SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCX* [2015] QCA 188
PARTIES:	**R** **v** **BCX** (applicant)
FILE NO/S:	CA No 24 of 2015 DC No 287 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Rockhampton – Unreported, 13 February 2015
DELIVERED ON:	Orders delivered ex tempore 3 June 2015 Reasons delivered 9 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2015
JUDGES:	Margaret McMurdo P and Philippides JA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Orders delivered ex tempore on 3 June 2015:** **1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. The sentence imposed on count 1 is set aside and instead it is ordered that the appellant be released on probation for two years on the usual conditions and on the special condition that he undertake such medical, psychological or psychiatric treatment as directed by the relevant Corrective Services officer.** **4. The sentences on counts 2 and 3 suspending the sentences after six months is set aside and instead it is ordered that the sentences be suspended forthwith.** **5. The sentences imposed at first instance are otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of making child exploitation material and two counts of indecent treatment of a child under the age of 16 years with a circumstance of aggravation, that is, that the child was under 12 years – where the

applicant was sentenced to six months' imprisonment for making child exploitation material and 18 months' imprisonment (suspended after serving six months for an operational period of two years) for the indecent treatment counts, to be served concurrently – where the applicant appealed on the ground that the sentencing judge erred in not making a finding of "exceptional circumstances" under s 9(4) of the *Penalties and Sentences Act* 1992 (Qld) – where the applicant also appealed on the ground that the sentences imposed were, irrespective of any finding of "exceptional circumstances", manifestly excessive in all of the circumstances – whether the sentencing judge erred in not making a finding of "exceptional circumstances" – whether the sentences were manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 9(4), s 9(5), s 9(6), s 9(7), s 9(9A)

Baker v The Queen (2004) 223 CLR 513; [2004] HCA 45, cited
Griffiths v The Queen (1989) 167 CLR 372; [1989] HCA 39, cited
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
Muldrock v The Queen (2011) 244 CLR 120; [2011] HCA 39, cited
Norbis v Norbis (1986) 161 CLR 513; [1986] HCA 17, cited
R v Carmichael & Armbruster [2009] QCA 41, cited
R v CBI [2013] QCA 186, considered
R v Clark [2009] QCA 361, cited
R v Dwyer [2008] QCA 117, cited
R v Engert (1995) 84 A Crim R 67, cited
R v GAE; ex parte Attorney-General (Qld) [2008] QCA 128, cited
R v GAW [2015] QCA 166, cited
R v Goodger [2009] QCA 377, cited
R v Grehan (2010) 199 A Crim R 408; [2010] QCA 42, cited
R v KT; ex parte Attorney-General (Qld) [2007] QCA 340, cited
R v MBM (2011) 210 A Crim R 317; [2011] QCA 100, considered
R v Quick; Ex parte Attorney-General (Qld) (2006) 166 A Crim R 588; [2006] QCA 477, considered
R v Rogers [2009] QCA 10, cited
R v Rosenberger, ex parte Attorney-General [1995] 1 Qd R 677; [1994] QCA 488, cited
R v Tootell; ex parte Attorney-General (Qld) [2012] QCA 273, considered
R v Verdins (2007) 16 VR 269; [2007] VSCA 102, cited

COUNSEL: J Fraser for the applicant
M Cowen QC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** For the reasons given by Burns J, I joined in the orders of this Court on 3 June 2015 granting leave to appeal and allowing the appeal against sentence.

[2] **PHILIPPIDES JA:** These are my reasons for the orders made on 3 June 2015. Sentencing under s 9(4) of the *Penalties and Sentences Act* 1992 (Qld) (the Act) requires an integrated approach which takes into account all of the circumstances of the case, having regard to s 9(5) and the circumstances specified in s 9(6) of the Act. Exceptionally low level offending may, in the circumstances of a particular case, point to it being able to be characterised as an exceptional case.[1] Reasonable minds may differ as to whether the circumstances of a case are such that the usual operation of s 9(4) requiring actual imprisonment is not warranted. When regard is had to the circumstances of this case, which are set out in the reasons for judgment of Burns J, it is apparent that this was not such a case. I do not therefore consider that the learned sentencing judge erred in not making a finding of exceptional circumstances. In that regard, I agree with the reasons of Burns J at paras [47]-[48].

