipient to engage in sexual activity with the sender. There is however no requirement that the sexual activity referred to in the transmission be the particular sexual activity the sender actually intends to engage in with the recipient. Indeed there is no requirement that the transmission make any express reference to sexual activity at all.

[38] Section 476.26's focus is upon the use of a carriage service to transmit a communication "with the intention" of procuring the recipient to engage in sexual activity with the sender. Evidence that the transmission was engaged in with the requisite intention might be inferred from the content of the transmission but it also might be inferred from other evidence, including previous carriage service transmissions.

[39] It will be recalled the applicant had earlier shown an obvious sexual interest in Cilla and that when her responses dwindled he then pursued her pretending to be Katalina. Had the matter gone to trial the prosecution would have invited the inference on the totality of the evidence, including the applicant's previous communication with Cilla, that in sending the communication the subject of count 5 the applicant held the admittedly ambitious intention of himself engaging in sexual activity with Cilla. Such evidence would have given rise to a reasonable case of a breach of s 474.27, in that that section only requires the intention "of making it easier to procure the recipient to engage in sexual activity". However, the case that this conduct involved a breach of s 474.26 was a weak one.

[40] It follows that the plea of guilty to count 5[11] reflected a significant degree of cooperation in the administration of justice. The applicant submits that the sentencing judge did not give due weight to that significant degree of cooperation, highlighting that the sentence for count 5 was no different than the sentences for counts 4 and 6.

[41] The mere fact that the sentence for count 5 was no different than that for the other breaches of s 476.26 does not mean his Honour failed to take into account the special degree of cooperation in respect of count 5. That single mitigating factor was but one of a number of mitigating and aggravating factors under combined consideration in a case involving a course of conduct, multiple counts and concurrent sentences. In such a case it is not necessary for a single mitigating feature relating to one count to be taken into account by reducing the corresponding count as it if were the sole offence. Because concurrent sentencing involves fixing a sentence appropriate to the total criminality[12] it is proper to take all of the mitigating and aggravating factors into account in totality in determining the effective overall sentence.

[42] The fact the applicant was ordered to be released after serving only one quarter of the concurrent sentences of imprisonment imposed for the three s 476.26 offences suggests significant weight was given to mitigating features such as the special value of the plea of guilty to count 5. Further, in the course of sentencing submissions his Honour observed that the prosecution would have "had a very difficult time proving the intent" in respect of count 5.[13] More particularly his Honour's sentencing remarks specifically noted the plea of guilty to count 5 and the Crown's difficulty in proving that charge but for the plea.[14]

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11 Relevant per *Crimes Act* 1914 (Cth) s 16A(2)(g).

12 *R v Gilles; Ex parte Attorney-General* [2002] 1 Qd R 404.

13 AR 13 L14.

14 AR 32 L45.

[43] It cannot be doubted that the sentencing judge did take the special degree of cooperation involved in the plea of guilty to count 5 into account. There was no error.

Was there a failure to properly comply with s 17A *Crimes Act*? (Ground 1.2)

[44] The applicant complains the sentencing judge did not comply with s 17A of the *Crimes Act* 1914 (Cth). Section 17A relevantly provides:

> "**17A Restriction on imposing sentences**
>
> (1) A court shall not pass a sentence of imprisonment on any person for a federal offence… that is prescribed for the purposes of this section, unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case.
>
> (2) Where a court passes a sentence of imprisonment on a person for a federal offence…that is prescribed for the purposes of this section, the court:
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> (a) shall state the reasons for its decision that no other sentence is appropriate; and
> (b) shall cause those reasons to be entered in the records of the court.
>
> (3) The failure of a court to comply with the provisions of this section does not invalidate any sentence.
>
> (4) This section applies subject to any contrary intention in the law creating the offence." (emphasis added)

[45] While failure to comply with s 17A does not invalidate any sentence, it may constitute an error requiring this court to exercise the sentencing discretion having proper regard to s 17A.[15]

[46] In the course of the sentencing judge's reasons, after highlighting matters of mitigation in the applicant's favour, he went on to say:

