SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2018 0072

KENNETH McNIECE — Applicant

v

THE QUEEN — Respondent

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|---|---|
| JUDGES: | McLEISH, T FORREST and WEINBERG JJA |
| WHERE HELD: | MELBOURNE |
| DATE OF HEARING: | 29 March 2019 |
| DATE OF JUDGMENT: | 10 April 2019 |
| MEDIUM NEUTRAL CITATION: | [2019] VSCA 78 |
| JUDGMENT APPEALED FROM: | [2017] VCC 2043 (Judge Sexton) |

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CRIMINAL LAW – Appeal – Sentence – Use of carriage service to solicit child pornography, procuring child to engage in sexual activity, transmitting indecent communications to person under 16 years and possession of child pornography – Total effective sentence 4 years 10 months' imprisonment – Whether judge diluted mitigating effect of no prior offending through observation that applicant did not have computer at relevant times – Whether sentences manifestly excessive – Base sentence on procuring charge – Procuring 15 year old boy to have sexual activity with girlfriend – No inducement or role of offender in activity – 2 years 6 months' imprisonment – Sentence manifestly excessive – Resentenced to 12 months' imprisonment – Total effective sentence 3 years' imprisonment – *DPP v Watson* [2016] VSCA 73, applied – *DPP v Meharry* [2017] VSCA 387, distinguished – *Criminal Code* (Cth), ss 272.14(1), 474.19(1), 474.26(1), 474.27A(1); *Crimes Act 1958*, s 70(1).

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| APPEARANCES: | Counsel | Solicitors |
|---|---|---|
| For the Applicant | Mr C K Wareham | James Dowsley & Associates |
| For the Respondent | Ms K Breckweg | Ms A Pavleka, Solicitor for Public Prosecutions (Cth) |

McLEISH JA
T FORREST JA
WEINBERG JA:

1 On 22 December 2017, the applicant was sentenced following a plea of guilty in the County Court to a total effective sentence of 4 years and 10 months' imprisonment on a number of Commonwealth offences involving use of a carriage service and one State offence of knowing possession of child pornography. Following an addendum to the sentence which was made on 16 March 2018, the sentences took the following form:

| Charge | Offence | Maximum penalty | Sentence | Cumulation[1] (Commencement) |
|---|---|---|---|---|
| 1. | Use carriage service to solicit child pornography material: s 474.19(1) *Criminal Code* (Cth) | 15 years | 12 months | 3 months (22 December 2020) |
| 2. | Use carriage service to transmit indecent communication to a person under 16 years: s 474.27A(1) *Criminal Code* | 7 years | 8 months | 2 months (22 December 2021) |
| 3. | Procure a child to engage in sexual activity outside Australia s 272.14(1) *Criminal Code* | 15 years | 2½ years | Base (22 December 2018) |
| 4. | Use carriage service to solicit child pornography material: s 474.19(1) *Criminal Code* | 15 years | 12 months | 3 months (22 March 2021) |
| 5. | Use carriage service to transmit indecent communication to a person under 16 years: s 474.27A(1) *Criminal Code* | 7 years | 6 months | 1 month (22 March 2022) |
| 6. | Use carriage service to transmit indecent communication to a person under 16 years: s 474.27A(1) *Criminal Code* | 7 years | 6 months | 1 month (22 April 2022) |
| 7. | Use carriage service to procure to a person under 16 years for sexual activity: s 474.26(1) *Criminal Code* | 15 years | 2 years | 3 months (22 September 2019) |
| 8. | Use carriage service to solicit child pornography material: s 474.19(1) *Criminal Code* | 15 years | 12 months | 3 months (22 June 2021) |
| 9. | Knowingly possessing child pornography, contrary to s 70(1) of the *Crimes Act 1958* | 10 years | 12 months | 12 months (22 December 2017) |
| **Total Effective Sentence:** | | 4 years and 10 months' imprisonment | | |
| **Non-Parole Period:** | | 2 years and 2 months' imprisonment | | |
| **Pre-sentence detention declared:** | | Nil | | |
| **Section 6AAA Statement:** (State): 2 years' imprisonment with a non-parole period of 12 months. | | | | |

[1] The sentencing judge directed when each Commonwealth sentence was to commence in accordance with s 19(3) of the *Crimes Act 1914* (Cth). We have derived periods of cumulation from those dates.

**Other:**

The total effective sentence imposed on the Commonwealth charges was 3 years and 10 months' imprisonment with a non-parole period of 1 year and 2 months' imprisonment.

The total effective sentence imposed on the State charges was 12 months' imprisonment.

The applicant was sentenced as a serious sexual offender on charge 9 pursuant to s 6F *Sentencing Act 1991*.