[3] I also agree that the sentences imposed on the applicant's pleas were manifestly excessive for the reasons stated in paras [49]-[50] of Burns J's reasons. In relation to the sentence imposed under s 9(4), that was particularly the case when the following features, made pertinent by the s 9(6) of the Act, are borne in mind: the effect on the complainant child (s 9(6)(a)); the applicant's prospects of rehabilitation (s 9(6)(f)); the remorse demonstrated by the applicant reinforced by his plea; and the applicant's mental condition as revealed in the psychiatric reports (s 9(6)(i)) which reduced the need to place weight on the element of general deterrence (s 9(6)(e)).

[4] **BURNS J:** On 13 June 2014, an indictment was presented in the District Court at Gladstone charging the applicant with one count of making child exploitation material[2] (count 1) and two counts of indecent treatment of a child under the age of 16 years with a circumstance of aggravation, that is, that the child was under the age of 12 years at the time of both offences (counts 2 and 3).[3] Six days later, the applicant pleaded guilty to each count and, after the allocutus was administered, his sentencing hearing was adjourned at the request of his legal representatives to allow a report to be obtained from a psychiatrist.

[5] On 10 and 13 February 2015, the sentencing hearing took place in the District Court at Rockhampton. On count 1, the applicant was imprisoned for six months and, on each of counts 2 and 3, he was imprisoned for 18 months suspended after serving six months for an operational period of two years.[4] These terms of imprisonment were ordered to be served concurrently and pre-sentence custody of two days was declared to be time already served under those sentences.

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1 *R v GAW* [2015] QCA 166 see McMurdo P and Holmes JA at [3]; and Philippides JA at [66].

2 In contravention of s 228B(1) of the *Criminal Code* (Qld).

3 In contravention of s 210(1)(a) of the *Criminal Code* (Qld).

4 At the time of the commission of the subject offences, the maximum penalty for making child exploitation material was 14 years' imprisonment and the maximum penalty for indecent treatment of a child under the age of 16 years, with the circumstance of aggravation alleged, was 20 years' imprisonment.

[6] On the hearing of this application on 3 June 2015, the Court granted leave to appeal and allowed the appeal. The sentence imposed with respect to count 1 was set aside and, in lieu thereof, it was ordered that the applicant be released on probation for two years on the usual terms and on the special condition that he undertake such medical, psychological or psychiatric treatment as may be directed by the relevant Corrective Services officer. I note, in this regard, that the applicant's counsel undertook to explain the terms of the probation order to the applicant. The Court also ordered that the sentences of imprisonment imposed with respect to counts 2 and 3 be suspended forthwith. The sentences imposed at first instance were otherwise confirmed.

[7] At the time of making these orders, the Court indicated that it would deliver reasons later. These are my reasons for joining in the orders made.

The grounds of appeal

[8] Two grounds of appeal were advanced on behalf of the applicant: first, that the learned sentencing judge erred in not making a finding of "exceptional circumstances" within the meaning of s 9(4) of the *Penalties and Sentences Act* 1992 (Qld);[5] and, second, that the sentences imposed were, irrespective of any finding of exceptional circumstances, manifestly excessive in all of the circumstances.

The statutory sentencing guidelines

[9] The subject convictions were for offences of a sexual nature committed in relation to a child under 16 years and, as such, s 9(4) PSA mandated that the applicant serve an "actual term of imprisonment unless there are exceptional circumstances". In deciding whether there are exceptional circumstances, the court may have regard to the closeness in age between the offender and the child in any particular case[6] but, otherwise, the PSA does not "define or confine what amounts to exceptional circumstances".[7]

[10] Otherwise, by s 9(6) PSA, a court sentencing for an offence of a sexual nature committed in relation to a child under 16 years "must have regard primarily" to each of the following factors:

> "(a) the effect of the offence on the child; and
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> (b) the age of the child; and
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> (c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another; and
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> (d) the need to protect the child, or other children, from the risk of the offender reoffending; and
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> (e) the need to deter similar behaviour by other offenders to protect children; and
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> (f) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community; and
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> (g) the offender's antecedents, age and character; and

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5 The "PSA".

6 Section 9(5) PSA.

7 *R v Tootell; ex parte A-G (Qld)* [2012] QCA 273 at [18].