> "However, you are 35 years of age and of average intelligence. The grooming involved numerous communications with, as you understood it, two 14-year-old girls, over a lengthy period. Importantly, you intended procuring the girls for sexual activity and went to some trouble to achieve that on one occasion. There was a determined pursuit of what you believed were two 14-year-old girls for sexual activity. General deterrence is plainly an important consideration in the determination of penalties today.
>
> I've had regard to the relevant provisions of the *Crimes Act* [(Cth)]. In my view, in relation to the Commonwealth offences, sentences of imprisonment are the only appropriate sentences to be imposed."[16] (emphasis added)

[47] It is a formidable obstacle to this ground of appeal that the sentencing judge indicated his satisfaction that sentences of imprisonment were the only appropriate sentences. His Honour did not articulate the nature of the other sentences available

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15 *R v Verburgt* [2009] QCA 33.

16 AR 33 LL8-18.

under the Commonwealth sentencing regime. However, his decision that sentences of imprisonment were "the only appropriate sentences" necessarily means he considered that no other sentences, vis those not involving a sentence of imprisonment, would have been appropriate.

[48] When the sentencing remarks are considered in context it appears the reasons for his Honour's decision are stated in the first paragraph quoted above. Those reasons were sufficient. They included the determined extent of the applicant's pursuit of sexual activity with children and the importance of general deterrence. The latter consideration was identified in the authorities to which the parties at first instance referred as being of particular importance in relation to sexual offences against children.

[49] The submissions of counsel at first instance are also said to be relevant to this ground. The written submissions of the Crown prosecutor below submitted, after reference to authority, that "it would be outside the exercise of proper sentencing discretion if a sentence other than a period of immediate imprisonment were imposed".[17] The applicant complains this submission, described by his present counsel as an unnecessary distraction,[18] offended the principle in *Barbaro v The Queen*; *Zirilli v The Queen*.[19] It is unnecessary to determine that complaint. Even if the submission did go beyond proper bounds that would not demonstrate that the sentencing judge failed to properly comply with s 17A unless the submission was shown to have influenced the judge's application of s 17A in fixing sentence.[20] Here the submission would at worst have been, as the applicant's counsel put it, an unnecessary distraction.[21] It has not been shown the experienced sentencing judge was influenced by it in fixing sentence.

[50] For the present purposes the more relevant submissions below were those made by defence counsel. He conceded in respect of s 17A:

> "I accept for present purposes that section 17A of the *Crimes Act*, as far as that consideration is concerned, that a term of imprisonment is the only appropriate penalty in the circumstances."[22]

[51] Defence counsel went on to refer to a number of authorities. He acknowledged a similarity in sentencing principle between Commonwealth and state sentences relating to sexual offences against children to the effect that, because of the paramountcy of deterring such conduct, it will ordinarily be met with a period of actual imprisonment.[23] Ultimately, while conceding imprisonment was the only appropriate penalty, defence counsel urged the sentencing judge to immediately release and suspend so that the applicant was not actually incarcerated.[24]

[52] Those submissions support the above interpretation of the sentencing judge's reasons. It is quite plain that by the time his Honour was imposing sentence the issues had narrowed so that the central issue was not whether a sentence of imprisonment was the only appropriate sentence but whether it was necessary for the applicant to serve some component of it in actual custody.

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17 AR 52, 53.
18 T9 L7.
19 (2014) 305 ALR 323.
20 *Matthews v R; Vu v R; Hashmi v R* [2014] VSCA 291, [7].
21 T9 L7.
22 AR 23 L7.
23 AR 24 L44; AR 25 L31.
24 AR 25 L35.

[53] If, as I have found, the sentencing judge's sentencing remarks sufficiently stated the reasons required by s 17A(2)(a), it is not contended that inclusion of those reasons in the sentencing remarks was an inadequate means of entering them in the court record for the purposes of s 17A(2)(b).

[54] This ground of the application must fail.

Was there a failure to adequately take account of the circumstances of the pleas of guilty? (Ground 1.3)

[55] The applicant complains the sentencing judge erred in finding the applicant was not remorseful and did not reduce the sentence to make sufficient allowance for the circumstances of the guilty pleas.

