SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lewis-Grant* [2015] QCA 252
PARTIES:	**R** **v** **LEWIS-GRANT, Daryl James** (applicant)
FILE NO/S:	CA No 108 of 2015 DC No 226 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Townsville – Unreported, 21 May 2015
DELIVERED ON:	4 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	16 November 2015
JUDGES:	Fraser and Morrison JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. The order made on 21 May 2015, setting aside the parole eligibility date at 21 December 2015, is set aside and in lieu thereof the parole eligibility date is set at 4 December 2015.** **4. The orders made on 21 May 2015 are otherwise affirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to a number of charges, including possessing child exploitation material; making child exploitation material; distributing child exploitation material; indecent treatment of a child under 16, under 12, under care; rape; and two summary charges of possession of cannabis and possession of a thing (a pipe) used in connection with smoking a dangerous drug – where the applicant seeks leave to appeal against his sentence on the ground that it is manifestly excessive – where the applicant was sentenced to concurrent terms of imprisonment amounting to seven years – where the applicant was 27 years of age and the complainant was four

years of age at the time of the offending – where the applicant knew the complainant who would sometimes be under his care in his apartment – where the applicant performed sexual acts on the complainant and recorded the acts on his phone – where the applicant disposed of his phone – where the phone was discovered and the applicant was identified – where the phone contained sexually explicit images of children – where the complainant was identified in one of the photographs – where the police became involved and the applicant was arrested – where a second phone was seized and further sexually explicit images and videos of children were discovered – where the applicant submits the sentence was manifestly excessive because the learned trial judge failed to appropriately take into account the applicant's plea of guilty – whether the sentence was manifestly excessive because comparable cases do not support seven years for the conviction of rape, even with the other charges taken into account

Penalties and Sentences Act 1992 (Qld), s 13(1)(a)

R v BBS [2009] QCA 205, considered
R v Bull [2012] QCA 74, considered
R v Choomwantha [2014] QCA 115, considered
R v D [2003] QCA 88, considered
R v M [2003] QCA 443, considered
R v Safi [2015] QCA 13, cited

COUNSEL:	J P Benjamin for the applicant S J Farnden for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

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

[2] **MORRISON JA:** The applicant (**Lewis-Grant**) lived in a unit with his girlfriend, AD, and her children. He knew the complainant (F) who was four years of age. She would sometimes play with the children in his unit.

[3] In July 2013 Lewis-Grant threw away his mobile phone, which was picked up at a recycling depot. The SD card was found to contain sexually explicit images of children, including F, and 16 sexually explicit videos involving other children. Police searched Lewis-Grant's unit, and on leaving it, a police officer recognised F as a child in the images on the phone.

[4] Lewis-Grant pleaded guilty to a number of charges, the most serious of which was a charge of having raped F:

- counts 1 and 16 – possessing child exploitation material;
- counts 2, 4, 6, 8, 10, 12, 13 & 15 – making child exploitation material;
- count 3 – distributing child exploitation material;

- counts 5, 7, 9 & 14 – indecent treatment of a child under 16, under 12, under care;
- count 11 – rape; and
- two summary charges: possession of cannabis, and possession of a thing (a pipe) used in connection with smoking a dangerous drug.

[5] The photos concerning F, and when they were taken or distributed, were:

(a) 22 June 2013: image 1, F's pants pulled to one side and her vagina exposed;[1]

(b) 22 June 2013: image 1 was sent to AD's mobile phone;[2]

(c) 24 June 2013: image 2, F's pants pulled down and her vagina exposed;[3]

(d) 24 June: image 3, F lying on the floor with Lewis-Grant's erect penis placed above her legs;[4]

(e) 26 June: image 4, Lewis-Grant's erect penis in F's hands; Lewis-Grant's hand is seen guiding hers;[5]

(f) 26 June: image 5, Lewis-Grant's erect penis in F's hands;[6]

(g) 26 June: image 6, Lewis-Grant's erect penis in F's mouth;[7]

(h) 26 June: image 7, F's vagina;[8] and

(i) 26 June: image 8, F inserting her finger into her vagina.[9]

[6] There were 14 videos, downloaded on 23 March 2012, of children as young as 18 months, having sexual intercourse performed on them, or engaging in various sexual acts with other children or adults. The 14 videos and the images of F were the subject of count 1.

