RP v The Queen [2008] NTCCA 8

PARTIES:	RP
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 19 of 2007 (20622148)
DELIVERED:	17 July 2008
HEARING DATES:	28 APRIL 2008
JUDGMENT OF:	MARTIN (BR) CJ, THOMAS & SOUTHWOOD JJ
APPEAL FROM:	RILEY J, 19 DECEMBER 2007

CATCHWORDS:

APPEAL – CRIMINAL LAW
Appeal against sentence – gross indecency and indecently dealing with a child – juvenile offender – whether sentence manifestly excessive – appeal allowed – re-sentenced.

Criminal Code Act 1983 (NT), s 127(1)(b) and s 132(2)(a); *Sentencing Act 1995* (NT), s 52, s 52(3) and s 112; *Youth Justice Act 2005* (NT), s 4, s 81(6), s 125 and s 125(3).

REPRESENTATION:

Counsel:

Appellant:	S Corish, P Dwyer
Respondent:	J Tippett QC

Solicitors:

Appellant:	Northern Australian Aboriginal Justice Agency
Respondent:	Northern Territory Director of Public Prosecutions

Judgment category classification:	A
Judgment ID Number:	Mar0806
Number of pages:	24

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

RP v The Queen [2008] NTCCA 8
No. CA 19 of 2007 (20622148)

BETWEEN:

RP
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, THOMAS AND SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 17 July 2008)

Martin (BR) CJ:

Introduction

[1] The appellant was born on 9 March 1993. On 26 October 2007 he pleaded guilty to offences of gross indecency upon a male child under the age of 16 years and indecently dealing with the same child under the age of 16 years. The offences occurred on separate occasions in 2006 when the appellant was aged 13 years and the victim 11 years. The age difference was one year and five months.

[2] The learned sentencing Judge imposed a sentence of detention for eight months which was suspended on conditions of supervision after the appellant had served one month.

[3] The appellant appealed against the sentence on the grounds that the sentence, including the period to be served, was manifestly excessive and the Judge erred in failing to apply or adequately apply the principles governing the sentencing of juveniles. In addition leave was granted on the hearing of the appeal to add a ground asserting that the Judge erred in imposing an aggregate sentence.

[4] The Crown conceded that the appeal should be allowed on the basis the sentencing Judge erred in imposing a sentence of detention. The Crown also conceded that even if detention was justified, requiring the appellant to serve any period resulted in a manifestly excessive sentence.

[5] I now set out my reasons for allowing the appeal and for the new orders as to sentence. A summary of the essential facts and principles by which the appeal is determined is set out in para [46].

Facts

[6] The appellant pleaded guilty to the offences charged in counts 6 and 8 of the Indictment. Also charged on the same Indictment were four other offenders who pleaded guilty to a number of offences against the same victim. The sentencing Judge was required to sentence all offenders for their individual crimes and his Honour faced a particularly difficult task.

[7] The first group of offences occurred between 24 April 2006 and 26 May 2006 at Maningrida where all the offenders and the victim resided. Lethan Taylor (aged 16), Claevon Cooper (aged 18) and MB (aged 15) were at premises in Maningrida known as the White House with other persons. A pornographic DVD was played during which sexual offences were committed against the victim who was lying down in the room. Taylor and Cooper each penetrated the anus of C with their penis. Those individual acts were the basis of the charges in counts 1 and 2 that the offenders had sexual intercourse with a child under the age of 16 years. Taylor was sentenced to imprisonment for two years and six months suspended on conditions after he had served six months. Cooper was sentenced to three years imprisonment (other sentences and the net result for Cooper are discussed later).

[8] On this first occasion MB fondled the victim's buttocks area. That act was the basis of the charge in count 3 that MB indecently dealt with a child under the age of 16 years for which MB was placed on a non conviction bond.

[9] During the evening the victim left the White House with the appellant and they walked to premises known as the Orange House which was the home of the appellant and another offender, Isiah Pascoe (aged 19). Cooper also resided at the Orange House and, separately, returned to those premises.

[10] At the Orange House Isiah Pascoe placed his penis in the victim's mouth. That act was the basis of the offence charged in count 4 that Isiah Pascoe had sexual intercourse with a child under the age of 16 years. A sentence of two years and eight months imprisonment was imposed and suspended on conditions after service of 10 months.

[11] Cooper rubbed his penis in the area of the victim's buttocks. That act was the basis of the charge in count 5 that Cooper indecently dealt with a child under the age of 16 years for which a sentence of nine months imprisonment was imposed.

