CITATION:	*The King v Porch* [2024] NTCCA 2
PARTIES:	THE KING v PORCH, Jared Kane
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 5 of 2023 (22134972)
DELIVERED:	25 January 2024
HEARING DATE:	3 July 2023
JUDGMENT OF:	Blokland and Barr JJ and Huntingford AJ

CATCHWORDS:

SENTENCING – Crown Appeal – inadequacy of sentences – child exploitation offences – whether individual sentences manifestly inadequate – whether total sentence manifestly inadequate – appeal dismissed.

Cases referred to:
Everett v The Queen [1994] HCA 49; *Griffiths v The Queen* [1977] HCA 44; *Hili v The Queen* [2010] HCA 45; *House v The King* [1936] HCA 40; *Lacey v Attorney-General (Qld)* [2011] HCA 10; *Markarian v The Queen* (2005) 228 CLR 257; *Mill v The Queen (1988)* 166 CLR 59; *Minehan v R* (2010) 201 A Crim R 243; *Pearce v The Queen*; *Postiglione v The Queen* (1997) 189 CLR 295; *R v Oliver* [2003] 2 App; *R v Osenkowski* (1982) 30 SASR 212; *R v Riley (2006) 161 A Crim R 414*; *Ryan v The Queen* (2001) 206 CLR 267; *The Queen v Hancock* [2011] NTCCA 14; *The Queen v Kilic* (2016) 259 CLR 256; *The Queen v Roe* [2017] NTCCA 7; *Walker v The Queen* [2008] NTCCA 7.

Statutes referred to:
Crimes Act 1914 s 19(5)-(7); s 16AAA
Criminal Code (Cth) 1983 (NT) s 474.25A
Sentencing Act (NT) 1995 (NT) ss 5(2)(e); 6
Thomas, Principles of Sentencing, 2nd ed (1979)

REPRESENTATION:

Counsel:

Appellant:	K Breckweg
Respondent:	J Tippett KC

Solicitors:

Appellant:	Commonwealth Director of Public Prosecutions
Respondent:	Greg Betts Legal

Judgment category classification:	B
Number of pages:	22

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

The King v Porch [2024] NTCCA 2
CA 5 of 2023 (22134972)

BETWEEN:

THE KING
Appellant

AND:

JARED KANE PORCH
Respondent

CORAM: BLOKLAND & BARR JJ & HUNTINGFORD AJ

REASONS FOR JUDGMENT

(Delivered 25 January 2024)

The Court:

[1] This is a Crown appeal against a total effective head sentence of four years and nine months with a non-parole period of 18 months imposed for offending involving the sexual exploitation of children committed by the respondent in the period from 31 July 2020 to 14 November 2021.

[2] The admitted offending was the subject of 12 separate charges and six distinct types of criminal conduct. On 22 occasions between 31 July 2020 and 14 October 2021, the respondent sent child abuse material to 20 different individuals using Facebook Messenger, generally using

fictitious names.[1] Over a 12-month period, he asked multiple persons if they could find young children to engage in sexual activity with him, and provided details of the sexual activity in which he wished to engage and the age and type of child he preferred.[2] On 24 occasions between 1 March 2021 and 1 November 2021, he asked 20 different participants to send him child abuse videos, very often in exchange for money.[3]

[3] On 27 May 2021 and again on 7 July 2021, the respondent communicated with a male university student in Fiji and asked him to find a 14 year old boy to have sex on video calls to the accused.[4]

[4] After his arrest, the respondent was found in possession of 6 items of child abuse material, some of which he had transmitted to or received from online correspondents.[5]

[5] The offending charged as count 7 was the most serious of the offences committed by the respondent. The sentence imposed was three years and nine months. On appeal, the appellant contended (as the first ground) that that sentence was manifestly inadequate for a number of reasons particularised.[6] Given the structure of the overall sentence and the

---

1 Count 1, contrary to s 474.22(1) *Criminal Code* (Cth).

2 Counts 2, 4, 8, 9, 10 and 11, contrary to s 474.27AA(1) *Criminal Code* (Cth).

3 Count 3, contrary to s 474.22(1) *Criminal Code* (Cth).

4 Counts 5 and 6, contrary to s 474.27AA(2) *Criminal Code* (Cth).

5 Count 12, contrary to s 474.22A *Criminal Code* (Cth).

6 Amended Notice of Appeal, AB 120.

significance of the sentence for count 7 to the appeal, it is appropriate to consider the nature of that offence and the relevant facts.