[7] In addition, on a second phone, taken from Lewis-Grant's bedroom, there were three images downloaded on 4 August 2013, and two videos downloaded on 5 and 14 July 2013. The images and videos were of very young, naked, prepubescent females, engaged in sexual acts and sexual intercourse. These images and videos were the subject of count 16.

[8] On 21 May 2015 Lewis-Grant was sentenced to concurrent terms of imprisonment:

(a) counts 1 and 16 – 18 months;

(b) counts 2, 4, 6, 8, 10, 12, 13 & 15 – three years;

(c) count 3 – three years and six months;

(d) counts 5, 7, 9 & 14 – two years;

(e) count 11 – seven years;

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1 Count 2.
2 Count 3.
3 Count 4.
4 Count 5 was indecent treatment by exposure of his penis; count 6 was taking the image.
5 Count 7 was indecent treatment by permitting the touching of his penis; count 8 was taking the image.
6 Count 9 was indecent treatment by permitting the touching of his penis; count 10 was taking the image.
7 Count 11 was rape; count 12 was taking the image.
8 Count 13.
9 Count 14 was indecent treatment by procuring F to do so; count 15 was taking the image.

(f) two summary charges – one month;

(g) 655 days of pre-sentence custody was declared as time served pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld); and

(h) a parole eligibility date was set at 21 December 2015.

[9] Lewis-Grant challenges the sentence as being manifestly excessive, and raises the following points:

- the failure of the sentencing judge to refer to, or appropriately take into account, the plea of guilty; and
- comparable cases do not support seven years for the conviction of rape, even with the other charges taken into account.

Nature of the offending

[10] The essential nature of each of the photos of F are set out above at paragraph [5]. An agreed schedule of facts gave more detail.

[11] F lived with her father at unit 1 of a unit complex. Lewis-Grant lived at unit 3 in the same unit complex. F would often play with other children in the complex, and sometimes with children in Lewis-Grant's unit. F's father said sometimes when he would come to collect F from Lewis-Grant's unit the door would be open and he would call for the complainant to come out. On other occasions the door would be locked and he would knock on the door, and Lewis-Grant would open it and F would then come out.

[12] AD lived at Lewis-Grant's unit. She was his girlfriend. Sometimes she would ask F's father if F could come over and play with her children in the unit. On other occasions F would ask to go over and play there.

[13] Mr Butler, an employee at a recycling plant, saw a bag with an LG mobile telephone that looked nearly new. He asked his manager if he could have the phone. He was authorised to take the phone home as it was going to be destroyed anyway. He could not "unlock" the phone. Eventually he gave the phone to his brother but he could not unlock the phone either. The brother saw an SD card in the phone and so he took it out and placed the card into his own mobile telephone. He saw photos of children in sexual positions. He saw that some of the photos were date stamped in June 2013.

[14] Mr Butler said that he too saw a couple of videos of young girls being sexually abused by adults. He also saw photos of a little girl being sexually abused. The little girl looked to be about four or five years old, and looked like she was a light skinned Islander girl. His brother took the phone to the police.

[15] Police forensic officers downloaded all the electronic data from the phone. Photographs on the phone of a child's report card allowed police to identity the names of the child's parents (one of whom was Lewis-Grant). Photographs of a male on the phone were later identified as being Lewis-Grant.

[16] On 4 August 2013 police executed a search warrant at Lewis-Grant's address. A second LG mobile phone similar to the one already in the possession of the police was seized from his bedroom. A pair of denim shorts which had a rip to the left leg

were seized as pants very similar to those identified in some of the sexually explicit photographs. Lewis-Grant was then arrested.

