SUPREME COURT OF QUEENSLAND

CITATION:	*R v Formenton* [2018] QCA 77
PARTIES:	**R** **v** **FORMENTON, Alexander Jonathan** (applicant)
FILE NO:	CA No 52 of 2017 DC No 1756 of 2016 DC No 2290 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 24 February 2017 (Bowskill QC DCJ)
DELIVERED ON:	27 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2017
JUDGES:	Sofronoff P and Fraser JA and Brown J
ORDER:	**Application 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 and was sentenced for the Commonwealth offence of using a carriage service to menace, harass or cause offence and the State offence of possession of child exploitation material – where the applicant was sentenced for the State offence to 12 months' imprisonment, wholly suspended for a period of two years – where the applicant seeks to overturn the sentence for the State offence on the basis that it was manifestly excessive – where the applicant submits that the learned sentencing judge erred in sentencing the applicant to imprisonment rather than imposing a community-based order – where the applicant contends that the learned sentencing judge gave insufficient weight to his various mitigating factors – whether a conviction should have been recorded – whether the sentence was manifestly excessive *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld) *Criminal Code* (Qld), s 228D *Penalties and Sentences Act* 1992 (Qld), s 9(2)(a), s 9(6A), s 9(7)

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
R v Daw [2006] QCA 386, considered
R v Jones [2011] QCA 147, considered
R v Lovi [2012] QCA 24, considered
R v MBM (2011) 210 A Crim R 317, [2011] QCA 100, considered
R v Murray [2014] QCA 250, cited
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited
R v Richardson; ex parte Attorney-General (Qld) (2007) 175 A Crim R 244; [2007] QCA 294, considered

COUNSEL: P F Richards for the applicant
D Caruana for the Director of Public Prosecutions (Commonwealth)
C N Marco for the Director of Public Prosecutions (Queensland)

SOLICITORS: Fisher Dore for the applicant
Director of Public Prosecutions (Commonwealth)
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons for judgment of Brown J and the order her Honour proposes.

[2] **FRASER JA:** I agree with the reasons for judgment of Brown J and the order proposed by her Honour.

[3] **BROWN J**: The applicant is a young man who pleaded guilty to and was sentenced on 24 February 2017 for the following offences:

(1) Use a carriage service to menace, harass or cause offence ("the **Commonwealth Offence**"), in relation to which he was released without proceeding to conviction on a $500 recognizance conditioned on:

(a) being of good behaviour for a period of two years;

(b) being subject to a two year period of probation; and

(c) submitting to such treatment or counselling as directed by the Probation Officer; and

(2) Possessing child exploitation material ("the State Offence") for which he was sentenced to 12 months' imprisonment, wholly suspended for a period of two years.

[4] The applicant seeks to overturn the sentence in respect of the State Offence on the basis that it was manifestly excessive. That is the only issue to be determined on this application.

[5] The applicant had originally sought to amend the grounds of appeal in relation to the Commonwealth Offence, but that was subsequently withdrawn during the hearing.

Circumstances of the State Offence

[6] The applicant was 20 years of age at the time of the offence and is now 22 years of age.

[7] In investigating a complaint which was the subject of the Commonwealth offence, a forensic investigation of the applicant's phone revealed downloaded child exploitation material (CEM). The scientific analysis of the phone's data discovered a total of 907 images and five videos identified as CEM of children between six and 12 years. Of the five videos, one was classified as belonging in one of the most serious categories, category 4. In relation to 907 images, 633 images proved to be unique. The majority of those images were classified as the lowest category, category 1. However, 130 of the images were classified as belonging to category 4 and six were category 5 images. The category 4 images included penetrative acts of children between six and 14 years while category 5 included sado-masochistic images of children.

[8] When the police attended his residence to execute a search warrant, the applicant went into his bedroom and knelt under a desk. He then refused to provide police with his mobile phone upon request and provided false information as to its location.

[9] The maximum penalty for possessing CEM is 14 years' imprisonment.