(h) any remorse or lack of remorse of the offender; and

(i) any medical, psychiatric, prison or other relevant report relating to the offender; and

(j) anything else about the safety of children under 16 the sentencing court considers relevant."

[11] Further, the conviction on count 1 meant that the applicant was a "child-images offender"[8] and, for that reason, s 9(7) PSA was engaged. That provision is in the following terms:

> "In sentencing a child-images offender, the court must have regard primarily to —
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> (a) the nature of any image of a child that the offence involved, including the apparent age of the child and the activity shown; and
>
> (b) the need to deter similar behaviour by other offenders to protect children; and
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> (c the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community; and
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> (d) the offender's antecedents, age and character; and
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> (e) any remorse or lack of remorse of the offender; and
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> (f) any medical, psychiatric, prison or other relevant report relating to the offender; and
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> (g) anything else about the safety of children under 16 the sentencing court considers relevant."

Circumstances of the offending

[12] An agreed Schedule of Facts was tendered at the sentencing hearing. It disclosed that the complainant in the case of each offence was the nine-year-old daughter of the applicant's partner, to whom the applicant was engaged. They, along with his partner's other children from a previous relationship, had lived together as a family for the preceding three to four years. The applicant and his partner also had a child who was born in July 2013.

[13] On two separate occasions on or about 3 December 2013, the applicant entered the bedroom of the complainant at night whilst she was asleep. On each occasion, the applicant moved the complainant's clothing aside and took photographs of her breasts and genitalia on his mobile telephone (count 1). In total, eight photographs were taken and, in two such images, the applicant's fingers are depicted spreading the complainant's labia apart (counts 2 and 3). Fortunately, the complainant remained asleep throughout both episodes and was unaware of what the applicant was doing. After taking the photographs, the applicant emailed them to his computer. He then deleted the photographs from his mobile telephone and, subsequently, from his computer.

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8 See s 9(13) PSA.

[14] The offending came to light two days later when the complainant's mother discovered the deleted emails on the applicant's computer. She promptly notified the police, who attended at the home and managed to recover the images. When interviewed, the applicant admitted taking indecent photographs of the complainant, although he said that he did not "touch her or anything". He told the police that he felt "disgusted and sick" about what he had done.

Factors personal to the applicant

[15] The applicant was aged 36 years at the time of each offence and 37 years at the time of his sentence. He had no prior criminal history.

[16] The charges proceeded to sentence via a full hand-up committal and, as already observed, the applicant pleaded guilty within days of the indictment being presented. His plea was therefore a timely one. When those matters are considered together with the feature that the applicant participated in a police record of interview during which he made some admissions, he is to be regarded as an offender who had cooperated to a substantial degree.

[17] The material before the learned sentencing judge included a report from a psychologist and two reports from a psychiatrist. These confirmed that the applicant had for a long time been afflicted by mental disorders, although the precise nature of those disorders was not diagnosed until 2011. That diagnosis established that he suffers from Autistic Spectrum Disorder,[9] a developmental disorder of the mind characterised by obsessive compulsive traits, as well as a depressive disorder characterised by severe anxiety.

[18] The applicant completed secondary school and then undertook a pre-vocational training course at a TAFE college. This equipped him to secure employment as an electrical instrument fitter, but his worsening psychological symptoms eventually led to his retrenchment. He had not worked in a full-time capacity since approximately 2006 and, for most of the period since then, was in receipt of the Disability Support Pension. The applicant made a number of attempts to undertake further study or training but, due to the sabotaging effects of his mental disorders, all such attempts were unsuccessful.

[19] Over the years, there had been sporadic attempts by the applicant to seek help, but it was not until he was diagnosed in 2011 that he began to obtain some assistance from a local Mental Health Service. Even then, he encountered a number of difficulties associated with the efficacy or side effects of the medication prescribed for his conditions. These difficulties, in turn, caused the applicant to resort at times to self-medication through the consumption of tranquillisers or benzodiazepines in the form of Valium.

[20] A few days prior to the offending, the applicant was rocked by the death of a close friend who had been killed in a car accident, and he became markedly depressed. Quite apart from this event, he was already in a state of "raised anxiety" due to various problems in his home environment, including post natal depression affecting his partner. The applicant once again resorted to self-medication – on this occasion, taking large doses of Valium – and, at the time of the offending, he was heavily under the influence of that drug. Indeed, in the reports from the psychiatrist which were before the sentencing judge, the opinion was expressed that the applicant would have been "both confused and dis-inhibited (sic) by the sedative intoxication" and that this would have resulted in "impaired judgement and partial anterograde amnesia".