[17] As a police officer was leaving Lewis-Grant's unit he saw a young female child who he recognised as being the child in the images he had been attempting to identify. After taking Lewis-Grant into the police station, other police returned to the unit complex to locate the child. Forensic officers downloaded all the electronic data from the second seized phone.

[18] Lewis-Grant later declined to take part in an interview with police.

[19] The day before the first photo Lewis-Grant sent AD a text saying: "Send a sexy pic one of these men wanna see what a women kid Fucker looks like make it some what sexy". The first image of F (with her pants pulled aside and vagina exposed)[10] was sent by Lewis-Grant to his girlfriend AD. A minute later AD sent back a "smiley face" icon.

[20] The 14 videos revealed various sexual acts with very young children. They included:

(a) 1, 6 and 9: a very young female child sucking a male's penis;

(b) 2: a young female child's vagina being penetrated by an adult male penis; the child cries with each thrust;

(c) 3: an adult male masturbating his penis in front of a four year old girl; he is holding the back of her head and ejaculates in her face; there is a children's lullaby playing in the background;

(d) 4: an adult male penetrating a three year old girl's vagina for five minutes and 28 seconds;

(e) 5: a very short video of an adult male penis penetrating the vagina of a baby (approximately 18 months old); the baby is clearly distressed; the adult male tickles the baby's stomach;

(f) 7 and 8: one entitled "11 year old Lola", the other entitled "Asian-Teen-Sex";

(g) 10: two male children having sexual intercourse with an adult female; neither male has pubic hair;

(h) 11: a very young female child being masturbated by a male;

(i) 12: a young female child, firstly fully naked and showering herself, and then having sexual intercourse with a male child; the video is entitled "13 yo boy and 10 yo sister incest";

(j) 13: a young female child having sexual intercourse with a very young male child; and

(k) 14: a female baby (approximately between one and three years of age) being masturbated by a male; a young female child masturbating on a bed and an adult naked male then rubbing his penis against her genitals; two separate videos depicting a young female child performing oral sex on a penis (different children on each video); a prepubescent female child masturbating.

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[10] See paragraph [5][1](b) above.

[21] The images and videos referred to in paragraph [7] above were as follows:

1. image: prepubescent naked female sitting on the beach;

2. image: very young prepubescent female, naked with her legs spread, having sexual intercourse with a naked adult male lying on top of her;

3. image: two very young prepubescent females naked, one lying on a bed, the other facing away from the camera crouching over the other child with her vagina fully exposed; the child lying down is pulling apart the cheeks of the other child's buttocks;

4. video: a very young female child on a bed performing oral sex on a naked male also on the bed; the male then places the child on her back and penetrates her vagina with his penis for approximately four minutes; and

5. video: a very young prepubescent girl performing oral sex on a male's penis.

Lewis-Grant's circumstances

[22] Lewis-Grant was about 25 at the time of the offences, and 27 at sentence. He had a substantial criminal history commencing when has was 16, but largely concerned with dishonesty, property and drug offences. There was no history of sexual offences.

[23] The offences fell into four basic bands:

- between April and October 2004 – possession of dangerous drugs; possession of utensils or pipes; possession of tainted property; unlawful use of a motor vehicle (nine charges); stealing (twelve charges); receiving (ten charges); unlawful entry of a vehicle (ten charges); attempt to enter a dwelling (seven charges); enter a dwelling with intent (one charge); enter a dwelling and commit an indictable offence (eleven charges); and break and enter;

- between March and July 2006 – receiving (three charges); stealing; public nuisance and obstruct a police officer;

- May 2007 – possession of dangerous drugs and utensils; and

- March 2013 – contravention of a domestic violence order (two charges); assault or obstruct a police officer (two charges).

[24] Lewis-Grant's childhood involved a lot of moving around from location to location because his father had difficulty maintaining a job. He had five step-siblings but did not enjoy a good relationship with any of them at any time. The step-siblings bullied him.

[25] Having settled in Townsville at the age of 11 or 12, he was left to his own devices with little or no structure in his life, either at school or at home. He fell into using illicit substances, progressing to methylamphetamine. His father died in about 2011, and his mother has a schizophrenic disorder.