[12] The appellant was present during the sexual activity in the Orange House. He had been lying on a mattress watching television. He then lay on top of the victim and put his penis on the opening of the victim's anus. The appellant was unable to penetrate the victim and soon desisted. That sexual activity was the basis of the offence in count 6 of gross indecency upon a child under the age of 16 years.

[13] The second group of offences occurred on a later occasion between April and August 2006. A group including Cooper, the appellant and the victim walked to a beach where they went swimming. Cooper removed the victim's shorts and rubbed his penis in the area of the victim's buttocks. That act was the basis of the charge in count 7 that Cooper indecently dealt with a child under the age of 16 years for which a sentence of nine months imprisonment was imposed. The sentencing Judge directed that the

sentences on counts 2 and 5 be served concurrently, but that the sentence on count 7 be served cumulatively, resulting in a total sentence of three years and nine months. That sentence was suspended on conditions after Cooper had served 15 months.

[14] As to count 8, while they were swimming the appellant and the victim removed their shorts and the appellant held the victim's penis. That act was the basis of the charge in count 8 that the appellant indecently dealt with a child under the age of 16 years.

[15] There was no evidence as to the effect on the victim of the individual acts of the appellant. The sentencing Judge noted that the true effect of the totality of the offending by all offenders on the victim may not be known for many years. In his victim impact statement, the victim spoke of the offenders doing bad things to him and hurting him "a little bit". The victim had been required to leave Maningrida and although he initially participated well in school in Darwin, his behaviour had changed. His attendance at school dropped off and he was transferred to another school without success. It appears that the victim began associating with persons involved in anti-social behaviour and a report provided to the Judge suggested a "growing disconnection from positive family role models". Prior to sentencing in December 2007 the victim had recently come to the attention of police. The sentencing Judge observed:

> "Such behaviour is of course consistent with experience in relation to other victims of sexual assault. The future for the victim remains uncertain and of significant concern."

Approach of Sentencing Judge

[16] In his sentencing remarks, after dealing with the facts of all offending and the overall effects on the victim, his Honour made general remarks concerning the difficulties associated with sentencing young offenders and the possible role of pornographic material in the offending. His Honour said:

> "A major difficulty for the court in sentencing is that the offenders in these proceedings, especially the juveniles are youthful. It must be recognised that many young people are immature and may lack a full understanding of the seriousness of their actions and the consequences for others. The courts and the community recognise that wherever possible the court should avoid sending young people to gaol or detention and particularly for lengthy periods. The younger the offender the greater is the need to endeavour to avoid the imposition of a term of imprisonment or detention.
>
> Of course, some offending is so serious that it demands imprisonment. In such cases, whilst the rehabilitation of young offenders must remain a prominent consideration in the sentencing process, considerations of punishment and general deterrence must also play a significant role.
>
> The sentence to be imposed must reflect the seriousness of the offending. It must denounce the crime and reflect the abhorrence the community feels for such conduct.
>
> I am told that there was pornographic material being played on a television set on the occasion of the first group of offences. How that came to be has not been explained. What impact that had upon the youthful offenders is not known to me. What cannot be doubted is that the playing of such material to young people is quite unacceptable and should not have occurred. It may, to some extent, some limited extent, provide an explanation for the behaviour of the

> prisoners on this occasion. The viewing of such material must provide impressionable young people with a distorted view of what is and what is not acceptable conduct.
>
> The sentencing exercise is made more complex by the circumstances of the offenders. The offenders have a number of things in common. They are each young men. They have each had a very basic formal education, their schooling has been at best sporadic and of little impact upon them. English is, for each of them, effectively a foreign language. They have limited understanding of European concepts. They have been brought up in a remote location. They each have limited awareness of things outside their narrow community and the psychologist regards each as having cognitive skills below his chronological age. None of them has a criminal history."

[17] The Judge then referred to matters arising from reports of a psychologist concerning each offender that were common to each offender and the problems associated with young people living in difficult circumstances within remote communities whose prospects are bleak because they have "no education, no likelihood of a job and no likelihood of any different future". His Honour then dealt with the response within the Maningrida community, following which he canvassed at significant length the circumstances of each individual offender, including the appellant.