The sentence imposed by the sentencing judge

[10] In imposing the sentences for the Commonwealth and State Offences, her Honour took into account:

(a) The applicant's youth;[1]

(b) The nature of the offending and particularly that the possession of CEM is not a victimless crime;[2]

(c) The applicant's conduct when police attended his residence;[3]

(d) The applicant's lack of criminal history;[4]

(e) The fact that the applicant has an incredibly supportive family and family friends;[5]

(f) His early plea of guilty and other evidence of remorse;[6]

(g) The fact that he had done well at school, getting an OP Score of 8, and that he is now undertaking further study, but finding that difficult;[7]

(h) A number of reports tendered to the Court in relation to the applicant's mental health and other issues. Her Honour noted that a lot of attention had been paid to his mental health and other matters consequent upon the offending coming to light.[8] In particular, her Honour referred to the following matters raised in the medical evidence;

(i) Dr Keane's opinion that the applicant had executive deficits which influence the ability of a person to utilise intact cognitive resources in a consistent and predictable manner, which might affect

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1 AB 32/19-20; AB 34/33.
2 AB 32/12-17.
3 AB 32/36-39.
4 AB 32/20; AB 34/33.
5 AB 32/21-23.
6 AB 31/8-12.
7 AB 32/30-33.
8 AB 32/24-28.

a person's social behaviour. Dr Keane did not consider that the applicant had been entirely upfront in his responses to her;[9]

(ii) Professor McCombe, a neurologist, could not make a neurological diagnosis in December 2015. She considered that the applicant possibly had long-standing problems with cognition. She considered that he was presenting with depression caused by the proceedings;[10]

(iii) Dr Calder-Potts, a psychiatrist, considered that the applicant had a depression caused by these proceedings but also considered that it was possible that the applicant had long-standing problems with cognition. Dr Calder-Potts noted that the applicant played down his criminal offences in relation to the CEM possession. He considered that the applicant had a low IQ (despite his attendance at University) and was having difficulty with academic requirements. He also found that he was easily influenced and manipulated by acquaintances;[11]

(iv) Dr Gardner, a clinical neuropsychologist and clinical psychologist, had seen the applicant on many occasions. She considered that the applicant has a naivety and a lack of understanding and forethought in relation to particularly the CEM offence. She found that he appeared to be uninformed and uneducated about such topics and was shocked when she informed the applicant of behaviours that would be considered against the law and could lead to the applicant to being charged;[12]

(v) Dr Robertson, a psychiatrist, considered that the applicant is on the autistic spectrum with Asperger's disorder. She described the applicant as having feelings of guilt, shame and regret in relation to the offences;[13]

(vi) The report of Ms Bardsley, with whom the applicant engaged in relation to undertaking and completing a sex offenders' course. She recorded in particular that the applicant was far more frank and candid in providing information about the offending behaviour in admitting that he had been actively downloading the material. This was in contrast to what he had told Dr Calder-Potts. She considered that the applicant was at low risk of further offending of any kind and particularly offending of a sexual nature.[14]

[11] Her Honour accepted the Crown Prosecutor's submission that the applicant had down-played the criminal behaviour leading to the offences when speaking to Dr Calder-Potts in denying that he knew that CEM material was specifically downloaded and saying it may have been mixed with other pornography.[15] That was, as her Honour

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9 AB 32/35-40.
10 AB 32/44-46; AB 33/1-2.
11 AB 33/4-15.
12 AB 33/17-28.
13 AB 33/30-33.
14 AB 33/40-46; AB 34; 1-2.
15 AB 33/9-11.

noted, inconsistent with what he told Ms Bardsley. Her Honour however noted that to the applicant's credit, he was more frank with Ms Bardsley and owned up to the fact that he was actively downloading the material.[16] Her Honour commented that the opinion of Dr Gardner that the applicant did not appreciate the images that he was downloading were wrong and horrific was concerning, particularly given what the applicant had achieved, albeit with academic difficulties, as a person of his age.[17]

[12] Her Honour accepted the principle referred to in the authorities that general deterrence ought to be given less weight in a case of an offender who may be said to be suffering from some kind of mental disorder.[18] Her Honour considered that while she was satisfied having regard to the material presented to her that it was not appropriate for the applicant to serve time in actual custody, she was not persuaded by that material that the penalty should be considerably different from what is imposed on other offenders in terms of the upper limit.[19] In this regard her Honour referred to the fact that the maximum penalty for the State Offence had significantly increased in recent years from five years' to fourteen years' imprisonment. Her Honour stated that the increase in the legislated maximum penalty was an indication of how serious the offence is and how seriously it is regarded by the community and by the Courts.