The applicant was required to comply with the reporting obligations of the *Sex Offenders Registration Act 2004* for life.

2 The applicant sought leave to appeal against sentence on the following grounds:

> Ground 1: The learned sentencing judge erred by impermissibly eroding the significance to the exercise of her discretion of the applicant's prior good character.
>
> Ground 2: When regard is had to the following circumstances:
>
> - the early plea of guilty and the stage at which it was entered,
> - the applicant's lack of prior convictions,
> - [the] personal circumstances of the applicant,
> - his extra-curial punishment,
> - the weight given by the sentencing judge to the Court of Appeal's judgment in *DPP & DPP (Cth) v Meharry* [2017] VSCA 387, and
> - the objective seriousness of the offending
>
> the individual terms of imprisonment imposed, the orders for cumulation and the non-parole period fixed are manifestly excessive.

3 Leave to appeal was refused by a single judge.[2] The applicant has elected under s 315(2) of the *Criminal Procedure Act 2009* to have his application determined by the Court constituted by at least two judges.

4 For the reasons that follow, we consider that leave to appeal should be granted and the applicant should be resentenced as set out at the end of these

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2 [2018] VSCA 186.

reasons.[3]

*Summary of offending*

5 The offending, involving use of a carriage service contrary to the provisions of the *Criminal Code* (Cth), took place between 29 December 2015 and 1 January 2016, and in July and August 2016. It involved communications with five different persons. The communications were explicit and obscene but it is necessary to set out much of them in order to evaluate the seriousness of the offending.

6 Between 9 and 15 August 2016, the appellant communicated with an undercover police officer, designated 'AI-SL1', who purported to be a 14 year old homosexual male. As a result of these communications, police executed a search warrant at the appellant's residential address where they arrested him and seized electronic devices in his possession. Analysis of those devices identified communications with four other persons who were all 15 year old males. It also revealed possession of 286 child pornography files, which are the subject of the State offence under the *Crimes Act 1958*.

7 In relation to the undercover police officer, on 9 August 2016 the appellant asked the officer (who, as we have said, was posing as a 14 year old boy) via Facebook whether he wanted to meet that night. On 10 August 2016, the appellant raised the topic of sexual relations with the officer and asked him whether he had ever had sex with any boys. The appellant told the officer he would like to meet, and described public transport routes that could be used for that purpose. The appellant subsequently asked the officer whether he wanted to engage in sexual intercourse with him and stated that he would teach him how to do so.

8 Conversations between the appellant and AI-SL1 formed the basis of charges of use of a carriage service to procure a person under 16 years of age contrary to s 474.26(1) of the *Criminal Code* and use of a carriage service to solicit child

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3 It is convenient therefore to describe the applicant hereafter as 'the appellant'.

pornography material contrary to s 474.19(1)(a)(iv). As outlined in the prosecution opening on the plea, the conversation that formed the basis of the procuring charge proceeded on 10 August 2016 as follows:

| | |
|---|---|
| Appellant: | 'maybe u like to fuck me one day'. |
| AI-SL1: | 'how would we do that?' |
| Appellant: | 'Im come over ill suck u u fuck me yeh ok'. |
| AI-SL1: | 'suck me where ? lol'. |
| Appellant: | 'cock [AI-SL1]'. |
| AI-SL1: | 'and then what'. |
| Appellant: | 'you fuck me yes'. |
| AI-SL1: | 'how will that happen'. |
| Appellant: | 'u will [AL-SL1] u no'. |
| AI-SL1: | 'but I haven't done it b4'. |
| Appellant: | 'its all cool ill teach u ok'. |
| AI-SL1: | 'ok what sort of things will u teach me?' |
| Appellant: | 'how to fuck a boy or man how not to come quick wen u fuck me all cool stuff'. |
| AI-SL1: | 'yeah ok. Im just curious that's all'. |
| Appellant: | 'ill be nice ok but when u fuck take it easy don't rush ok'. |

9 The appellant also told the officer that he was in love with him. On 15 August 2016 their conversations concluded with the offender stating that he was 'in Borina tonight'.

10 The conversation in which the appellant solicited child pornography took place on 10 August 2016, as follows:

| | |
|---|---|
| Appellant: | 'okay ill send my ass my cock my body and face pics okay but u need send the same u have a big cock [AI-SL1]?' |
| AI-SL1: | 'haha not sure'. |
| Appellant: | 'show me ill tell u ok'. |

| | |
|---|---|
| Appellant: | 'ok ill show u my body and can u do pics as well'. |
| AI-SL1: | 'ok'. |
| Appellant: | 'cock ass face, cock ok ill send u ok'. |
| AI-SL1: | 'lol ok'. |
| Appellant: | 'how big inches are u'. |