[18] Counsel for the appellant criticised his Honour's approach in grouping the offenders together "for the purpose of considering the principles in relation to the sentencing of juveniles and young offenders". It was contended that this approach failed to distinguish between the individual offenders and failed adequately to take into account the fact that the appellant was the youngest of the offenders aged only 13 years at the time of the offending. Further, it was put that in considering the impact of pornographic material,

his Honour erred in giving inadequate consideration to the impact on the appellant and in failing to consider the extent to which the conduct of the appellant was attributable to peer pressure or following the lead of others. Counsel also contended that his Honour erred in regarding the appellant as part of a group of "young men" because the appellant "is not a young man; he is a child".

[19] In my view, these criticisms are utterly without merit. The general remarks of the sentencing Judge were accurate as to the principles and were totally unexceptional. His Honour was dealing with a group of young offenders who had committed offences against the same victim on two identified occasions. It was entirely appropriate to speak generally of the principles governing the sentencing of youthful offenders and the difficulties attached to that task.

[20] It was also entirely appropriate to discuss the playing of the pornographic material and to note that the impact upon the offenders was not known to his Honour. The reference to "young men" was in this very general context and cannot reasonably lead to an inference of error in his Honour's approach or to any reasonable suggestion that his Honour failed to recognise that the appellant was the youngest of the group and still a child. As I have said, his Honour dealt at length with the individual circumstances of each offender. With respect to the appellant in particular, when dealing with the appellant's personal circumstances his Honour specifically referred to the appellant's young age:

> "The major difficulty in sentencing is caused by the very young age of R [the appellant]. He is now aged 14 years and nine months and was just 13 at the time of the offending."

[21] As to the suggestion that his Honour failed to consider the impact of pornography upon the appellant in particular, or the question of peer pressure or following the lead of others, his Honour specifically addressed these questions:

> "The offences were committed after R [the appellant] had been in the company of others …
>
> … It is not clear whether and to what extent R was influenced by the conduct of the older males present at the earlier time. He and the victim were of course alone at the time of the offending.
>
> …
>
> It is said, by the psychologist, that R was not fully aware of the consequences of his actions because of his immaturity. It was submitted on behalf of R, and I accept, that he was mimicking what he had seen in the pornographic material on the television and possibly elsewhere. His offending followed soon after he had been exposed to similar conduct."

[22] The written submissions filed on behalf of the appellant also criticised the approach of the sentencing Judge to the allowance made for the plea of guilty. The Judge stated that with respect to count 6, but for the plea of guilty he would have imposed a sentence of detention of eight months. With respect to count 8, but for the plea of guilty his Honour would have imposed detention for four months. His Honour specifically stated that but for the

plea of guilty the total period of detention would have been 12 months. In other words, his Honour intended to accumulate the individual sentences.

[23] Having made those observations, the Judge stated that in light of the plea of guilty, he sentenced the appellant "to a total period of detention of eight months". In this way his Honour determined the total sentence by accumulating the individual sentences and then allowed a reduction of one third in recognition of the appellant's plea of guilty. Leaving aside whether accumulation was appropriate and whether the total reached was excessive, this was a legitimate way of arriving at the total period that his Honour considered properly reflected the gravity of the appellant's total criminal conduct. It was also an entirely appropriate way in which to reflect the allowance for the plea of guilty.

[24] Having determined that the total sentence should be eight months detention, the sentencing Judge should have reduced each of the individual sentences by one third and accumulated the net periods to arrive at the total of eight months. Instead, his Honour imposed an aggregate sentence of eight months and was in error in doing so. The powers contained in s 125 of the Youth Justice Act and s 52 of the Sentencing Act to impose an aggregate sentence do not extend to sentences for offences of the type under consideration. Sections 125(3) and 52(3) specifically exclude sexual offences and the offences to which the appellant pleaded guilty are sexual offences for this purpose.

[25] It is unfortunate that neither experienced counsel drew this matter to the attention of the Judge at the time of sentence or subsequently. The error could easily have been corrected by his Honour pursuant to s 112 of the Sentencing Act. While the error must be corrected by this Court, it has no impact upon his Honour's approach to sentencing or to the question of whether the sentence was manifestly excessive. It is plain that his Honour intended to accumulate the sentences and to allow a reduction of one third in order to reflect the appellant's pleas of guilty. Two thirds of eight months is 5.33 months. Two thirds of four months is 2.67 months. If those two periods are accumulated, the total of eight months is reached.