[6] The offence charged as count 7 was as follows:

> Between 29 August 2021 and 5 October 2021, at Alice Springs in the Northern Territory of Australia or elsewhere, engaged in conduct in relation to a child, who was under 16 years of age, causing the child to engage in sexual activity using a carriage service with another person, namely DH, being someone who was at least 18 years of age.
> Contrary to section 474.25A(2) of the *Criminal Code* (Cth).

[7] Although the offence carries a maximum penalty of imprisonment of 20 years, counsel for the appellant concedes that the sentencing judge was misinformed by the prosecutor below that the maximum penalty for the offence was 15 years' imprisonment. The appellant submits that, for the purposes of this appeal, this Court should proceed on the basis that the offence did carry a maximum penalty of 15 years imprisonment, "so that the error does not act in any way to the detriment of the respondent". However, we note that a particular of the first ground of appeal is that "the sentence does not adequately reflect the serious nature and circumstances of the offending, including the maximum penalty prescribed for the offence".

[8] Section 16AAA *Crimes Act 1914* requires that a sentencing court impose a sentence of imprisonment of at least 5 years upon conviction for an offence against subsection 474.25A(2).[7] However, s 16AAA is subject to s 16AAC, which permits a reduction of the minimum penalty from that specified in

---

7 Item 14 in the Table to s 16AAA.

s 16AAA by up to 25%, taking into account a plea of guilty.[8] Further, s 16AAA does not provide for any minimum period of custody before release. There is no mandatory minimum non-parole period calculated as a percentage of the head sentence.

[9] The section heading for s 474.25A *Criminal Code* is 'Using a carriage service for sexual activity with person under 16 years of age'. The sub-heading for s 474.25A(2) is 'Causing child to engage in sexual activity with another person'. The elements of the s 474.25A(2) offence are specified as follows:

a. the defendant engages in conduct in relation to another person (the child); and
b. that conduct causes the child to engage in sexual activity with another person (the participant) using a carriage service; and
c. the child is under 16 years of age when the sexual activity is engaged in; and
d. the participant is at least 18 years of age when the sexual activity is engaged in.

[10] The term 'engage in sexual activity' is given an extended meaning in the Dictionary to the C*riminal Code,* as follows:

> *Engage in sexual activity*: without limiting when a person engages in sexual activity, a person is taken to *engage in sexual activity* if the person is in the presence of another person (including by a means of communication that allows the person to see or hear the other person) while the other person engages in sexual activity.

8 See s 16AAC(2)(a) & (3)(a).

[11] It is therefore not necessary that the child victim of an offence contrary to 474.25A(2) engage in sexual activity in the sense of being a participant or a knowing participant in sexual activity. Element b. is satisfied where a child victim is in the presence of a person ('the participant') who engages in sexual activity, even if the child is asleep or otherwise unaware of what the other person is doing.

[12] Count 7 charged offending conduct on three separate occasions as one offence. The agreed facts are summarized in [13] – [18] below.

[13] On 29 August 2021, the respondent asked DH to engage in a video call with him, while the six year old son of DH was in the room and awake. It is unclear exactly what DH did, but whatever it was, the respondent asked him to "keep going", before then saying "… roll him over so he is facing u too chore while ur doing it'.[9] DH then sent a category 3 child abuse material video to the respondent. The respondent encouraged him to keep going:

> Keep going chore like that for 5 minutes…and cum chore.

[14] DH then sent further videos, including one where he placed a child's arm on top of his erect penis. The respondent encouraged further sexual activity, specifically that DH get the child's "hand on there like this and cum for me". The respondent asked for further videos but DH was reluctant, saying: "It's my son chore ahah". He apparently overcame his reluctance after the respondent offered him three hundred dollars for a further five minutes with

9 AB 54, par 33.

the encouragement, "... just u two and 300 chore for 5 mins and just use his hand over ur chest and dick like in that other video".

[15] DH sent a further category 3 child abuse material video of himself masturbating, then pulling the child's arm so that it rested on his chest. He then ejaculated. There followed a discussion about payment: the accused paid $250 and DH apparently objected on the basis that he thought he was to receive $300.[10]

[16] On 30 August 2021, the respondent asked DH for a further video with the instruction, "Well u take videos and have him asleep there next to u and use his hand". The respondent also asked for a video of DH and his son in the shower with the request that DH should ejaculate.[11]

[17] On 17 September 2021, the respondent and DH spoke again. In the course of that conversation, the respondent asked DH to take his son for a shower, in return for which the respondent would pay $300. During a video call shortly afterwards, DH filmed his six year old son naked in the shower, with his penis and anus exposed and visible. After the child then walked away, DH got into the shower and masturbated. The content of that call was categorised as category 1 on the ANVIL scale.