11 The second set of offences concerned a 15 year old boy (SP) located in the Philippines. The following communications formed the basis of a charge of use of a carriage service to transmit indecent communication to a person under 16 years of age contrary to s 474.27A of the *Criminal Code*:

| | |
|---|---|
| Appellant: | 'im in bed naked, you can work out what im doing.' |
| [SP attempted to video call the appellant.] | |
| Appellant: | 'not yet, my boys in bed sucking me'. |
| SP: | 'Oh... can I see it.' |
| Appellant: | 'my boy will get upset ok'. |
| SP: | 'its... if he is very young I want to see her sucking your dick... please...forgive me my dear'. |
| Appellant: | 'Tell u something honest hes only 17 and im breaking him in his very shy and he will leave if pone keeps going off ok sorry'. |
| SP: | 'but im only 15... told him.. don't be shy and ashamed to me.. because its okay for me.. please'. |

12 On 29 December 2015, the appellant transmitted to SP four images of an erect penis and an image displaying semen. The conversations continued as follows:

| | |
|---|---|
| SP: | 'the boy sucking your dick where?' |
| Appellant: | 'no ive just fucked him and came on him and me.' |
| SP: | 'wait im going to eat some dicks now... wait a few hours ok.... My beastfriends are here now ok... . you fool me.' |

13 Between 29 December 2015 and 30 December 2015 the appellant asked SP to send images of himself of a pornographic nature. These communications formed the basis of a charge of using a carriage service to solicit child pornography material

contrary to s 474.19(1)(a)(iv). First, on 29 December 2015 the appellant said to [SP] 'show me naked cock pics of u hard ill show him and u can talk to him while I fuck him which im going now…a lot of pics okay, cock hard, face pics, ass pics, everything u got.' Again, on 30 December 2015, the appellant said to SP '[w]ell u can show me now your cock if u want to honey.' Also on 30 December 2015, the appellant asked SP 'wat about if I don't see him and u get sucked can I watch u anyway cute sexy boy…. Can u show me your cock honey.' SP responded 'No… bye… going to sleep now.'

14 The third set of charges involved a 15 year old male in the United Kingdom (JH). First, the appellant procured JH to engage in sexual activity outside Australia with JH's girlfriend, contrary to s 272.14 of the *Criminal Code*. Between 30 December 2015 and 1 January 2016, the appellant gave directions and advice to JH as to how he should engage in that activity, as well as conveying his own past experiences and encouraging JH to experiment in sexual activity with JH's girlfriend. The following examples of the procuring conduct were given by the prosecutor on the plea hearing:

| | |
|---|---|
| Appellant: | 'play fight, so no sex, you're a good looking boy, y not have sex….tell me why you are not having sex with your girl?' |
| Appellant: | 'don't need contraception or condoms mate – just use your cock pull out – when your coming that's all u need to do.' |
| Appellant: | 'it feels good to have your big hard fat cock in your girls pussy her moaning in pain taking how big your cock shes going to take it in her.' |
| JH: | 'its against the law to have sex at my age.' |
| Appellant: | 'don't you watch MTV all those 16 yr old pregnant not saying u will but they have sex man y not as I say to u b4 your cute get your cock out and fuck the girl she may want u to fuck her man think about it ok.' |
| Appellant: | 'Were u kissing and touching her tits and pussy or at least trying to?' |
| JH: | 'ummm yah'. |
| Appellant: | 'u get anywhere inside her pussy did u get her wet their'. |

| | |
|---|---|
| JH: | 'Dunno... don't think so'. |
| Appellant: | 'did u put a finger in her pussy buddy'. |
| JH: | 'Yeah'. |
| Appellant: | 'did you hear her moan?' |
| JH: | 'Yeah'. |
| Appellant: | 'great work buddy all we need to do now is get your cock in or did y do that to just saying mate try 3 fingers next time make her feel it ok u kiss while finger her'. |
| Appellant: | 'She was pretty much horny for u yesterday man. Did y try fuck her. When u finger was her pants off?' |
| Appellant: | 'give her great sex today, put 3 fingers in her then kiss her neck making her feel your mouth as y finger her tight pussy as u then should unzip let her touch your cock and suck your cock till u cum on her face man.' |
| JH: | 'bye'. |
| Appellant: | 'why we spoke about this yesterday man.' |

15 On 31 December 2015, the appellant asked JH to send pornographic images of himself, as follows:

| | |
|---|---|
| Appellant: | 'can u do me a friend thing can u take a pic of your cock for me. And make pic reason just saying I like to see ok, make your cock hard show me.' |
| JH: | 'why'. |
| Appellant: | 'just hoping you will because if its big y she not sucking or fucking u let me see one pic okay u can see me if u like as well.' |
| Appellant: | 'let me judge it'. |
| JH: | 'no.' |
| Appellant: | 'y u being like this'. |
| JH: | 'I'm judging you right now and you're a pedo.' |

16 This conversation formed the basis for a charge of use of a carriage service to solicit child pornography material contrary to s 474.19(1)(a)(iv) of the *Criminal Code*.