[13] Her Honour considered that the Court of Appeal decisions that had been put before her were consistent with a period of imprisonment being imposed upon a person who commits an offence such as the State Offence, with different outcomes as to whether time is spent in custody, depending on an offender's personal circumstances.[20]

[14] On the basis that the applicant was a very young man and had no criminal history, and by reference to the medical material that had been put before her, her Honour was persuaded that it was not in the interests of the community in terms of his rehabilitation for the applicant to serve time in custody.[21] However, she was not persuaded that making a probation order in respect of such a serious offence was appropriate. Her Honour had regard to the authorities and particularly the authority of *R v MBM*[22] and *R v Jones*,[23] in determining the appropriate period of imprisonment, even though they were decisions made when the maximum penalty for the State Offence was less than 14 years' imprisonment. Her Honour determined that the appropriate period of imprisonment was 12 months, to be suspended wholly for an operational period of two years. Her Honour imposed a probation order for a period of two years in relation to the Commonwealth Offence.

Contentions of the applicant

Commonwealth Offence

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16 AB 33/5-9 and 41-45.
17 AB 33/18-25.
18 AB 34/5-8, particularly with reference to *R v Grehan* (2010) 199 A Crim R 408.
19 AB 34/15-18.
20 AB 34/26-30.
21 AB 34/34-37.
22 (2011) 210 A Crim R 317.
23 [2011] QCA 147.

[15] In relation to the sentence in respect of the Commonwealth Offence, that the applicant withdrew the ground of appeal that the sentence was based on an incorrect factual basis. The applicant did not pursue the appeal against the sentence for the Commonwealth Offence on any other basis.[24] Nor with respect could he have done so. The offence was punishable by up to three years imprisonment and considerations of personal and general deterrence were relevant. Although intended to be a prank, it had scared the complainant. Given the nature of the sentence imposed, there is no basis upon which that sentence could be said to be manifestly excessive.

State Offence

[16] Counsel for the applicant submitted that her Honour erred in sentencing the applicant to imprisonment rather than imposing a community-based order without recording a conviction.

[17] The applicant does not identify any particular error made by her Honour. Rather, his complaint is that she gave insufficient weight to particular factors in the applicant's favour.

[18] The applicant contends that the sentencing judge gave insufficient weight to the applicant's age and his completion of a sex offenders' program prior to sentencing. He further submits that the Court gave insufficient weight to the applicant's lack of criminal history and gave no weight or insufficient weight to the fact that the applicant posed a low risk of reoffending.

[19] The applicant particularly relies on the decision of *R v Daw*[25] and to a lesser extent *R v Lovi*.[26] The applicant submits that community-based orders for youthful, first time offenders charged with possessing CEM remains an appropriate sentencing option despite the increased maximum penalty for the offence and the enactment of s 9(6A) and s 9(7) of the *Penalties and Sentences Act* 1992 (*PSA*).

[20] The applicant also submits that the Court gave undue weight to the increased maximum penalty. It contends that a maximum penalty serves as a yardstick and an increase in the maximum penalty does not lead to an automatic increase in penalties imposed.

[21] The applicant submits that if the Court was minded to grant leave and impose a community-based order or orders with respect to the State Offence, no conviction ought to be recorded.

[22] The applicant contends that the recording of a conviction will particularly impact upon him in the future. In particular, the applicant relies on the fact that recording a conviction identifies the applicant as a reportable offender under the provisions of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld). The applicant's counsel submits that his becoming a reportable offender at such a young age, while still a student, is likely to have an impact on his social and economic well-being, as well as his prospect of finding employment.

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24 T1-59/1-3.
25 [2006] QCA 386.
26 [2012] QCA 24.

[23] The applicant submits that the appropriate sentence to be imposed is three years' probation with no conviction recorded and/or 240 hours of community service.

The respondent's contentions

[24] The respondent submits that the sentence could not be regarded as manifestly excessive.

[25] In addition to the matters expressly referred to by her Honour, the Crown referred to some additional matters in connection with the applicant's offending as identified by Ms Bardsley including, *inter alia*, that the applicant "felt like a child in an adult's body and had no idea how to be physically intimate with someone of his own chronological age", and that he was sexually aroused by the CEM. It also noted Ms Bardsley's reference to the applicant's delusional belief that the images weren't real. The applicant also told Ms Bardsley that when viewing the material he did not consider the consequences of the offending and although he knew it was wrong, the need for instant gratification somehow made up for his offending. Ms Bardsley had, however, considered that the applicant lacked knowledge and experience regarding age-appropriate relationships such that he could not progress along the continuum of intimacy in reality. Conversely , the Crown referred to the fact that the applicant had also identified a number of environmental restrictions and protective factors to Ms Bardsley which will assist him to not reoffend and stated that he intended to strictly adhere to any and all such conditions of ANCOR that applied to him.