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9 Commonly known as *Asperger's Syndrome*.

[21] The applicant gave a somewhat bizarre account to both the psychologist and psychiatrist when asked why he had taken the photographs. It is difficult, however, to accept that the applicant had any genuine recall as to his motivation at the time of the offending. His overall recollection was patchy at best, and the psychiatrist cautioned against placing any reliance on the applicant's "attempts to fill in the memory gaps". The better view is that the applicant simply could not explain why he had acted in the way in which he did. Beyond that, what motivated the applicant to offend was something which the psychiatrist was much better qualified to address. In the first of his two reports, the psychiatrist said this:

> "It is very likely indeed that extreme levels of stress arose from his partner's post natal depression and the chaotic effects of this on her large family. This would have exhausted his limited coping ability and resulted in an ill advised attempt at self-treatment with benzodiazepines.
>
> The described rationale for his offending actions was a result of the benzodiazepine intoxication inter-reacting with obsessional and autistic thinking. I doubt that there was a sexual motivation or exploitative intent, but judgement and inhibition were disabled."

[22] It only remains to be added that the psychiatrist's conclusion against any "sexual motivation or exploitative intent" was supported by the psychologist who did not consider that the applicant fulfilled the DSM4 criteria for paedophilia. The risk of recidivism was accordingly low, with the psychiatrist expressing the opinion that "any slight risk of re-offending would be solely contingent on the use of intoxicating substances particularly benzodiazepine".

The sentencing hearing

[23] Before the learned sentencing judge, the Crown drew attention to the feature that the applicant entered the complainant's bedroom on two separate occasions at night, and argued that his overall conduct involved a "clear breach of trust". The disparity in age between the complainant and the applicant was also stressed and the submission was made that, "for sentencing purposes, deterrence and denunciation are emphasised as having particular significance in this type of offending". Two decisions of this Court were expressly relied on – *R v MBM*[10] and *R v CBI.*[11]

[24] For the applicant, the factors personal to him were highlighted in submissions from his counsel, as well as the pertinent features of the psychiatric and psychological reports. Counsel for the applicant then made submissions by reference to the sentencing factors enumerated in s 9(6) PSA before contending for a sentence that did not involve an actual term of imprisonment, specifically, probation for three years with respect to count 1 and a wholly suspended term of 12 months' imprisonment with respect to each of counts 2 and 3. To justify such a course, the applicant's counsel pressed for the finding of "exceptional circumstances". That submission was articulated in the following way:

> "Your Honour, the exceptional circumstance here is the fact that my client was heavily affected by medication at the time of commission of the offence, that there had been the death of the close friend shortly before the commission of the offence, that there were significant matrimonial – significant disharmony in the relationship between him and [his partner],

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10 (2011) 210 A Crim R 317.
11 [2013] QCA 186.

> who has five children from an earlier relationship, and psychiatric issues herself, and, again, your Honour, that the complainant child was asleep and still has no knowledge of the offending, and, your Honour, the complainant's mother and her five children from previous relationships are most anxious to have [the applicant] return to the family home".

[25] The sentencing judge commenced his remarks by outlining the purposes for which sentences may be imposed,[12] after which, his Honour said:

> "In this instance, the significant factors are matters of punishment, matters of denunciation, and matters of general deterrence."

[26] His Honour then went on to record that the applicant had made admissions to the police and pleaded guilty at an early stage, thereby sparing any witnesses the need to give evidence and the community the cost of running a trial. His Honour recognised the absence of any criminal history on the part of the applicant and remarked that the applicant probably did not pose a significant risk of reoffending if he was compliant with his medication. His Honour observed that the circumstances of the offending were serious but, by reference to the psychological and psychiatric reports, accepted that the applicant was not paedophilic, that he suffered from the mental disorders to which I have earlier referred and that, at the time of the offences, he was in a "state of high anxiety" as well as depressed. In these respects, his Honour accepted that it was this combination of factors which led to the applicant self-medicating with Valium. His Honour also accepted that the applicant had insight into his behaviour and that he had demonstrated remorse.