Parity

[26] Counsel for the appellant submitted that the sentences imposed upon the appellant and MB created an impermissible disparity. MB was aged 15 at the time of the offending. He committed only one offence in the first group and that was the offence of indecently dealing with a child under the age of 16 years by fondling the victim's buttocks area with his hands.

[27] In a general observation, the Judge noted that the offending of MB was "much less serious than the offending of his fellow prisoners". This was a very general remark and was not intended to address the specifics of each offence. MB was not involved in any other sexual misconduct and was not present at the time the second group of offences were committed.

[28] As I have said, the sentencing Judge did not convict MB. His Honour imposed a bond to be of good behaviour for a period of 12 months with conditions. Counsel for the appellant submitted that the culpability of the appellant in relation to count 8 was "comparable" to that of MB and that whatever the difference in the actual conduct, "it was not so grave as to warrant such a disparity of disposition".

[29] MB was only two years older than the appellant. He was only present on one occasion. His act in fondling the appellant's buttocks area with his hands was less serious than the appellant's act in holding the victim's penis. The appellant's act was the second occasion on which he was guilty of sexually offending against the victim.

[30] In my view, there was a basis for distinguishing between the appellant and MB. As to the extent of the disparity, different minds might reach different conclusions, but the disparity in itself is not so great that error is demonstrated or interference by this Court on this basis alone is justified. However, for the reasons that follow, in my view the sentence of detention that the Judge had in mind in respect of the offence charged in count 8 was manifestly excessive.

Manifestly Excessive

[31] Consideration of whether the sentence was manifestly excessive requires an examination of the seriousness of the offending and the personal circumstances of the appellant. I have already dealt with the facts of the

appellant's offending. The sentencing Judge found that the offences were on the lower end of the scale of seriousness for offences of their type and there is no criticism of that categorisation.

[32] As to matters personal to the appellant, he had not previously been in trouble with the law. The sentencing Judge had the assistance of a psychological assessment and the key features arising from that assessment may be summarised as follows:

- When seen by the psychologist in November 2007, the appellant was a small, thin child of rather frail appearance. That appearance may in part be attributed to a medical history of fevers and scabies. The appellant has a benign heart murmur.

- The appellant's understanding of English is rudimentary. He was unable to give his date of birth accurately.

- In the area of verbal and non-verbal logico-deductive reasoning, the appellant possesses very limited skills. He is generally performing at about a five year old level for verbal concepts and at a level between eight and 11 years for non-verbal and logico-deductive reasoning.

- In terms of reasoning ability, the appellant performs in the well-below average range; about 85% of people in the appellant's age group would out perform him.

- Drawing and copying skills suggest a mean age equivalent of six and a half years. The appellant was unable to imagine a picture of a person and could not draw one.

- The appellant's cognitive abilities fall far short of his chronological age.

- The appellant has had "the most limited of educational experiences" and possesses "very limited awareness of most things outside his narrow community".

- "In the light of his narrow awareness of the outside world, [the appellant] has limited ability to compare models of behaviour and to determine that some of the things seen on films are unlikely to occur in real life."

- The appellant possesses "limited capacity to consider the implications of his behaviour."

- There is no evidence the appellant possesses prior experience with sexual activity, but his psychological profile suggests the possibility that he has been the victim of sexual abuse.

- "[The appellant] is a product of an extremely disadvantaged group with limited exposure to European educational values. His understanding of things pertaining to the wider community is rudimentary."

- The appellant now understands that what he has done is not appropriate and is unlikely to re-offend.

[33] The sentencing Judge accepted that the appellant is unlikely to offend and that he was remorseful for his conduct. His Honour noted, however, that the appellant had not complied with bail conditions and, in particular, did not comply with the explicit condition that required him to attend school. His Honour observed that it appeared that the seriousness of the situation had "not yet fully impacted" upon the appellant and that the appellant did not appreciate that consequences would follow from his failure to honour his obligation. His Honour concluded that the appellant "has a way to go".

[34] Notwithstanding those qualifications, having noted that the appellant would have strong community support from family and members of the community, his Honour concluded that the appellant's prospects for rehabilitation were "positive". This was an appropriate conclusion and the extent of the support within the Maningrida community was quite exceptional.

[35] As I have said, the sentencing Judge faced a difficult task with respect to all offenders, but particularly with respect to the appellant. His Honour approached his task with great care and had regard to all matters relevant to the exercise of the sentencing discretion, including the appellant's young age and other matters personal to him to which I have referred. His Honour was also acutely aware of the serious nature of the conduct amounting to gross indecency because it involved an "endeavour to penetrate the victim".