[26] He completed schooling to year nine, and obtained landscaping work on and off until he was 19. He started to offend and was sent on a youth rehabilitation program, on a station on the outskirts of Townsville for a number of months. In more recent years he worked on a casual basis in a handyman type business, and in concreting work. He had ambitions of joining the army but because he is colour-blind his application did not succeed.

[27] Lewis-Grant and his then partner separated in 2013, after a relationship lasting about nine years, and two children. The break-up was unanticipated and devastated him. Between March and June of 2013, as a consequence of the relationship break-down and losing interest in life, he started using drugs in an escalated way. Specifically, he started using methylamphetamine on a regular basis. Because of the drug use he lost his rights to shared contact with his two boys, aged five years and six months.

Taking into account the plea of guilty

[28] Section 13(1)(a)of the *Penalties and Sentences Act* 1992 (Qld) requires a sentencing judge to take into account the plea of guilty. Then s 13(3) provides:

> "When imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed".

[29] A review of the sentencing remarks shows that the learned sentencing judge did not comply with s 13(3). However, the mere fact that s 13(3) is not complied with does not necessarily mean that the sentence should be reviewed. In *R v Safi*[11] the Court said:[12]

> "The question in this application is not whether there was such a non-compliance but what were the consequences of that non-compliance. I accept that the obligation imposed by s 13(3) is important. Where leniency is afforded on account of a plea of guilty, a statement to that effect serves the particularly important purpose of informing offenders of that fact. The publicity given to such statements encourages guilty offenders to plead guilty, thereby saving victims and witnesses of offences the trauma, disruption, and expense which may be involved in giving evidence and it saves the State the expense of prosecuting offences. **Where it is evident that the guilty plea was in fact taken into account, however, those considerations will not necessarily justify the Court in reviewing a sentence merely because the sentencing judge did not clearly state that the plea was taken into account.** The applicant relied upon the Court's observation in *R v Mallon* [1997] QCA 58 that one result of failure of a sentencing court to make the required statement in open court will be to "place the imposed sentence in jeopardy." That observation does not suggest that a non-compliance inevitably must result in the sentence being reviewed in all cases. That such a non-compliance may not always require review of the sentence is also consistent with the Court's immediately following observation that a non-compliance "will cause the Appeal Court to examine [the sentence] closely since it will not clearly appear that the court has in fact taken the plea into account."

[30] In the course of the sentencing remarks the learned sentencing judge reviewed the nature of the offences, Lewis-Grant's background and criminal history, and the aggravating factors. His Honour then said:[13]

> "It cannot be said, in my view, that it can appropriately be met by **a sentence of five years' imprisonment as was contended for by your**

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11 [2015] QCA 13.

12 Fraser JA at [16], Holmes and Morrison JJA concurring. Emphasis added.

13 AB 27 line 24. Emphasis added.

> **counsel**. In my view, the appropriate head sentence is one of seven years' imprisonment."

[31] That was a direct reference to the sentence that Lewis-Grant's counsel had submitted was appropriate, namely five years on the basis of a guilty plea. It was put thus:[14]

> "… in my respectful submission, **a head sentence in the order of five years would adequately reflect all of those matters**. He of course comes before the court with a criminal history but, as has been rightly pointed out, that criminal history discloses no previous convictions for offences of a sexual nature.
>
> He has of course now served some 22 months in pre-sentence custody, or thereabouts, which of course is not an insubstantial amount of time. **Ordinarily with a head sentence of five years on a plea of guilty might attract a recommendation for parole or a suspension at the one-third point, which would equate to 20 months.** So in that sense, your Honour, he's now served beyond the one-third point of such a sentence. And given the delays that would be associated with applying for parole, if your Honour regarded 22 months of actual custody as adequately reflecting, in an overall sense, a sufficient period of actual imprisonment then your Honour could of course, if the head sentence was no higher than five years, suspend it after the period of time that he's already served."