[27] The sentencing judge then observed that the facts in *CBI* were "not significantly different" to the facts of this case and, apparently guided by the sentence imposed in that case, expressed the view that an overall head sentence of 18 months' imprisonment was "appropriate in this case".

[28] His Honour turned next to the question whether exceptional circumstances existed such as would justify the full suspension of such a term of imprisonment. In the course of doing so, his Honour referred to the statements of principle to be derived from *R v Quick; ex parte Attorney-General (Qld)*[13] and *R v Tootell; ex parte Attorney-General (Qld)*.[14] Then, focussing on the approach taken, and the conclusion reached, by Chesterman JA in *Quick*, his Honour said:

> "… the factors that were before his Honour are very similar to the factors here. The approach that his Honour adopts is an approach that I adopt here. It seems to me that having regard to those factors in aggregation, that exceptional circumstances are not made out."

Exceptional circumstances

[29] As already observed, there is no statutory definition of what may amount to "exceptional circumstances" for the purposes of s 9(4) PSA. In a limited number of cases, the circumstances of the offending may be at such a low level as to lead to such a finding.[15] More often than not, though, it will only be when the factors personal to the offender

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12 As set out in s 9(1) PSA.

13 (2006) 166 A Crim R 588.

14 [2012] QCA 273 at [18], [24] and [25].

15 See, for example, *R v GAW* [2015] QCA 166 at [2]-[3] where the President and Holmes JA held that a single episode of low level of offending, combined with the absence of any prior of subsequent sexual offending, meant that it was open to the sentencing judge to conclude that, under s 9(4) PSA, there were exceptional circumstances.

are also taken into account that the overall circumstances are capable of being seen as sufficiently exceptional to exempt the offender from the usual operation of that provision. What is required is a careful consideration of all of the circumstances in order to determine whether, alone or in aggregation, they constitute exceptional circumstances so as to warrant the conclusion that the offender should be spared imprisonment.[16] But, as this Court affirmed in *Tootell*, the provision[17] must be read in its statutory context and with its obvious legislative intent in mind, that is, to "make it the usual case that those who commit sexual offences against children will serve actual imprisonment".[18]

[30] When undertaking such an assessment, it should not be thought that a combination of circumstances, none of which is individually exceptional, can never be regarded as exceptional, because it may be that it is only in combination that particular circumstances take on an exceptional quality.[19] The position was summarised in *Tootell* in the following way:

> "What emerges, then, is there is no one clear prescription for what circumstances are capable of being regarded as exceptional. Consideration must be given not only to the unusualness of individual factors but to their weight; and factors which taken alone may not be out of the ordinary may in combination constitute an exceptional case".[20]

[31] Those principles stated, it is perhaps useful to make the following additional observations.

[32] *First*, whether the circumstances in any given case justify a finding of exceptional circumstances will always be a matter for the discretionary judgment of the sentencing judge. For that reason, this Court will not lightly interfere with such a finding in the absence of an error of the kind identified in *House v The King*.[21] It will only be if the sentencing judge has erred in that sense that the Court will proceed to make its own assessment whether exceptional circumstances exist, and substitute its own decision, provided the material before the Court is sufficient to do so.

[33] *Secondly*, whether exceptional circumstances are established on the facts of a particular case is a matter where reasonable judicial minds might very well differ. This is because such an assessment calls for a value judgment in respect of which, as Mason and Deane JJ said in *Norbis v Norbis*, there is "room for reasonable differences of opinion, no particular opinion being uniquely right".[22] Their Honours continued:

> "If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at

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16 *Quick* at [8]; *Tootell* at [19].

17 Although the Court in *Tootell* was concerned with a repealed form of s 9(4) PSA, the relevant language was identical. For the history of the repealed provision (s 9(5)(a)), see *CBI* at [9]-[10] per Fraser JA. Section 9(4) was legislated in its present form by the *Youth Justice and Other Legislation Amendment Act* 2014 (Qld); s 34.

18 *Tootell* at [19].

19 *Tootell* at [19]-[23]; *Griffiths v The Queen* (1989) 167 CLR 372 at 379 per Brennan and Dawson JJ; *Baker v The Queen* (2004) 223 CLR 513 at 573-574 per Callinan J (who referred with approval to the observations made by Lord Bingham of Cornhill CJ in *R v Kelly (Edward)* [2000] QB 198 at 208).