17 The next victim, JC, was a 15 year old male located in the United States of

America. His Facebook profile displayed that he had a sexual interest in 'men'. The following communications formed the basis of a charge of transmitting indecent communications to a person under 16 years of age contrary to s 474.27A of the *Criminal Code*:

| | |
|---|---|
| Appellant: | 'how old r u u should have plenty to do hey'. |
| JC: | 'im 15 im bored have nothing to do'. |
| Appellant: | 'don't u have a girl or boy friend to play with [JC]'. |
| JC: | 'No'. |
| Appellant: | 'no girl of boy friend hey'. |
| JC: | 'nope'. |
| Appellant: | 'you r niice [JC] how old again r u'. |
| JC: | '15'. |
| Appellant: | 'so keep that in mind ok u think u top or bottom hey'. |
| JC: | 'bottom'. |
| Appellant: | 'can I say one thing ok find a guy with a big cock it will hurt u only for a short time but you will love it ok I no im bottom as well love big hard cocks ok'. |
| JC: | 'okay'. |
| Appellant: | 'and if u into black guys go for their fucking good fucks ok'. |
| JC: | 'Okay'. |
| Appellant: | 'so where u think u will go big and black boys or sweet and gentle white boys you think'. |
| JC: | 'Idek'. |
| Appellant: | 'let me tell u something go for both ok… at your age for it now if y can ok'. |
| JC: | 'ok'. |

18 Finally, the appellant was charged with the same offence of using a carriage service to transmit indecent communications to MJ, another 15 year old male located in the United States of America. A summary of the relevant conversation is as

follows:

| | |
|---|---|
| Appellant: | 'wow wat is your age then'. |
| MJ: | '15'. |
| Appellant: | 'to young for me u got boyfriend then'. |
| MJ: | 'yes'. |
| Appellant: | 'how old he u top or u bottom'. |
| MJ: | 'bottom'. |
| Appellant: | 'wow u like cock in u yes'. |
| MJ: | 'Yes'. |
| Appellant: | 'hard or slow'. |
| MJ: | 'hard'. |
| Appellant: | 'really does your boy have big cock to pound u... yes or no honey pls tell ok'. |
| MJ: | 'yes'. |
| Appellant: | 'wow nice, u like hes big hard cock in u how big is hes cock how many inches boi' |
| MJ: | '15'. |
| Appellant: | 'no u talk cm not inches... lets see'. |
| MJ: | 'No.' |
| Appellant: | 'y pls honey boi tell.' |

19 The State offence of knowing possession of child pornography contrary to s 70(1) of the *Crimes Act 1958* concerned 283 child pornography image files and three pornography video files. The material was classified as follows:

| **Category** | **Number of images** | **Number of videos** | **Total** |
|---|---|---|---|
| 1 | 70 | 0 | 70 |
| 2 | 60 | 1 | 61 |
| 3 | 80 | 0 | 80 |
| 4 | 72 | 2 | 74 |
| 5 | 1 | 0 | 1 |
| **Total** | **283** | **3** | **286** |

20 The above categories were explained as follows:

**Level One:** Contained images of males aged between 8 and 16 years old in different positions exposing their genitals or erect penises.

**Level two:** Images of males aged between 10 and 16 years old either masturbating or in different sexual positions with other males of their own age. The level 2 video file depicted children masturbating.

**Level three:** Images of males between 8 and 16 years of age with genitals exposed, holding adult penises or in view of adult penises, or depicted in different sexual positions with other children or adults.

**Level four:** Images of males between 8 and 16 years of age performing oral sex on children or being penetrated by adult males or other children. The video files depicted children between 12 to 15 years of age performing oral sex on adult males or being penetrated by adult males.

**Level five:** One image of a male aged between 14 and 16 years of age tied, bound and penetrated by an adult male penis.

*Plea hearing*

21 The appellant was 44 years of age at the time of the plea hearing. His early life was spent at the home of his maternal grandparents after his parents separated when he was 12 months old. Various members of the appellant's family lived in a number of rental properties, but they were repeatedly evicted for non-payment of rent. Between 2001 and 2009 the appellant lived with an aunt and her husband, before returning to his maternal grandparents' house to live with his mother, stepfather and sister. After the death of his father he was in a position to leave in 2013, and he resided in a flat in Doncaster until his finances were exhausted. In 2015 he gave up the flat. He had nowhere else to live and no friends. When he received his inheritance he also ceased work he had been doing as a security guard.