[56] The applicant's counsel below tendered references by the applicant's mother and brother.[25] Each of those references asserted the applicant was remorseful but in context those assertions were references to the shame and embarrassment occasioned by his behaviour.

[57] The applicant's counsel below did not in his own submissions adopt the assertion that the applicant was remorseful and rather submitted the applicant was very ashamed and very embarrassed about his behaviour. That was an unsurprising submission in light of the substance of the references and more significantly the content of the psychological report.

[58] That report noted the applicant's tendency to minimise his behaviour and his lack of awareness or insight into the intent behind his behaviour in asserting he "was seeking friendship". The applicant engaged in a protracted period of offending during which he expressly mentioned his caution about not being set up by a police trap – it is obvious he was determinedly seeking more than friendship.

[59] It is unremarkable that in the course of the sentencing judge's reasons he said:

> "I take into account in your favour your pleas of guilty. I accept that you are deeply embarrassed by your conduct. However, I do not accept that genuine remorse plays any part in the pleas of guilty. There was plainly a strong Crown case against you, and, whist you're embarrassed, it does not necessarily reflect genuine contrition. Your dealings with the psychologist, whose report has been admitted into evidence, does nothing to support a contention of genuine remorse. Nonetheless your please of guilty have saved the State time and money, and that, too, is in your favour."[26]

The sentencing judge's finding that the applicant was not genuinely remorseful was reasonably open on the information before him and no error of reasoning has been demonstrated.

[60] Some complaint was made of the sentencing judge's observation that there was a strong Crown case. He qualified that observation by reference elsewhere in his remarks to the fact that count 5 would have been difficult to prove had it gone to trial. Otherwise it is undoubtedly correct that there was a strong Crown case against

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25 AR 74, 75.

26 AR 32 LL35-42.

the applicant in respect of the other charges. His conduct left behind an unequivocally incriminating digital trail culminating in the police catching him red handed at the moment of his attempted rendezvous, as he understood it to be, with Gemma in Sydney. The sentencing judge's reference to the strength of the Crown case was obviously intended to distinguish the case from that category of case in which remorse has obviously driven an offender to plead guilty even though the case against the offender is not so strong as to make conviction inevitable in the event of a trial.

[61] The applicant's broader complaint that the sentence was not sufficiently reduced to take account of the pleas of guilty is also unsustainable. It ought be borne in mind that a plea of guilty indicates an acceptance of responsibility and a willingness to facilitate the course of justice and, even in the absence of a positive finding of remorse, should be taken into account in mitigation of sentence.[27] The finding that there was a lack of remorse, which may be taken into account per s 9(7)(e) *Penalties and Sentences Act* 1992 (Qld), does not appear to have detracted from the discounting of penalty here warranted by the pleas of guilty. The sentencing judge expressly stated that he took the applicant's pleas of guilty into account on sentence. That assertion was tangibly reflected in his Honour requiring the applicant to only serve one-quarter of the effective head sentence of three years. The applicant would have been fortunate to receive a more generous discount even if the sentencing judge had found him to be remorseful.

[62] This ground must also fail.

Was the sentence manifestly excessive? (Ground 2)

[63] This ground requires consideration in light of the fact there were three sets of offending before the court – the Gemma offences, the Cilla offences and the possess child exploitation material offence. Each set of offending was very serious in its own right.

[64] The possession of child exploitation material involved 308 files of almost 66 hours running time. The substantial majority were in the serious (level 4) category of penetrative sexual activity between children or between children and adults. This court's decisions in *R v Verburgt*,[28] *R v Sykes*,[29] *R v Smith*[30] and *R v Hickey*[31] and the reviews of other cases therein suggest that even considered in isolation the sentence imposed here, of 12 months imprisonment suspended after four months, was within the range of the sound exercise of the sentencing discretion, albeit that it was not at the low end of that range. This heralds the applicant's difficulty in arguing that none of the sentences imposed should have required the applicant to serve any actual gaol time.