[26] The respondent relies on the additional decision of *R v Richardson; ex parte Attorney-General (Qld)*.[27] The respondent referred to *R v Hickey*,[28] but properly conceded that it was a much more serious case than the present.

[27] The Crown submits that her Honour took into account all relevant considerations and that the wholly suspended term of imprisonment struck the proper balance between the seriousness of the offence and the applicant's rehabilitation that showed he was not in need of immediate supervision.

Consideration of comparable cases

[28] To establish that a sentence is manifestly excessive, the applicant must show that the sentence is "unreasonable or plainly unjust" such that it may be inferred "that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance".[29] The fact that another judge may have imposed a different sentence is not enough. In *R v Pham*,[30] French CJ, Keane and Nettle JJ stated:

> "Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle." (citation omitted)

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27 (2007) 175 A Crim R 244.
28 [2011] QCA 385.
29 *House v The King* (1936) 55 CLR 499; [1936] HCA 40.
30 (2015) 256 CLR 550 at 559; [2015] HCA 39 at [28].

[29] In *R v Lovi*,[31] the offender pleaded guilty to 15 counts of using a carriage service to access child pornography and one count of possessing CEM under s 228D of the *Criminal Code* 1899 (Qld). On the count of possessing CEM (Count 16), the applicant was sentenced to eight months' imprisonment to be suspended after two months with an operational period of two years. At the time the maximum penalty for possession of CEM was five years. The Court of Appeal found that the sentencing judge's discretion had miscarried in failing to recognise that the offender in *R v Lovi* was to be sentenced as a child in relation to one of the offences that were committed when he was between 16 and 17 years old.

[30] The offender in that case downloaded 540 images, including images in category 4 in respect of females between five and seven years old, as well as an image of a female between seven and 10 years old which would be regarded as in category 5. There were a number of movies also found, depicting young females between the ages of seven and 12 engaged in various sexual acts with adults.

[31] The offender in *R v Lovi* was 19 years old at the time of sentencing. He was 16 years old at the time that one of the counts was committed and 17 to 18 at the time of the other offences, in particular Count 16. He had no prior criminal convictions.[32] He had a good work history and a history of unpaid community work. Matters in mitigation were the applicant's guilty plea, the applicant's age and his prospect of rehabilitation.[33] At the time of his arrest he was applying to join the Armed Forces.

[32] In exercising the sentencing discretion, Muir JA, with whom the Chief Justice and Atkinson J agreed, determined that, having regard to fact that the applicant was 16 and 17 throughout most of the offending period and to his prospects of rehabilitation, a probation order should be imposed in respect of Count 16.[34] The Court particularly referred to the fact that imprisonment for short periods of young offenders who have not been previously imprisoned is generally recognised as being potentially harmful to their rehabilitation.[35] However, even though the Court accepted his employment prospects would be adversely affected, the Court rejected the submission that no conviction should be recorded, given the seriousness of the offences committed by him, the protracted duration of the offending conduct and the circumstance that its cessation was not voluntary.[36] The Court considered that the conduct could not be seen as an act or even a few acts of youthful folly. It was not a case where the offender could simply be released on probation.

[33] The offender in *R v Lovi* was very young and less images of CEM were involved than in the present case. The sentencing judge had also imposed a sentence involving a period of actual custody and the offender had already served one month in custody when the appeal was determined. At the time of sentencing, the maximum penalty was considerably less.

[34] In *R v Daw*,[37] the sentencing judge had imposed a sentence of nine months' imprisonment to be served by way of an intensive correction order. The maximum

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31 [2012] QCA 24.
32 Save he had been ordered to perform 80 hours of community service in relation to a driving offence.
33 [2012] QCA 24 at [12].
34 At [39].
35 At [38].
36 At [42].
37 [2006] QCA 386.

penalty had increased from two years to five years' imprisonment between the time of offending and the time of sentencing.

[35] The circumstances of that case were exceptional and the Court was satisfied by the evidence that it was a one-off incident borne out of curiosity. The applicant was 21 years of age at the time of the offending and 23 at the time of sentencing. He had downloaded 58 images and had pleaded guilty on an *ex officio* indictment to knowingly possessing CEM under s 228D of the *Criminal Code* 1899 (Qld). The images had not been dealt with by the applicant by cataloguing them or by storing them in a lasting form.