22 The appellant was a serious binge drinker of alcohol. After October 2015 he moved between boarding houses, his only contact with the outside world otherwise being in hotels. He had been a football umpire until he suffered physical injuries and this work became completely unavailable as a result of the charges.

23 The appellant had no prior offences. It was submitted on his behalf that he was a socially isolated person who had run out of money and committed a limited number of offences over a limited period of time during a period of real vulnerability. The matter proceeded without committal or trial due to his plea of guilty. It was submitted that limbs 5 and 6 of *Verdins* were applicable.[4]

24 The sentencing judge was provided with a letter of Kim Dowse, a psychologist, who stated that she had seen the appellant six times since May 2017. The appellant had initially presented with a poor understanding of his offending. He had a somewhat detached manner, suggestive of a schizoid presentation or a mild form of autism. Ms Dowse said that for many years the appellant had been a heavy drinker and he appeared to have some cognitive difficulties. She stated that the appellant had come to understand that his victims were highly vulnerable and that he was 'predatory'. She said that, at the time of the offending the appellant thought that the victims would not be negatively affected because he saw them as having adult thoughts and feelings. This perception was likely to be related to his difficulty in empathy. Ms Dowse stated that the appellant had attended alcohol counselling as part of his treatment. An attendance report of Access Health & Community in Hawthorn confirmed that he had attended one assessment session and six counselling sessions between July and September 2017, with three non-attendances.

25 Reliance was also placed on a report of clinical psychologist Carla Lechner, who saw the appellant on 28 September 2017. She stated that he presented as a solitary man with poor social and communications skills and symptoms of alcohol use disorder and depressive mood disorder. She said that the appellant stated that he had an interest in young teenage boys but 'would not act on these interests' and that his only sexual contacts had been with adult men, without leading to any serious relationship.

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4 *R v Verdins* (2007) 16 VR 269.

26 Ms Lechner said that the appellant had some schizoid personality traits such as poor social and communication skills and a solitary lifestyle. His offending occurred in the context of depression, to the point of often considering suicide, heavy drinking, loneliness and some deviant sexual interests. She said that the appellant had gained a better appreciation of the seriousness of his offending over time and through involvement with counselling supports, and that he would benefit from ongoing alcohol rehabilitation and personal counselling. She said that he was likely to 'struggle in a custodial setting in light of his social, cognitive and emotional immaturity'. Ms Lechner went on to say that, given that the appellant was 'not very bright and lives in a virtual social vacuum', it was unsurprising that he was experiencing symptoms of depression. His use of alcohol aggravated his low mood state and poor self-esteem. She stated that this would further undermine his already immature judgment and reasoning skills.

27 Ms Lechner considered that the appellant presented as a 'moderate' risk of reoffending, which would be reduced through treatment for his mental health and alcohol abuse problems.

28 At the plea hearing, the sentencing judge indicated that she had decided to have the appellant assessed for a community correction order ('CCO'). She emphasised that this was just one of the sentencing options she was considering. The appellant was subsequently assessed as suitable for a CCO with conditions attached for community work, supervision, and treatment and rehabilitation in respect of alcohol, mental health and reducing the chance of reoffending. The appellant gave his consent to an order being made.

*Sentencing remarks*

29 The sentencing judge said that the charges were 'all very serious examples of very serious offending'.[5] She noted the age differences involved. The judge

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5 *DPP (Cth) v McNiece* [2017] VCC 2043 [13].

described both instances of procuring as being 'persistent' encouragement of sexual penetration and noted that in the charge relating to the undercover officer the appellant had suggested meeting.[6] The soliciting offences were 'depraved' and 'serious attempt to sexualise the children' by requesting that they create and transmit child pornography.[7] The communications that were the subject of indecent transmission charges were 'highly explicit and grossly indecent'.[8]

30 In relation to the charge of possessing child pornography, the judge observed that every child depicted in the images was a victim and the appellant had perpetuated their abuse by looking at the material. While the offending was not committed for profit, and the quantity of material involved was not as large as in other cases, the appellant's participation in the global child pornography market was 'of high seriousness'.[9]

31 The judge went on to note that it was to be presumed that all of the child victims of the charges suffered harm from a sexual offence being committed against them and that this harm could be 'both long term and serious, and both physical and psychological'.[10]

32 Turning to matters in the appellant's favour, the judge noted his plea of guilty at an early opportunity. She said that the plea demonstrated an acceptance of responsibility, as well as remorse. The judge then noted that the appellant had no criminal record. She added:

> I note that you did not have a computer until 2014, and have not owned a computer since August 2016.[11]

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6 Ibid [14].