[36] A determination as to whether the sentence was manifestly excessive must be made in the light of the sentencing principles which the Court is required

to apply when sentencing youthful offenders. First and foremost is the direction in s 81(6) of the Youth Justice Act ("the Act") that the Court must impose a sentence of detention or imprisonment on a youth "only as a last resort". The Court is also directed to consider the age and maturity of the youthful offender and to have regard to the principles of youth justice set out in s 4 of the Act. For present purposes, the relevant principles may be summarised as follows:

- The youth must be held accountable for the offending and encouraged to accept responsibility.

- The youth should be dealt with in a way that acknowledges the needs of the youth and will provide the youth with the opportunity to develop in socially responsible ways.

- The youth should only be kept in custody as a last resort and for the shortest appropriate period.

- The youth must be dealt with in a manner consistent with the youth's age and maturity.

- The youth should be dealt with in a way that allows the youth to be re-integrated into the community.

- A balanced approach must be taken between the needs of the youth, the rights of any victim and the interests of the community.

- Family relationships between the youth and members of the youth's family, should, where appropriate, be preserved and strengthened.

- The youth should not be withdrawn unnecessarily from the youth's family environment and there should be no unnecessary interruption of the youth's education or employment.

- Punishment of a youth must be designed to give the youth an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways.

- A youth's sense of racial, ethnical or cultural identity should be acknowledged and the youth should have the opportunity to maintain it.

- If practicable, an Aboriginal youth should be dealt with in a way that involves the youth's community.

[37] I emphasise that the appellant is to be sentenced only for his individual offences. He was not charged with committing the offences in the company of others. There was no suggestion that the appellant was in any way involved in or connected with the offences committed by the other offenders. Stripped of any complications associated with the offending by other offenders, the essential facts concerning the appellant and his moral culpability were as follows:

- The appellant is not the average 13 year old boy. At the time of offending he was a small, thin, 13 year old child whose psychological

development was well below his age. His cognitive abilities fell far short of his age to the extent that in some areas he was generally performing at about the level of a five year old and in other areas at a level between eight and 11 years.

- The appellant possessed a rudimentary understanding of English and had experienced little education which had left him with a very limited awareness of most things outside his very narrow community.

- As a product of an extremely disadvantaged group the appellant had experienced very limited exposure to European educational values and possessed limited ability to compare models of behaviour or to determine that some of the things seen on pornographic films are unlikely to occur in real life.

- The appellant has been the victim of sexual abuse.

- The appellant possessed limited capacity to consider the implications of his behaviour and, by reason of his limited cognitive ability and immaturity, was not fully aware of the consequences of his actions.

- By reason of his immaturity, not only was the appellant not fully aware of the consequences of his actions, he was mimicking what he had seen in pornographic material and, possibly, in the actions of others.

- The offences were committed against a male relative who was one year and five months younger than the appellant and who was a friend of the

appellant with whom the appellant regularly played within the community.

- The appellant had never been in trouble with the law previously and is unlikely to re-offend. He possesses good prospects for rehabilitation.

[38] Against this background, and bearing in mind that no force was used, the appellant's act in holding his friend's penis during a swimming outing was an offence at the very lowest end of the scale of seriousness for offences of this type. While the appellant was one year and five months older than his friend, he possessed a mental age well below the average 13 year old and below the chronological age of the victim. For a child of such a young age, who was mimicking the conduct of older offenders and conduct seen in pornographic material without any appreciation of the implications of what he was doing, the appellant's act of holding his friend's penis was more in the nature of sexual experimentation than a criminal offence.

[39] Bearing in mind the principles applicable to the sentencing of children, and in particular that a sentence of detention may only be imposed as a last resort, in my opinion the sentencing Judge erred in reaching the view that detention was required with respect to the offending in count 8.

[40] The offending in count 6 is more problematic. It was more serious. However, that offending was of very short duration and did not involve any degree of force or penetration. No-one else was involved. As I have said, the appellant is to be sentenced for his individual conduct and the sentence

is not to be influenced by the conduct of other offenders who committed more serious offences. Again, the appellant was mimicking the conduct of others. By reason of his young mental age he did so without any appreciation of the implications of what he was doing. He lacked any awareness of the boundaries of appropriate behaviour.