[36] The images were mostly of young females naked or semi-naked. Two images could be described as category 4 images.

[37] Jones J[38] considered that the offence was at a very low level. He noted that the applicant's conduct was significantly less serious than the conduct in other cases referred to, that he had no prior criminal conviction and that he had pleaded guilty on an *ex officio* indictment. While the applicant had a troubled upbringing, he had made some achievements in his studies and employment. A psychologist found that there was no overt evidence of any deviant paedophilic tendencies. In those circumstances, Jones J considered that the making of a probation order was entitled to be given serious consideration. That accorded with the penalty sought by the prosecutor and by the applicant's counsel. Jones J found that the recording of a conviction would jeopardise the applicant's employment and his prospects of success generally, and in particular that the completion of the intensive correction order would jeopardise his employment.

[38] His Honour determined that the sentence imposed had been manifestly excessive. He found it was unlikely that the applicant would re-offend and that general deterrence was not assisted by a heavy penalty. He considered that a lengthy probation period would enhance rehabilitation. The sentence was set aside and the Court imposed a sentence of two years' probation and directed that a conviction not be recorded.

[39] Although the applicant is slightly younger than the offender in *R v Daw*, and both the applicant in the present case and the offender in *R v Daw* were found to have a low risk of reoffending, the offending was more serious in the present case. The number of images that were downloaded in *R v Daw* was considerably less than the present case and only one image was a category 4 image. In *R v Daw* it was also positively demonstrated that the images had been downloaded in a one-off incident and were not looked at again by the offender. Unlike the present case, there was no suggestion that the offender derived any sexual gratification in relation to the images.

[40] In *R v Richardson; ex parte Attorney-General (Qld)*,[39] the offender who was convicted on a plea of guilty of three offences of possessing CEM under s 228D of the *Criminal Code* 1899 (Qld) and sentenced to 12 months' imprisonment wholly suspended for three years. The applicant was 24 years of age with no prior convictions. He had discarded the material prior to the detection of the offences. There were 167 video files in total with two files being in the worst category

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38 With whom Jerrard and Holmes JJA agreed.

39 (2007) 175 A Crim R 244.

displaying brutal sexual abuse. Most images consisted of pre-pubescent boys masturbating. The Court of Appeal dismissed the Attorney-General's appeal against sentence. The maximum penalty was five years' imprisonment. The Attorney-General sought a sentence of actual imprisonment. That case was decided before amendments to s 9(6A) and s 9(7) of the *PSA*.

[41] McMurdo P found that the sentence provided sufficient personal and general deterrence given that there had been public shaming of the offender. A conviction had been recorded and by providing for a suspended sentence the offender would be at risk for three years of serving twelve months in prison. The offender had lost the opportunity for his desired areas of employment and would be required to report pursuant to the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld).

[42] Keane JA[40] considered the circumstances of the offender's possession might fairly be described as in the category of less serious examples of this type of offending. His Honour noted that it was a matter of considerable significance that the respondent had thrown the computer disc with 165 video files away before any detection, which showed a real commitment to rehabilitating himself. His Honour further noted that one of the obstacles to the Attorney-General's submission was that imprisonment was under s 9(2)(a) a matter of last resort. The offender's own admissions had resulted in the two additional changes. In the circumstances his Honour found it was open to the learned sentencing judge to consider that actual imprisonment or intensive correction orders were not necessitated by the circumstances of the case. Philippides JA agreed with the reasons of the President and Keane JA and noted that the Attorney-General's submissions failed to have proper regard to the mitigating circumstances.

[43] The case of *R v Richardson; ex parte Attorney-General (Qld)* has a number of similarities to the present case insofar as the offender had no prior convictions and had taken steps towards his rehabilitation. The maximum penalty at the time was however less than in the present case, and s 9(2)(a) of the *PSA* was at that time unaffected by the amendments of s 9(6A) and s 9(7) of the *PSA* which apply to the State Offence in the present case. While there were two images that were in a worse category, the overall number of images possessed were considerably less than in the present case. The offender had also stopped offending prior to detection and made admissions leading to the charging of two offences. His mitigating circumstances in that regard were slightly stronger than the applicant's in the present case and the offending in the present case is no less serious.