7 Ibid [15].

8 Ibid [16].

9 Ibid [18].

10 Ibid [19] citing *R v Clarkson* (2011) 32 VR 361, 368 [26], 371 [33] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA) and *Adamson v The Queen* (2015) 47 VR 268, 293 [56] (Warren CJ, Redlich and Weinberg JJA).

11 Ibid [23].

33 Next, the judge stated that she had decided that the significant social disadvantage suffered by the appellant was relevant as a general mitigating factor to be taken into account, but that it did not attract the principles in *Verdins*. She said that there was a slight reduction in the appellant's moral culpability as a result of this finding. However, the judge stated that the principles of specific and general deterrence, and the need to denounce the conduct in question, remained of paramount importance in a case of sexual offending involving children by the use of the internet.

34 The judge stated that the appellant's prospects of rehabilitation were guarded. It was to his credit that he had begun work on some of his issues, but more needed to be done. She accepted that the fact that the appellant no longer had a computer reduced the risk of online offending, but found that that risk still existed, especially without offence-specific treatment and treatment for the appellant's alcoholism and underlying issues. The judge said that she took into account that the appellant would be entering custody as a first-time offender at the age of 45, and that prison would be harder for him because of his depression. She stated that she had decided that there was 'no alternative to imprisonment'.[12] She quoted this Court in *DPP v Meharry*[13] as follows:

> The ease with which offences of this kind are committed using the internet makes it imperative that those who might be inclined to act in this way should be made aware that, if detected, they will face very lengthy terms of imprisonment indeed.[14]

***Grounds of appeal***

35 It may immediately be said that the first ground of appeal is without substance. By that ground, it is submitted that the judge's observation that the appellant had not had a computer before 2014, or since August 2016, impermissibly 'diluted' the mitigating effect of her finding that the appellant had no other

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12 Ibid [43].

13 [2017] VSCA 387.

14 Ibid [5] (Maxwell P and Kyrou JA with Priest JA substantially agreeing).

convictions. It was said that the observation showed that the judge had considered that, if he had access to a computer at other times, the appellant would or might have offended. But the judge was doing no more than stating the facts. The appellant had not previously offended using a computer, or at all, but he had not previously had access to a computer. It cannot be said that the judge proceeded on the basis that, if he had had such access, he would or might have used that access to commit other offences.

36 There is more substance in the second ground. In his written submissions, the appellant emphasised his plea of guilty, lack of prior convictions and other mitigating factors. Reliance was also placed on the relative lack of objective gravity of the offending. It was accepted, as it plainly had to be, that the contents of the communications were explicit and that the offending against SP, the subject of charge 2 (transmitting indecent communications), was aggravated by the sending of images. However, it was submitted that each of the sentences on the transmitting indecent communications charges was manifestly excessive.

37 In relation to charge 3, the procuring charge involving JH, the appellant submitted that, while the conversation was again sexually explicit, there was no suggestion that the appellant was seeking to view or participate in the sexual activity, nor was any inducement offered. On the face of it, there was no attempt to procure sexual activity with an adult.

38 It was submitted that the requests for images could not be regarded as persistent, the victims were not significantly under 16 years of age and the appellant made no attempt to conceal his identity.

39 In relation to the sentencing judge's reliance on *Meharry*, the appellant drew attention to the fact that the case involved protracted explicit communications in which the offender sought pictures and videos of underage girls, coupled with threats of dissemination of such material unless they engaged in sex acts through Skype or by means of webcam, and then the recording of those acts. The offender

was sentenced, on a Director's appeal, to an effective global sentence of 22 years' imprisonment on 62 charges involving 22 victims. (It should be noted that in several of those cases, the online offending became contact offending.) It was submitted that *Meharry* was not an appropriate comparator, in any relevant sense.

40 In oral argument, counsel placed emphasis on the sentence on charge 3, the procuring offence involving JH. This was the 'base' sentence, in the sense that it was treated by the judge as the primary Commonwealth sentence, that is, the first Commonwealth sentence to commence. (In a sense, there were two 'base' sentences, because the sentence for this offence was fixed to commence on the expiry of the whole of the 12 month sentence on the State charge.) It was submitted that the judge hearing the first leave application in this Court had correctly accepted that this sentence might be manifestly excessive. Counsel submitted that, contrary to the judge's conclusion that no different total effective sentence would be passed, if this sentence were to be found to be manifestly excessive, this would have a flow-on effect on the total effective sentence.[15]

41 Counsel made reference to a number of cases in which, it was submitted, comparable or lower sentences had been imposed for far more serious examples of this offence.[16] It was submitted that the cases showed that the present case was at the very lowest end of seriousness. In particular, there was no discussion or proposal involving the appellant or any other adult engaging in the sexual activity in question.