[18] On 5 October 2021, the respondent engaged in a further video call with DH during which DH filmed his six year old son in the shower. The events

10 AB 54, par 36.

11 AB 54, par 37.

which then took place were identical with the events which took place on 17 September 2021. The content of that call also was categorised as category 1 on the ANVIL scale.

[19] There is no doubt that the respondent's conduct charged as count 7 was appalling. There was a clear need for the sentence to reflect the objectives of punishment, denunciation and general deterrence. However, there are two important matters to take into account in relation to the objective seriousness of the respondent's conduct. The first and probably the more important is that the child did not engage in sexual activity, except in the sense contemplated by the extended definition, as explained in [11] above. It appears that he was used as a 'prop' in the making of the respondent's masturbation videos, and was manipulated for that purpose. The second matter is that it is unclear from the Crown facts whether the child was awake or remained awake for the activities described in [13] – [16].

[20] Before the sentencing judge, the prosecution submitted that that the offending generally was sexually motivated, manipulative and was almost exclusively aimed at corrupting adults into procuring children to participate in the creation of sexually explicit material to send to the accused. In the case of count 7, the prosecution submitted that the accused had persuaded DH to film his own 6 year old child on a number of different occasions, even after DH indicated he was reluctant to use his son in the videos. The prosecution further submitted that the offending was particularly grave

because the accused was a serving police officer involved in the corruption and exploitation of Aboriginal people amongst whom he lived and worked.

[21] The prosecution nonetheless contended that offending was in the mid-range of objective seriousness.[12] In those circumstances, the sentencing judge was "bound to consider where the facts of the particular offence and offender lie on the 'spectrum' that extends from the least serious instances of the offence to the worst category, properly so called".[13]

[22] The prosecutor made a number of concessions in the course of sentencing proceedings.

[23] The prosecutor conceded that there was no evidence to indicate that the respondent planned to meet up with any children, although the prosecutor submitted that the accused appeared to have met up with some of the adults with whom he communicated.[14]

[24] The prosecutor acknowledged, in relation to Count 12, that the number of child abuse material images was comparatively small.[15]

[25] The prosecutor further acknowledged that the pleas of guilty were entered at the first reasonable opportunity.[16] Reference was made not only to the utilitarian value of the early pleas of guilty but also to their relevance on a

---

12 AB 7, par 4(d).

13 *The Queen v Kilic* (2016) 259 CLR 256 at [19].

14 Crown written submissions, par 12(c), AB 10.

15 Crown written submissions, par 18, AB 13.

16 Crown written submissions, par 27, AB 14.

subjective basis in considering remorse and contrition. That submission may appropriately be linked with the letter written by the respondent in which he expressed his shame and remorse for his actions.[17] Courts, and particularly appellate courts, are naturally cautious in relation to the weight to be given to such letters, but the sentencing judge accepted that the respondent was "genuinely remorseful". Much of the evidence suggested that he was a broken man.

[26] It was accepted by the prosecutor that a former police officer identified as a sex offender would be more likely to serve his sentence in protective custody and in that sense any period of incarceration would be more burdensome compared to the sex offender who was not a former police officer.[18] In our opinion, the prosecutor's attempt to limit the class of comparator to "a sex offender who was not a former police officer" was unsatisfactory because, logically, the respondent was likely to be the victim of assault and other mistreatment by fellow prisoners on account of both being a police officer and a sex offender.[19]

[27] Another matter relevant to the sentencing of the respondent was evidence of good character or 'past good deeds'. We refer to matters of a more substantial nature than the mere absence of criminal history. Prior to serving

---

17 AB 74.

18 Crown written submissions, par 4(f), AB 7.

19 The position of the Crown was explained in the following submission at AB 45: "You don't load up the fact when considering hardship ... because of the type of offences he has committed, because that ... is taken into account by the legislature in setting the maximum penalty. So the weight that your Honour is going to give to the fact that he's a police officer and any additional hardship that accrues, it is really a question of weight ...".

as a police officer in the Northern Territory, the respondent had been a firefighter with the National Parks and Wildlife Service. For several years he had been a volunteer firefighter with the South Australian Country Fire Service, and also a volunteer ambulance officer with the South Australian Ambulance Service.[20] As a serving police officer in the Northern Territory he had been commended by the coroner for the standard of care provided to a deeply disturbed woman bent on self-harm by dousing herself in petrol and attempting to set herself alight. The coroner's finding was as follows:

> … The Police were particularly caring and supportive of N [the deceased]. We heard at the inquest from Sergeant Jarred Porch and saw footage from his body worn camera. It showed the care of N to be of a very high standard and I commend Sergeant Porch on his compassionate and caring approach.