20 *Tootell* at [24].

21 (1936) 55 CLR 499 at 504-505. And see *Hili v The Queen* (2010) 242 CLR 520 at [58].

22 *Norbis v Norbis* (1986) 161 CLR 513 at 518 per Mason and Deane JJ.

> first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."[23]

[34] *Thirdly*, when sentencing an offender for an offence of a sexual nature committed in relation to a child under 16 years, the sentencing judge is required to give primacy to the considerations set forth in s 9(6) as well as, in this case, s 9(7).[24] Any assessment whether exceptional circumstances exist in a particular case will therefore need to be undertaken with those considerations at the forefront of the sentencing judge's mind. In this regard, it can be seen that they not only include factors going to an assessment of the objective seriousness of the offence, the effect of that offence on the victim and the need for personal and general protection and deterrence, but also such considerations as the offender's prospects of rehabilitation (including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community), the offender's antecedents, age and character, whether there is remorse and any medical, psychiatric, prison or other relevant report relating to the offender.

[35] *Fourthly*, and closely allied to the observation just made, sentencing by reference to s 9(4) is not a "two-stage process"[25] whereby the sentencing judge must first consider whether exceptional circumstances exist and then determine the sentence to be imposed. Rather, in the sentencing process, the court "must consider whether there are exceptional circumstances which, in the light of all the other aspects of the case including those described in [ss 9(5), 9(6) and 9(7)], warrant the imposition of a sentence which does not involve actual custody".[26] Viewed in this way, a finding whether exceptional circumstances exist is but one part of the overall process of "instinctive synthesis" discussed by McHugh J in *Markarian v The Queen*[27] whereby each of the factors relevant to the sentence are identified and then weighed before a value judgment is made as to a sentence which is, in *all* of the circumstances of the case, appropriate.[28]

[36] *Lastly*, in the absence of any statutory definition of "exceptional circumstances", it is understandable why a sentencing judge might seek to draw guidance from the findings made on that point in other cases, and particularly where those cases have been the subject of appellate review. But such an approach can be fraught because it is prone to distract from the requirements of the sentencing task as just discussed. Moreover, rarely, if at all, will the circumstances of one case be sufficiently comparable with the circumstances of another case to derive much assistance from such an exercise. Indeed, just as it would be inappropriate for a sentencing judge to grade the criminality in a case at hand through a comparison of aggravating and mitigating factors in other cases as if there could only ever be a single correct sentence[29] so, too, would it be inappropriate to conclude that a finding of exceptional circumstances, or not, in one case dictates that the same finding should be made in another.

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23 At 518-519.

24 In addition, the closeness in age between the offender and the child in any particular case may also be taken into account: s 9(5) PSA.

25 *Tootell* at [25].

26 Ibid.

27 (2005) 228 CLR 357.

28 At [51].

29 *R v Dwyer* [2008] QCA 117 at [37] per Keane JA. And see *Markarian* at [27] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

Consideration

[37] In written and oral submissions to this Court on behalf of the applicant, Mr Fraser of counsel (who did not appear in the court below) argued that the learned sentencing judge erred by failing to find the existence of exceptional circumstances and that, in any event, the sentences imposed were manifestly excessive in all of the circumstances. In support of that argument, Mr Fraser placed particular emphasis on the causal significance of the applicant's underlying disorders to the offending. Furthermore, in written argument, Mr Fraser submitted that the presence of those disorders meant that this case did not present as a good vehicle for general deterrence and Mr Cowen QC (who, likewise, did not appear in the court below) very properly drew the Court's attention to this very point at the outset of his oral submissions on behalf of the Crown.

[38] As already discussed, the sentencing judge was taken by the conclusion reached by Chesterman JA in *Quick* against a finding of exceptional circumstances because, his Honour considered, the factors in that case were "very similar" to the factors in this case. In addition to the observations just made about such an approach, it is also important to observe that the sentencing judge was not referred to *Quick* by either counsel in the court below. His Honour therefore did not have the benefit of argument regarding the extent to which a true parallel could be drawn between this case and the conclusion in *Quick*. Had his Honour been assisted in that way, at least one essential difference between this case and the facts in *Quick* may well have emerged.