42 The respondent submitted that the decision in *Meharry* merely stated the established sentencing principle that an immediate term of imprisonment is ordinarily required for offending involving child pornography and online sexual

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15 *Ludeman v The Queen* (2010) 31 VR 606, 616 [64] (Ashley and Redlich JJA with Warren CJ, Buchanan and Nettle JJA agreeing).

16 Reference was made to *Rivo v The Queen* [2012] VSCA 117, *Gajjar v The Queen* (2008) 192 A Crim R 76, *Tector v The Queen* (2008) 186 A Crim R 133, *Engeln v The Queen* [2014] QCA 313, *DPP (Cth) v Singh* [2017] VSCA 146, *R v Philpot* [2015] ACTSC 96 and *DPP (Cth) v Haynes* [2017] VSCA 79.

exploitation of children. It was submitted that the maximum penalties for the offences indicate their seriousness. Reference was made to this Court's observations in *DPP (Cth) v Watson*,[17] to the effect that the rapidly developing and easy means by which children can be exploited by use of the internet reflects the gravity with which such offending is to be regarded.

43 The respondent submitted that the offences involved five separate types of offending involving four child victims who must be taken to have suffered long term physical and psychological harm. It was submitted that the cumulation imposed by the judge was very modest. Further, it was said that the sentences for the offending against SP (charges 1 and 2) and the procuring offences (charges 3 and 7) were lenient because they were 'rolled up' charges involving more than one instance of offending.

44 The respondent submitted that, far from being manifestly excessive, the sentences imposed could be seen as lenient. The offending involved insidious sexualised conversations with children which demand stern punishment because by its nature conduct of this kind evolves into more serious offending. The offences involving JH had to be viewed in the context that the appellant was pestering JH with questions about sexual matters and subsequently asked for a photograph of his penis. The conversations constituting the procuring charge against JH took place over 3 days, so the charge was a rolled-up one. As a result, the total effective sentence could not be said to be manifestly excessive.

45 The respondent otherwise submitted that the sentences were within the available range and that the judge had appropriately balanced the various mitigating factors.

***Analysis***

46 There is much force in the respondent's submissions about the insidious

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[17] (2016) 259 A Crim R 327, 341–2 [33] (Redlich and Beach JJA).

nature of offending of this kind. Although made in the context of child pornography offences, the observations of this Court in *DPP (Cth) v Watson* are apposite to offending against children by means of the internet more generally:

> any evaluation of the adequacy of sentences for offending in the use of the internet for the purposes of creating, obtaining or transmitting child pornography must be informed by the fact that this medium is a rapidly developing and easy means by which vulnerable children are exploited. The expanding breadth of offending and increased maximum penalties reflects the gravity with which the legislature views this form of offending in the area of child pornography.[18]

47 The Court's observations in *Meharry*, which the sentencing judge quoted and which were the subject of submissions by the parties, point to the prospect of very lengthy terms of imprisonment for offences of this kind, committed using the internet.[19] That is in large part because of the importance of general deterrence in such cases. Plainly, however, each case will be different and will depend on the nature of the offending and the circumstances of the offender. For that reason, while still giving due weight to general deterrence, a 'very lengthy term of imprisonment indeed' will not necessarily be appropriate.

48 We have not been particularly assisted by consideration of the facts of previous cases in this area. That is for two reasons. First, the range of offences for which the law provides, and the ways in which those offences may be committed, are so many and varied that comparison is often difficult, if not meaningless. The differences may be seen in the tone and content of the communications, the identity of the parties involved and the nature and extent of any related acts. Secondly, as the High Court made clear in *DPP v Dalgliesh*, current sentencing practice is only one of the matters to be taken into account in the course of formulating a just sentence according to law.[20]

49 However, some observations may be made about the present case,

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18 (2016) 259 A Crim R 327, 341–2 [33] (Redlich and Beach JJA).

19 See [34] above.

20 (2017) 349 ALR 37, 51 [68] (Kiefel CJ, Bell and Keane JJ), 54–5 [81]–[84] (Gageler and Gordon JJ).

concentrating on charge 3, which distinguish it from other cases of procuring sexual activity on the part of a child under 16. First, there was no suggestion that the appellant was seeking to procure sexual activity on the part of JH with himself or any other adult, nor was he seeking to view such activity. Secondly, no inducement was offered to take part in the activity. Thirdly, no specific occasion was suggested or arranged where the activity would take place. Finally, as with the other offending, the appellant did not disguise his true identity or his age in his communications. We would therefore accept the appellant's submission that the offending under charge 3 was at the lower end of the range of seriousness for this serious offence.

50 In our opinion, the sentence on charge 3 was manifestly excessive. While the language used by the appellant was debased and revolting and has to be viewed in the context of the related request for an indecent image of JH, in our opinion a sentence of 2 years and 6 months' imprisonment for encouraging a 15 year old boy to engage in sexual activity with his girlfriend, even penetrative activity, cannot be justified in this case. There is no aggravating feature of the appellant's circumstances or antecedents that could justify what, in our view, is an unduly severe sentence.