[28] There are a number of authorities to the effect that less weight is given to previous good character for this type of offending.[21] However, as Mildren J observed in *The Queen v Hancock*: [22]

> As a generality, that may be so, but it is only a generality. In *Walker v The Queen*,[23] this Court said that a person of otherwise good character is entitled to have it taken into account, citing *Ryan v The Queen*,[24] and *Sentencing Act* (NT) s 5(2)(e) and s 6. The weight to be given to prior good character will vary according to the circumstances of the case including the objective seriousness of the offending. It may also be an important factor in considering the extent to which special deterrence is a relevant factor, and the prospects of rehabilitation of the offender,

---

20 Testimonial Glenda Cass, 15 February 2023, AB 82.

21 See for example, *R v Oliver* [2003] 2 App. R. (S.) 15 at 74, *Minehan v R* (2010) 201 A Crim R 243 at 261, [96] – [99].

22 *The Queen v Hancock* [2011] NTCCA 14, per Mildren J at [37], Riley CJ and Southwood J agreeing at [1] and [50] respectively.

23 [2008] NTCCA 7 at [32].

24 (2001) 206 CLR 267.

> which in turn may become relevant to the fixing of a non-parole period or a suspended or partially suspended sentence; or in minor cases, some lesser disposition. Obviously, consistently with what was said in *R v Oliver* about the relevance of previous convictions for the same kind of offending, a person of bad character or who has prior convictions of that kind will expect to receive a higher sentence, not to punish him again for his past offending, but because it is relevant to show his moral culpability for his present offending, the extent to which he remains a danger to the public, and it has obvious relevance to his prospects of rehabilitation.

[29] The prosecutor also drew attention to the Court's obligation to have regard to the objective of rehabilitation when sentencing an offender for a Commonwealth child sex offence.[25] The need for clinical intervention to address the respondent's deviant arousal was referred to in the report of Dr Sullivan, consultant forensic psychiatrist.[26] Dr Sullivan considered that the respondent was "a deeply conflicted man who is prosocial in orientation and whose world view is challenged by his sexual orientation, which is associated with marked guilt and confusion". Dr Sullivan expressed the opinion that the respondent should undergo "offence-specific intervention, focused upon developing positive and pro-social sexual identity and the capacity to develop and sustain healthy reciprocal relationships".

Dr Sullivan expressed the further opinion that, given the limited range of treatment options in the Northern Territory, the respondent would not only have better family support in South Australia, but "potentially a greater range of treatment options without the risk that he [would] be in groups with

---

25 Crown written submissions, par 8(b), AB 8, in reference to s 16A(2AAA) *Crimes Act 1914* (Cth).

26 AB 80-81.

those he had interactions as a police officer"; and that "individual treatment was likely to result in better treatment gains than group treatment".

[30] The sentencing judge considered the offence charged as count 7 to be the most serious of the 12 offences committed by the respondent. Her Honour made the following statements in the course of her sentencing remarks:

> Count 7, using a carriage service for sexual activity with a person under 16, and causing a child to engage in sexual activity with another person, is the most serious of all.[27]
>
> .....
>
> In the case of count 7, you successfully persuaded DH to film his own six year old child on a number of different occasions, even after DH indicated that he did not really want to use his own child for those videos. You persuaded him with money and offers of money.
>
> Now, at all times during this offending, you were a serving Territory police officer and I agree that that increased your moral culpability for the offending. You knew it was very wrong.
>
> The offending involved the corruption and exploitation of Aboriginal people amongst whom you lived and worked, and you must, at all times, have been cognizant of the Commonwealth Intervention and the concern, the general concern expressed in the community about sexual exploitation of Aboriginal children; in particular, relating to the availability of online pornography.
>
> I agree with the Crown submission that this is in the mid-range of objective seriousness.

[31] As mentioned, the offence carried a maximum penalty of imprisonment of 20 years and a mandatory minimum sentence of imprisonment of five years. Her Honour made an assessment that there were no exceptional circumstances which would have warranted a sentence of less than the mandatory minimum but also determined that the offence did not warrant

---

27 AB 110.7.

more than the mandatory minimum.[28] Her Honour took as a starting point a sentence of five years, which was discounted by 25 per cent for the guilty plea. Her Honour considered that the guilty plea was evidence of a willingness to facilitate the course of justice and also indicative of genuine remorse.[29] Her Honour convicted the respondent and sentenced him to a term of imprisonment of three years and nine months. The sentence was backdated by some days and deemed to have commenced on 20 March 2023.