[32] There are two important features of that submission in the current context. First, the express statement that the five years was on the basis of a plea of guilty. Secondly, that suspension would ordinarily occur at the one third mark, on a plea of guilty.

[33] The reference to that submission by the learned sentencing judge shows, in my view, that he did take the guilty plea into account. Further support for that conclusion is given by the later reference to the parole eligibility date:[15]

> "It seems, to me, that it's appropriate that you become eligible for parole after serving one-third of the head sentence, which would mean that you would be eligible for parole after a period of 28 months in prison. On that basis, I set your parole eligibility date after a further seven months on the 21st of December 2015."

[34] The setting of the parole eligibility date at the one third mark is, as Lewis-Grant's counsel at sentencing submitted, a recognition of a plea of guilty.

[35] Further to those matters, during the sentencing hearing there were references to the fact that a plea of guilty had been entered,[16] and Lewis-Grant's counsel distinguished a number of suggested comparable cases on the basis that they did **not** involve a plea.[17]

[36] In my view, it is plain that the learned sentencing judge proceeded to sentence taking into account the plea of guilty. This ground does not succeed.

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14 AB 24 lines 1-16. Emphasis added.
15 AB 28 line 6.
16 By the learned sentencing judge at AB 13 line 17; counsel for Lewis-Grant at AB 21 line 13.
17 AB 21 lines 21-27, 29 and 47; AB 22 lines 8-9.

Manifest excess?

[37] The contention advanced was based solely on comparable cases, rather than suggesting that there was any error in the record.

[38] The nature of the offending is set out above: see paragraphs [5] to [7] and [10] to [21]. Aggravating features of the offending are:

1. the offences were perpetrated on a four year old child;
2. it was not an isolated event; the offences took place over three days;
3. on 21 June Lewis-Grant sent a message to AD saying: "Send a sexy pic one of these men wanna see what a women kid Fucker looks like make it some what sexy"; it seems clear that he was referring to AD as the "woman kid fucker"; the first photo was taken on 22 June, and sent to AD at 1.06 pm on 22 June; at 1.07 pm AD responded with a "smiley face" icon;
4. the first photo (of F's pants pulled to one side with her vagina exposed) was taken at 1.02 pm on 22 June; at 12.34 Lewis-Grant texted AD telling her to "Send her in", and at 12.42, "Tell her a movie is on";
5. the inference is that Lewis-Grant was involving AD in some way in his offending, before, during and after the event;
6. his keeping of the photos of F can be seen as a form of trophy or memento, for his own continuing sexual gratification;
7. there was an escalation in the offending, starting with photos, progressing to exposing his erect penis, then to touching his erect penis, then to getting her to put her finger in her vagina, and the rape;
8. as to the rape, there was no suggestion that Lewis-Grant wore a condom, and from what F told police[18] Lewis-Grant ejaculated in F's mouth; the risk of sexually transmitted disease is obvious;
9. the matters above reveal Lewis-Grant's conduct as calculating, predatory and callous;
10. there was a gross abuse of the trust reposed in Lewis-Grant by F's parents permitting her to be at his unit;
11. the child exploitation material was explicit, and disturbing in that it involved not just very young children but also sexual intercourse with a baby;
12. the first set of child exploitation videos were downloaded in March 2012, more than a year before the offences against F; after his first phone was lost or dumped, Lewis-Grant downloaded further child exploitation material onto the second phone, on two days in July 2013 and one day in August 2013; there was therefore a deal of persistence in Lewis-Grant's pursuit of such material.

[39] Counsel for Lewis-Grant referred to a number of cases said to support the conclusion that the sentence of seven years was manifestly excessive. They are *R v Bull*,[19] *R v M*,[20] *R v BBS*,[21] and *R v D*.[22] The Crown added *R v Choomwantha*.[23]

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18 AB 43.
19 [2012] QCA 74. (***Bull***)
20 [2003] QCA 443. (***M***)
21 [2009] QCA 205. (***BBS***)
22 [2003] QCA 88. (***D***)
23 [2014] QCA 115. (***Choomwantha***)

[40] *Bull*, *Choomwantha*, *BBS* and *M* were all sentences imposed after a trial, so that must be weighed when considering their usefulness to the present case.