51 We do not accept the respondent's submission that, even so, the total effective sentence should stand. That result could only be achieved by increasing the cumulation ordered in respect of the remaining sentences. Even if that course were to be considered appropriate on a prisoner's appeal, we would not be prepared to take it. In our view, the cumulation ordered by the sentencing judge, totalling 1 year and 4 months, together with the full term of 12 months imposed on the State charge, could not be increased without offending the principle of totality.

52 We would therefore grant leave on ground 2 and allow the appeal. In resentencing, we will make the sentence for the State offence partly concurrent with the sentences for the Commonwealth offending, having regard to the appellant's status as a serious sexual offender and the requirements of totality, adjusted to take account of that status. We also consider that the sentence on the second procuring

charge (charge 7) falls to be reduced, for reasons similar to those advanced above. We regard this as the more serious of the two procuring charges, by reason of the suggestion, inchoate as it was, that the appellant and the officer who he believed to be a 15 year old boy, should meet together for sexual purposes. We will make that the base sentence.

53 We do not accept that the sentences on the charges of soliciting child pornography or transmitting indecent communications were manifestly excessive. These are serious offences and the appellant's offending was brazen and repeated. It was an aggravating feature that the appellant was in fact encouraging children to create child pornography, and not just soliciting its transmission. The communications were grossly indecent and in the case of charge 2 indecent images were transmitted. It cannot be said that these sentences were manifestly excessive.

54 However, we consider that the amount of cumulation ordered should be moderated so as to produce a total effective sentence of 3 years' imprisonment. We will reduce the cumulation on charges 4 and 8 (soliciting child pornography) by one month. We regard the third charge of that kind (charge 1) as involving more egregious and persistent offending and it attracts a somewhat higher degree of cumulation accordingly.

55 In the result, we will resentence the appellant as follows:

| Charge | Offence | Maximum penalty | Sentence | Cumulation (Commencement) |
|---|---|---|---|---|
| 1. | Use carriage service to solicit child pornography material: s 474.19(1) *Criminal Code* (Cth) **(SP)** | 15 years | 12 months | 3 months (22 March 2019) |
| 2. | Use carriage service to transmit indecent communication to a person under 16 years: s 474.27A(1) *Criminal Code* **(SP)** | 7 years | 8 months | 2 months (22 September 2019) |
| 3. | Procure a child to engage in sexual activity outside Australia s 272.14(1) *Criminal Code* **(JH)** | 15 years | 12 months | 3 months (22 August 2019) |
| 4. | Use carriage service to solicit child pornography material: s 474.19(1) *Criminal Code* **(JH)** | 15 years | 12 months | 2 months (22 October 2019) |
| 5. | Use carriage service to transmit indecent communication to a person under 16 years: s 474.27A(1) *Criminal Code* **(JC)** | 7 years | 6 months | 1 month (22 May 2020) |

| | | | | |
|---|---|---|---|---|
| 6. | Use carriage service to transmit indecent communication to a person under 16 years: s 474.27A(1) *Criminal Code* **(MJ)** | 7 years | 6 months | 1 month (22 June 2020) |
| 7. | Use carriage service to procure to a person under 16 years for sexual activity: s 474.26(1) *Criminal Code* **(AI-SL1)** | 15 years | 1 year 4 months | Base Commonwealth sentence (22 June 2018) |
| 8. | Use carriage service to solicit child pornography material: s 474.19(1) *Criminal Code* **(AI-SL1)** | 15 years | 12 months | 2 months (22 December 2018) |
| 9. | Knowingly possessing child pornography, contrary to s 70(1) of the *Crimes Act 1958* | 10 years | 12 months | 6 months (22 December 2017) |
| **Total Effective Sentence:** | | 3 years' imprisonment | | |
| **Non-Parole Period:** | | 1 year and 6 months' imprisonment | | |
| **Pre-sentence detention declared:** | | Nil | | |
| **Section 6AAA Statement:** (State): 2 years' imprisonment with a non-parole period of 12 months. | | | | |
| **Other:**<br><br>The total effective sentence imposed on the Commonwealth charges is 2 years and 6 months' imprisonment with a non-parole period of 1 year's imprisonment.<br><br>The total effective sentence imposed on the State charge is 12 months' imprisonment.<br><br>The appellant is sentenced as a serious sexual offender on charge 9 pursuant to s 6F *Sentencing Act 1991*.<br><br>The appellant is required to comply with the reporting obligations of the *Sex Offenders Registration Act 2004* for life. | | | | |

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