[39] In *Quick*, although there was evidence from a psychiatrist to the effect that the respondent suffered from "depression, and the devastating effect upon him of the loss of his teaching career consequent upon" his offending behaviour,[30] that was a far cry from the mental disorders which afflicted the applicant at the time of the subject offences. Nor did Mr Quick's depression appear to bear any causal relationship to his offending. Here, the unchallenged medical evidence was that the applicant's ability to cope with external stressors was limited by his mental disorders. When such stressors arose in the form of the death of his friend and the emotional difficulties he was experiencing with his partner, the applicant resorted to what the reporting psychiatrist described as "an ill advised attempt at self-treatment with benzodiazepines". In consequence, his judgment was compromised, he became disinhibited and he engaged in "obsessional and autistic thinking". In short, there was a cascading series of events which had, at their root, the applicant's mental disorders.

[40] Of course, voluntary intoxication of an offender by alcohol or drugs is not a mitigating factor which a court may have regard to in sentencing an offender: s 9(9A) PSA.[31] However, the intoxication in this case was, in substantial part at least, attributable to the applicant's underlying mental disorders. In such circumstances, and as Keane JA (as his Honour then was) observed in *R v Clark*,[32] the applicant's moral culpability was lessened and so, too, were the claims of deterrence and denunciation as considerations bearing upon the imposition of a proper sentence.[33] This is the very point that was the subject of written submissions from Mr Fraser and, about which, the Court was reminded by Mr Cowen QC.

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30 *Quick* at [4] per de Jersey CJ.

31 And see *R v Rosenberger; ex parte Attorney-General* [1995] 1 Qd R 677 at 678; *R v Dwyer* [2008] QCA 117 at [6] per de Jersey CJ.

32 [2009] QCA 361.

33 *Clark* at [23] per Keane JA.

[41] It must also be said that, in the court below, the causal relationship between the applicant's disorders and his offending behaviour was not underscored as well as it perhaps could have been. In turn, the learned sentencing judge seemed to regard the presence of such disorders to be of only contextual relevance. For the reasons stated immediately above, they went much further than that; the applicant's culpability was reduced by reason of his impaired capacity to deal with the stressors around him and the disinhibiting effect his consequent attempt at self-medication had on his ability to control his behaviour. Further, although his Honour's observation that "deterrence and denunciation are emphasised as having particular significance in this type of offending" was, as a general proposition, correct, such considerations were of only limited utility in a case such as this because an offender suffering from a mental disorder or abnormality is not an appropriate medium for making an example to others.[34]

[42] Indeed, quite apart from the causal relevance of the applicant's mental disorders to the offending and the limited scope for general deterrence as a sentencing consideration, the disorders themselves were significant mitigating features in this case. Not only was the applicant's moral culpability lessened by their existence, they went to the kind of sentence that ought be imposed.[35] In the court below, his Honour was unpersuaded by the submission made by counsel for the applicant that the imposition of wholly suspended periods of imprisonment coupled with a probation order would have been an appropriate exercise of the sentencing discretion. Of course, so much would follow from his Honour's rejection of the proposition that exceptional circumstances existed but, when proper regard is had to the applicant's underlying disorders, there was much to commend such an approach because it would also have aided the applicant's rehabilitation.

[43] In the last-mentioned respect, the sentencing judge was of course required by ss 9(6) and (7) PSA to take into account the applicant's "prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community". As to this, both the psychologist and psychiatrist who supplied reports expressed the opinion that the applicant would benefit from psychological treatment in the form of therapy to manage his disorders. Amongst other things, a probation order conditioned that he receive such treatment together with the threat of activation of suspended periods of imprisonment would have gone a long way towards ensuring that the applicant shunned any further attempt to self-medicate in favour of a suitable regime of prescribed treatment.

[44] For completeness, mention should also be made of the two decisions of this Court to which the sentencing judge was referred – *MBM* and *CBI*. Neither was truly comparable to the circumstances of this case, although they do provide some guidance as to the sentencing level with respect to first offenders for offences of this type.

[45] In *MBM*, an appeal against sentences imposed after a plea of guilty to possession of child exploitation material and making child exploitation material had some success, but only with respect to the possession count. The offender was aged 37 years with an excellent work history, strong family support, no previous convictions and good prospects of rehabilitation.[36] The circumstances of the making count were arguably more serious than the facts here; the offender secretly filmed his 14-year-old niece in

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34 See *R v Engert* (1995) 84 A Crim R 67 at 70-71 per Gleeson CJ; *R v Grehan* (2010) 199 A Crim R 408 at [24]-[25] per Chesterman JA; *Muldrock v The Queen* (2011) 244 CLR 120 at [53]-[54].