[44] In the case of *R v MBM*,[41] the applicant pleaded guilty to one count of possessing CEM and one count of making CEM which involved the applicant's niece undressed and entering a shower and touching herself, which was filmed by his brother. The applicant's older brother was charged on the same indictment, although not jointly, with two counts of making CEM. The applicant was sentenced on each charge to two years' imprisonment to be suspended after eight months with an operational period of two and a half years. He appealed on the ground that the sentences were manifestly excessive.

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40 As his Honour then was.

41 (2011) 210 A Crim R 317.

[45] The applicant was 37 years of age, had no previous convictions and entered early pleas of guilty. He had the support of his family and had undertaken intensive counselling after the offences were discovered. There were 159 images located aside from those of the applicant's niece. There were 17 individual category 4 images of children aged between three and five and 139 category 6 images involving cartoon characters.

[46] The Court of Appeal noted the strong mitigating features were the applicant's previously unblemished history, his excellent work history, his strong family support, his good prospects of rehabilitation and his pleas of guilty. A schedule provided to the Court showed sentences that had been imposed for possession of CEM for a person without previous conviction ranged from imprisonment for six months to 18 months.[42] The Court found that, having regard to comparable cases, the imposition of a sentence of two years' imprisonment for the quantity and nature of images involved and for a person without previous convictions who indicated a plea of guilty promptly and who immediately sought maintained rehabilitation, was outside the range of sentences imposed for that kind of offending. White JA[43] determined that the appropriate penalty for the possession charge should be one of 12 months' imprisonment suspended after three months (to reflect the plea and other mitigating factors) with an operational period of two years.[44] The maximum penalty for possessing CEM at the time was five years.[45] The Court did not consider the sentence for making child exploitation material was manifestly excessive.

[47] The offending in that case may be regarded as more serious in some respects and the offender was older, but in that case the offender did spend time in custody and the maximum penalty was considerably less than it was at the time the present offences took place.

[48] In *R v Jones*,[46] Muir and White JJA agreed with Daubney J in determining that a sentence of 12 months' imprisonment for two counts of possession of CEM suspended after two months for an operational period of two years, in addition to the head sentence of 15 months' imprisonment to be released after three months, for one count of the Commonwealth offence of using a carriage service to access child pornography material, should be set aside.

[49] The applicant had no criminal history and had pleaded guilty to the offences. He was 47 years of age. Police located 17 movie files and 44 pictures which contained CEM in categories 1 through 5. Most images were category 1 but twelve of the movies were category 4 and one was a category 5. The downloading occurred on a single day. The applicant had made a significant contribution to the community, and had references provided on his behalf indicating the high regard in which he was held notwithstanding his offending. He had a report by a forensic psychologist whose assessment was that he presented a very low risk of re-offending. At the time of downloading the material, he and his wife were in the midst of a relationship breakdown and according to a psychologist's report that circumstance clouded his judgment. He had been the subject of considerable media coverage and was removed from involvement in rugby league coaching as a result of the charges.

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42 At [22].
43 With whom Fraser JA and Chesterman JA agreed.
44 At [23].
45 At [12].
46 [2011] QCA 147.

[50] The Court considered that the sentencing judge abrogated the proper exercise of the sentencing discretion in considering that custody was necessary to take a "tough stand."[47]

[51] The Court of Appeal considered that the seriousness of the type of offending called for a sentence of general deterrence and considered that the head sentences of 15 months' imprisonment for the Commonwealth offence and 12 months' imprisonment for each of the State Offences was appropriate. However, the Court of Appeal considered that a singular circumstance of the offending together with the personal mitigating circumstances of the offender called for significant moderation of the sentence. The sentence for the possession of CEM of 12 months' imprisonment suspended after two months with a two year operational period was set aside to the extent that the applicant was released forthwith. The sentence for the Commonwealth offence was modified to provide for immediate release on recognizance. That sentence was prior to the increase in the maximum penalty in 2013.

[52] While the cases of *MBM* and *Jones* involved people who were significantly older, they involved less images than the present case and were imposed at a time when the maximum penalty was less.

Conclusion

[53] The analysis of the comparable cases does not support a finding that the sentence is manifestly excessive.

[54] There is no doubt that cases such as this present a difficult decision for a sentencing judge to make when weighing up all the relevant considerations to determine an appropriate sentence.

[55] The applicant is a young man with no criminal history and he and his family have taken active steps to address his offending and ensure that it does not take place in the future. In doing so it was discovered that he appears to suffer from Asperger's syndrome or some other cognition issues, which at least partly explain some of the factors which led to his offending.