[41] Notwithstanding the seriousness of the objective act involved in the offending, I have reached the view that there were alternative dispositions more appropriate than a sentence of detention for the offending in count 6. Similarly, having regard to the gravity of the total criminal conduct, in my view there were appropriate dispositions other than detention that were available to the sentencing Judge. The objective facts, considered in the light of the appellant's mental age and other matters personal to the appellant, did not support the conclusion that the point had been reached where the sentence of last resort was required.

Re-sentencing

[42] The Court having decided that the appeal should be allowed and the appellant re-sentenced, a further pre-sentence report was requested with a view to updating the information available to the Court as to the appellant's current circumstances and his progress or otherwise under family supervision. Unfortunately, the additional report is of limited assistance because of difficulties associated with communication between the author of the report and the appellant. However, the report confirms that the appellant

has been attending school regularly and continues to receive strong support from his family. In particular, the appellant's father is exercising significant supervision and will continue to do so.

[43] For the reasons stated, detention is inappropriate. A sentence which promotes the rehabilitation and proper development of the appellant will best serve the interests of the community.

[44] The appellant should be convicted of each offence and, on each count, should be released upon entry into a bond in the amount of $500 to be of good behaviour for a period of 12 months. Further, each bond should be subject to the condition that the appellant be under the supervision of the Director of Correctional Services and obey the reasonable directions of the Director or a probation officer, including directions as to his place of residence, education, training, treatment and counselling including treatment and counselling for sexual offending.

Summary

[45] In recent times, considerable media and public attention has been given to crimes involving sexual offences against children. Understandably, the community is greatly concerned about these types of offences. Unfortunately, on occasions the reporting of court proceedings and sentences has been incomplete or inaccurate and misleading impressions have been conveyed to the community. Reporting of proceedings with respect to the appellant has not always been accurate.

[46] I recognise that the media work under time and space constraints and it is not always easy to distil from lengthy sentencing remarks or appeal reasons the essential features which will accurately convey to the community adequate information concerning a particular case. In an endeavour to assist the media and other readers of this decision, and to ensure accuracy in reporting, the essential facts and principles may be summarised as follows :

- The appellant pleaded guilty to two offences, namely, gross indecency upon a male child under the age of 16 years and indecently dealing with the same child under the age of 16 years.

- Other offenders committed additional and more serious offences against the same victim for which sentences of imprisonment were imposed. The appellant was not involved in those other offences. The appellant is to be sentenced only for his individual offences.

- At the time of the offending, the appellant was aged 13 years and was one year and five months older than the victim.

- The offence of gross indecency was committed when the appellant lay on top of the victim and put his penis on the opening of the victim's anus. Penetration did not occur and the offence occupied a very short period.

- The offence of indecently dealing with the victim occurred while the appellant and the victim were swimming. Both removed their shorts and the appellant held the victim's penis.

- The appellant is not the average 13 year old boy. At the time of the offending he was a small, thin, 13 year old child whose psychological development was well below his age. His cognitive abilities fell far short of his age to the extent that in some areas he was generally performing at about the level of a 5 year old and in other areas at a level between 8 and 11 years.

- The appellant is the product of an extremely disadvantaged group and possessed very limited exposure to European educational values and very limited awareness of matters outside his very narrow community. In substance he was unable to compare models of behaviour or to determine that some of the things seen on pornographic films are unlikely to occur in real life.

- The appellant has been the victim of sexual abuse.

- The appellant mimicked what he had seen in pornographic material and, possibly, in the actions of others. By reason of his limited cognitive ability and immaturity, he was not fully aware of the consequences of his actions.

- The appellant now understands that what he did was inappropriate and he is sorry for his conduct. He is unlikely to re-offend and possesses good prospects for rehabilitation.

- The appellant has the strong support of his community and family.

- The Court is directed by the Act to apply particular principles when sentencing youthful offenders. Of significance are the directions that the Court must consider the age and maturity of the offender and is to impose a sentence of detention only as a sentence of last resort. Other relevant principles to which the Court must have regard are set out in paragraph [35] of these reasons.

- In substance, the Crown conceded that the circumstances of the offending, considered in the light of matters personal to the appellant, did not justify a sentence of detention.

- Detention being inappropriate, the interests of the community are best served through a sentence which will protect the community by ensuring the continued rehabilitation and proper development of the appellant.

Thomas J:

[47] I agree with the reasons for decision of his Honour the Chief Justice and with the proposed orders.

Southwood J:

[48] I agree with the reasons for decision of his Honour the Chief Justice and with the proposed orders.