[65] The most serious offences within both the Gemma and Cilla sets of offending were those of using a carriage service intending to procure a child to engage in sexual activity. That offence, contrary to s 474.26 *Criminal Code* (Cth), has a maximum term of imprisonment of 15 years. On the three counts of committing that offence to which the applicant pleaded guilty he was in each instance sentenced to three years imprisonment with recognizance release after nine months.[32]

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27 *Cameron v The Queen* (2002) 209 CLR 339.
28 [2009] QCA 33.
29 [2009] QCA 267.
30 [2010] QCA 220.
31 [2011] QCA 385.
32 He was also sentenced to 18 months probation, about which no complaint is made.

[66] In *R v Gajjar*[33] the 28 year old appellant pleaded guilty to a single offence contrary to s 474.26. Gajjar had no previous convictions and his incarceration would occasion hardship to his wife and baby. He engaged in salacious internet communications with an undercover police officer he believed to be a 14 year old girl. Prior to his arrest he arranged to meet her at a railway station and had attended as arranged. The Victorian Court of Appeal declined to interfere with his sentence of two and a-half years imprisonment with recognizance release after eight months. The court cited with approval the following relevant statement of principle in *State of Western Australia v Collier*:[34]

> "It is important to say, as clearly as one can, that adult persons who make use of the internet to locate, and make contact with, children so as to procure them to engage in sexual activity can ordinarily expect to receive a term of immediate imprisonment. As with offences concerning possession of child pornography … there is a paramount public interest in protecting children from sexual abuse."[35]

[67] While the present applicant's personal circumstances were slightly more favourable than those of Gajjar, who did not have the benefit of a psychologist's report, Gajjar was sentenced for only one offence. The present applicant was sentenced for more than one breach of s 474.26. In one instance he confirmed his nefarious intention by travelling interstate for a hotel rendezvous. He also fell to be sentenced for other offences, including that of knowingly possessing child exploitation material. Bearing those matters in mind, the applicant's head sentence of three years imprisonment with recognizance release after nine months compares comfortably with Gajjar's head sentence of two and a-half years with recognizance release after eight months.

[68] *Gajjar* was referred to in *Rampley v R.*[36] Rampley pleaded guilty to a single charge of the lesser offence of using a carriage service to groom a child contrary to s 474.27 of the *Criminal Code* (Cth), the maximum penalty for which is 12 years. He was sentenced to two years and nine months imprisonment with recognizance release after 18 months. Rampley was 33 years old, had no relevant criminal history, was of good character and had commenced a program of rehabilitative psychiatric treatment with a psychiatrist who considered his risk of reoffending was low. He engaged in internet communications with an undercover police officer he believed to be a 12 year old girl. The communications were sexually explicit and included instruction and encouragement in masturbation but did not go so far as to warrant the more serious charge that he intended to procure the child to engage in sexual activity with him. The New South Wales Court of Criminal Appeal dismissed his appeal. The result in that case, which did not involve multiple charges or, more particularly, a breach of s 474.26, also demonstrates that the present sentence is not out of line with "comparable" cases.

[69] The applicant's written outline referred to a variety of "comparable" cases involving singular breaches of s 474.26 where shorter terms than the present have been imposed.[37] The fact that, standing alone, an offence of the applicant could properly have been visited with a lower penalty does not render a higher penalty beyond the

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33 (2008) 192 A Crim R 76.

34 (2007) 178 A Crim R 310.

35 *Collier* was cited with approval by Muir JA, with whom the Chief Justice and White JA agreed, in *R v Costello* [2011] QCA 39.

36 [2010] NSWCCA 293.

37 See for example *R v Hizhnikov* (2008) 192 A Crim R 69; *R v Fuller* (2010) NSWCCA 192.

appropriate range, particularly given the applicant fell to be sentenced for multiple offences and received concurrent sentences. Where concurrent sentences are imposed it is permissible to fix a sentence for the most serious offence higher than that which would have been fixed had it stood alone, so as to take account of the overall criminality.[38]

[70] The effective overall sentence was not manifestly excessive.

Order

The application for leave to appeal the sentences should be refused.

[71] I would order:

Application for leave to appeal against sentence is refused.

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38 *R v Nagy* [2004] 1 Qd R 63.