35 See *R v Verdins* (2007) 16 VR 269 at [32]; *R v Goodger* [2009] QCA 377 at [18]-[20] per Keane JA.

36 *MBM* at [14].

the shower on five separate occasions and then collated the footage in the form of a "home movie" but, unlike the position here, there was no physical contact between the offender and his victim. After a review of cases in which this Court considered sentences imposed for the offence of making child exploitation material,[37] the sentence originally imposed for the making count of two years' imprisonment suspended after eight months was confirmed.[38]

[46] In *CBI*, the appellant was convicted after a trial with respect to two counts of indecently dealing with a child under the age of 16 years with the circumstance of aggravation present in this case, that is, that the victim was under the age of 12 years at the time of both offences. He was sentenced to an effective head sentence of 18 months' imprisonment with a parole eligibility date fixed at the halfway point. The victim was the eight-year-old daughter of a woman who was in a relationship with the offender's son. The offender had no criminal history and was aged 66 and 67 at the time of the offences, one of which involved contact with the child's genital area through her clothes and the other which involved "skin on skin" touching of the same area. It was argued on appeal that insufficient regard had been paid by the sentencing judge to the offender's advanced age and the likely effect incarceration would have on him given his age but, after reviewing various comparable decisions,[39] that argument was rejected and the sentence imposed at first instance was confirmed.[40]

Conclusion

[47] The above consideration of the sentences imposed in this case is not so much revealing of error as it is of issues of weight to be attributed to the various sentencing factors. It cannot, for instance, be said that the sentencing judge failed to bring into account any one relevant factor but, in my respectful view, his Honour's attention could have been more effectively drawn to the significance of the causal relationship between the mental disorders and the offending, the reduced significance of general deterrence and denunciation and the applicant's prospects of rehabilitation.

[48] Had that occurred, his Honour might very well have found that exceptional circumstances existed when regard was also had to the circumstances of the offending, the absence of any effect on the child, the absence of any previous convictions, the presence of remorse and the other factors personal to the applicant, including his plea of guilty. But I would not go so far as to hold that the sentencing judge was required to conclude that those matters constituted exceptional circumstances on the facts of this case. Even giving proper weight to the significance of the causal relationship between the mental disorders and the offending as well as the applicant's prospects of rehabilitation, and reduced weight to general deterrence and denunciation, it would nevertheless have been open to the sentencing judge to conclude that an actual term of imprisonment should be served in this case.

[49] However, and without disturbing the conclusion that an actual term of imprisonment needed to be imposed in this case, I do think that the causal relationship between the mental disorders and the offending as well as the applicant's prospects of rehabilitation called for a slightly greater degree of restraint in the fixing of the custodial portions of the terms of imprisonment which were imposed.

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37 *R v Carmichael & Armbruster* [2009] QCA 41; *R v GAE; ex parte A-G (Qld)* [2008] QCA 128; *R v Rogers* [2009] QCA 10.

38 At the time *MBM* was decided, the maximum period of imprisonment for the offence of making child exploitation material was 10 years: *MBM* at [12] per White JA, with whom Fraser and Chesterman JJA agreed.

39 In particular, *R v KT; ex parte A-G (Qld)* [2007] QCA 340.

40 *CBI* at [22] per Fraser JA, with whom Gotterson JA and Mullins J agreed.

[50] By the time of the hearing of the appeal, the applicant had already been in custody for three months and three weeks. In my respectful opinion, if the applicant was required to serve out the balance of the custodial portions of the terms of imprisonment imposed by the sentencing judge, it would have resulted in an overall sentence that was manifestly excessive in the sense of being "unreasonable or plainly unjust".[41]

Conclusion and orders

[51] It was for the above reasons that, on the hearing of the appeal, I agreed that the applicant should be granted leave to appeal, that the appeal should be allowed and that the orders earlier indicated[42] be made.

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41 *CBI* at [22] per Fraser JA (citing *Hili v The Queen* (2010) 242 CLR 520 at [58]-[59]).

42 See paragraph [6].