[56] His undertaking of the sex offending program with Ms Bardsley appears to have met with success in developing strategies to address his cognitive distortions, maladaptive behaviours and emotional responses and to provide him with a greater understanding of his cycle of offending. As a result, Ms Bardsley concluded that he was at low risk of reoffending and that he now has no criminogenic needs that currently require addressing.

[57] Her Honour did take into account the applicant's age and his engagement in the sex offender's program with Ms Bardsley, which she stated was greatly to the applicant's credit, and Ms Bardsley's view that he was at low risk of re-offending.

[58] It is apparent from her Honour's reasons that she considered the medical evidence, the applicant's age and lack of criminal history and that he was at low risk of reoffending in the future in determining that general deterrence did not require a period in custody and that the applicant's rehabilitation was best served by him remaining in the community and continuing to access his relevant assistance. While it may have been open for her Honour to impose probation as opposed to a suspended sentence,

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47 At [26].

it has not been shown to be an error to impose the sentence that was imposed. Her Honour had imposed probation in relation to the Commonwealth offence.

[59] As was stated by her Honour however, the offence of possessing CEM is not a victimless crime. The supporting of an industry with respect to CEM material which takes advantage of vulnerable children has been regarded more seriously by the community and by the Parliament in recent years and as a result the maximum penalty has been increased significantly.

[60] The suggestion that the sentencing judge gave undue weight to the increased maximum penalty must be rejected. A Court must take into account the maximum penalty for an offence in determining an appropriate sentence. This has been said to be for three reasons: the maximum penalty is what the legislature has legislated; secondly, a maximum penalty invites a comparison between the worst possible case and the case before the Court at the time; and thirdly, because it provides, taken in balance with all of the other relevant factors, a yardstick.[48] That said, the fact that there is an increase in the maximum penalty does not necessarily mean that all such offences committed after the amendment should attract a higher penalty than they previously would have, but it is to be expected that such an increase will produce a general increase in the severity of sentences, rendering earlier cases of little utility as comparable sentencing decisions.[49] Her Honour's approach was consistent with this and rather than just increasing the penalty automatically due to the change in the maximum penalty, her Honour made reference to it in determining the head sentence and whether a period of imprisonment should be imposed, albeit she particularly relied upon cases decided when the maximum penalty was lower.

[61] The applicant also submitted that the present case was an appropriate case for no conviction to be recorded.

[62] As was correctly accepted by the counsel for the applicant, the decision whether or not to impose a conviction in the applicant's circumstances, was a decision that could go either way and still be a correct exercise of discretion. While the applicant was a young, first time offender who had undergone considerable rehabilitation, the nature of the offending was serious and not a case of a few acts of youthful folly. The applicant had initially sought to evade detection of his activities by the police in hiding under the desk and refusing to say where his mobile phone was located and it took some time for him to acknowledge the nature of his offending to medical practitioners.

[63] There was a large amount of material including some of the material being in the more serious CEM categories of 4 and 5. Further, not only had the maximum penalty been increased to 14 years for the offence at the time that her Honour was sentencing but the *Penalties and Sentences Act* 1992 (Qld) had also been amended to insert s 9(6A) providing that the principle in subsection 2(a) does not apply to sentences for, *inter alia*, an offence against s 228D of the *Criminal Code* 1899 (Qld). Subsection 7 was also inserted in s 9, which provides for the matters to which the Court must primarily have regard, including the need to deter similar behaviour by other offenders to protect children.

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48 *Markarian v The Queen* (2005) 228 CLR 357 at [31], referred to by Fraser JA in *R v Murray* [2014] QCA 250 at [16].

49 *R v Murray* at [16], referring in particular to *R v CBI* [2013] QCA 186 at [19].

[64] The case of *R v Daw*, where the Court of Appeal did not record a conviction and imposed a period of probation had a number of distinguishing features as identified above.

[65] The seriousness and scale of the offending together with the fact that the applicant had downloaded the material for sexual gratification warranted the recording of a conviction. This case, as was the case in *R v Lovi*, could not be seen to be a few acts of youthful folly.

[66] Although it may be accepted that the applicant was afflicted by a mental disorder and/or Asperger's Syndrome, was young and naïve and unlikely to re-offend in light of his rehabilitation efforts for the State Offence, while another judge may have imposed a more lenient sentence, the sentence imposed was not manifestly excessive.

[67] The application for leave to appeal should be refused.