[41] *Bull* involved a five year sentence imposed for raping a 12 year old child. The offender was looking after the child while she was ill and her mother was at work. He made the child touch his penis, then pushed her head down while forcing her to suck it until he ejaculated in her mouth. He was 45 when the offence was committed and 49 at sentence. He was a disability pensioner with no criminal history. The rape was opportunistic, and involved a misuse of his position as temporary guardian. There was a lack of remorse.

[42] The court reviewed *M* (among other cases) saying that the three years given there was a lenient sentence, but *M* was more serious than *Bull*, in that the breach of trust was greater, and had greater overall criminality.[24] The court reduced the sentence to three and a half years. In respect of the task of using comparable cases in offences such as this Chesterman J said:[25]

> "Discerning gradations in depravity is a difficult if not impossible task, as is determining a precise level of punishment for each grade. The cases can be no more than indications of available ranges for roughly comparable offending."

[43] I do not consider *Bull* to be helpful in this case. It was a single, opportunistic offence, and did not involve the extra criminality reflected by the multitude of child exploitation and indecent dealing offences which exist here. Further the breach of trust here is worse as the offences occurred over three separated days, and were accompanied by a degree of planned predation.

[44] *D* involved a late plea of guilty to a charge of rape, by a 40 year old on a five year old child. He had a very lengthy criminal history which included dishonesty and violence but no sexual offences. He was sentenced to 12 years which the court reduced to 10 years. The offender took the child out of her own back yard and into his house. Her mother went into the offender's house to find him leaning over the naked child, touching her vaginal area while holding her legs. The child had not responded to the mother's calls because the offender threatened to punch her. The child had injuries to the vaginal area, in that the hymen was bruised and there was a possible laceration to it. They were consistent with digital penetration.

[45] Psychological evidence showed the offender to be suffering from an antisocial personality disorder and substance abuse. That meant he had problems with self-control and diminished self-concern for the consequences of his behaviour.

[46] The court reduced the sentence to 10 years for the rape,[26] but said that it was a serious case involving the abduction of a child from her yard and removal to another house. The President noted that the digital penetration did not have the risk of sexually transmitted disease, and the particularly serious aspects were the child's age (five years), the abduction, the offender was mature man with a bad criminal history, and there was a real risk of reoffending.[27]

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24 *Bull* at [51]-[52].
25 *Bull* at [56], White JA and Daubney J concurring.
26 There was an additional charge of deprivation of liberty.
27 *D* at page 8.

[47] *D* is, in my view, of some assistance. Even allowing for the fact that the offender was older, his criminal history was comparable in nature to Lewis-Grant's, and the child was a similar age. There was no breach of trust, and only the one occasion of offending, and there were none of the other aspects of child exploitation that are present here. True it is that there were some injuries caused, but that attack did not involve, as this one does, the risk of sexually transmitted disease. In my view, *D* offers some support for the sentence imposed on Lewis-Grant.

[48] *M* involved a three year sentence imposed for rape of a six year old child. The child was the offender's son, who was being looked after as part of an access arrangement. The rape was by putting his penis in the son's mouth. From the son's evidence his father ejaculated in his mouth. There were also two charges of indecent treatment, by sucking the son's penis, and by the offender rubbing his penis on the son's back, and rubbing ejaculate on the son's back. The Court did not regard the sentence as manifestly excessive, but lenient. The President said:[28]

> "These offences were a serious breach of a father's trust with potentially devastating consequences for both his six year old son and the boy's mother. Some physical force was used beyond the emotional force of the father/child relationship. Fortunately, the boy was not physically injured and, for this reason, the offending is towards the lower end of seriousness for rapes. The applicant had no prior convictions but he was a mature man who has shown no remorse and nor does he have the mitigating benefit of an early plea of guilty. The sentence imposed of three years imprisonment was by no means manifestly excessive for the applicant's combined offences; it was lenient."

[49] *M* is quite distinct from the circumstances here. There was a breach of trust and the rape was similar, but the offences did not have the child exploitation aspects present here, they occurred on one day, and it seemed an opportunistic offence. Those matters, and the court's conclusion that three years was lenient, make *M* of no real assistance.

[50] *Choomwantha* involved the digital rape of a five year old girl, by a 46 year old man with no criminal history. He was sentenced to 10 years but that was reduced to eight. The offender was at a birthday party at the house of someone else. He took her out of the yard and across the road, where he made her lie down behind a car, and penetrated her vagina. At first the offender would not let her go when her name was called. He released her eventually. She sustained a five to seven millimetre laceration to her labia majora, bruising to her hymen and a tear of her posterior fourchette.

[51] The court reviewed a number of cases including *D*. The court regarded the abduction to be different in degree from that in *D*, and there was no threat of violence like there was in *D*. Whilst describing the offending as grave, and noting the distress and pain inflicted on the child, the court considered the sentence should be eight years.

[52] *Choomwantha*, in my view, supports the sentence imposed on Lewis-Grant. Accepting that it involved an abduction and physical injury, there was no abuse of trust, the offence was opportunistic, it occurred on only one occasion, there was no risk of sexually transmitted disease, and there was not the child exploitation aspects that are present here.

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[28] *M* at [39], Dutney and Philippides JJ concurring.

[53] I do not regard *BBS* as being of much assistance. The offending was against two six year old girls, and included four charges of indecent treatment and one of maintaining a sexual relationship (over a period of seven to eight months). The girls were allowed to go to the offender's unit. The offending involved blindfolding the girls or asking them to close their eyes, in order to play a "tasting" game. Pretending to put his thumb in their mouths, the offender in fact put his penis in. There were four such occasions the subject of charges, but other uncharged acts. Some years after the offences with the girls, he had 1,390 images of child pornography on his computer.[29]

[54] The sentence was four years in respect of the indecent treatments charges, and five years and 10 and a half months in respect of the maintaining charge. The offender was 45 to 46 at the time of the offending, and had no prior criminal history. The Court considered that the sentences were not manifestly excessive, noting the age of the girls, the gross abuse of trust, absence of contrition save for the plea of guilty to the subsidiary charges, the attempts to avoid detection (blindfolding, and the artifice of the game), and the residual effect of the girls.

[55] There are some similarities between *BBS* and the present case, but the four charges were not of rape, but indecent treatment, so that the difference in the maximum penalty affects the utility of the comparisons.

[56] The review of the cases above demonstrates that the sentence was not manifestly excessive.

Parole eligibility date

[57] When the learned sentencing judge dealt with the issue of the parole eligibility date his Honour said:[30]

> "I declare that the period of 655 days between the 4th of August 2013 and the 20th of May 2015 should be taken to be time served under the sentences that I have imposed today.
>
> It seems, to me, that it's appropriate that you become eligible for parole after serving one-third of the head sentence, which would mean that you would be eligible for parole after a period of 28 months in prison. On that basis, I set your parole eligibility date after a further seven months on the 21st of December 2015."

[58] Since his Honour intended that Lewis-Grant be eligible for parole after serving 28 months, and the pre-sentence custody was declared as time served, the 28 months should have been calculated from 4 August 2013. That would make 4 December 2015 the correct parole eligibility date.

Conclusion.

[59] For the reasons given above I would allow the application for leave to appeal only in respect of the parole eligibility date. The orders I propose are:

1. The application for leave to appeal is granted.
2. The appeal is allowed.

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29 The offences were not revealed by the girls for six or seven years. The images were discovered when police searched his house.

30 AB 28.

3. The order made on 21 May 2015, setting aside the parole eligibility date at 21 December 2015, is set aside and in lieu thereof the parole eligibility date is set at 4 December 2015.

4. The orders made on 21 May 2015 are otherwise affirmed.

[60] **BODDICE J:** I have read the reasons for Judgment of Morrison JA. I agree with those reasons and the proposed orders.