[32] In relation to the remaining 11 counts, her Honour said:

> I need to take into account the objective seriousness of the offending, by reference to the number of images, the period of time over which the offending persists, the number of people that you engaged in activities of this nature, the ages of the children, and matters of that nature.
>
> I agree with the Crown submission that the offending was persistent and significant, and of a significant duration, going from May 2020 to November 2021, and that it only ceased on police intervening. It was sexually motivated, manipulative, and was almost exclusively aimed at corrupting adults into procuring children to participate in the creation of sexually explicit material to be sent to you.

[33] Her Honour imposed other sentences as follows:

> Count 1: imprisonment for 9 months, of which 3 months to be served cumulatively on the sentence imposed for count 7;
>
> Counts 2, 4, 8, 9, 10 and 11: imprisonment on each for 9 months, all to be served concurrently, and 3 months to be served cumulatively on the sentence imposed for count 1;
>
> Counts 5 and 6: imprisonment on each for 9 months, to be served concurrently, and 3 months to be served cumulatively on the sentences imposed for counts 2, 4, 8, 9, 10 and 11;

---

28 AB 111-112.

29 AB 111.9.

Count 12: imprisonment for 9 months, of which 3 months to be served cumulatively on the sentences imposed for counts 5 and 6;

Count 3: imprisonment for 9 months, to be served wholly concurrently with the sentence imposed for count 1.

[34] The total effective sentence was therefore four years and nine months, with a non-parole period of 18 months.

[35] The appellant contends not only that the sentence on count 7 was manifestly inadequate (Ground 1) but that "the individual sentences, the total effective sentence and the non-parole period imposed are manifestly inadequate" (Ground 2) deriving from the manifestly inadequate individual sentence imposed on count 7, and for a number of additional reasons particularised. We say more about Ground 2 below.

[36] In considering the first ground, it is important to bear in mind the principles in relation to manifest inadequacy in the context of Crown appeals against sentence, re-stated by this Court in *The Queen v Roe*:[30]

> [11] Crown appeals against sentence should be a rarity brought only to establish some matter of principle, and to afford an opportunity to the Court of Criminal Appeal to perform its proper function in this respect; namely, to lay down principles for the guidance of courts sentencing offenders.[31] The reference to a "matter of principle" must be understood as encompassing what is necessary to avoid the kind of manifest inadequacy or inconsistency in sentencing standards which constitutes an error in point of principle.[32]
>
> [12] As to what will constitute an error in point of principle, in *R v Riley* this Court stated:[33]

30 *The Queen v Roe* [2017] NTCCA 7, 40 NTLR 187 at [11]-[15].

31 *Griffiths v The Queen* [1977] HCA 44; 137 CLR 293 at 310.

32 *Everett v The Queen* [1994] HCA 49; 181 CLR 295 at 300.

33 *R v Riley* (2006) 161 A Crim R 414 at [19].

In *R v Barbara* (NSW Court of Criminal Appeal, unreported judgment number 60638 delivered 24 February 1997), Hunt CJ at CL, with whom the other members of the Court agreed, pointed out that the passage from the judgment in *Everett* cited by Thomas J was not limited to laying down some new point of principle. His Honour said:

> "It is usually overlooked by respondents that the High Court has at the same time also clearly indicated that sentences which are so inadequate as to indicate error or departure from principle, and sentences which depart from accepted sentencing standards, constitute error in point of principle which the Crown is entitled to have this Court correct."

[13] These remarks do not operate to displace the principle expressed by King CJ in *R v Osenkowski,* namely:[34]

> It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where the judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for leniency which has been traditionally extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of an offender's life might lead to reform. The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.

[14] The principles enunciated in *House v The King*[35] remain applicable to the determination of manifest inadequacy.[36] In the oft-quoted passage from that decision, the High Court stated:[37]

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in

---

34 *R v Osenkowski* (1982) 30 SASR 212 at 212-213.

35 [1936] HCA 40; 55 CLR 499.

36 *Lacey v Attorney-General (Qld)* [2011] HCA 10; 242 CLR 573.

37 *House v The King* [1936] HCA 40; 55 CLR 499 at 503-504.

> exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his, if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred. Unlike courts of criminal appeal, this court has not been given a special or particular power to review sentences imposed upon convicted persons. Its authority to do so belongs to it only in virtue of its general appellate power. But even with respect to the particular jurisdiction conferred on courts of criminal appeal, limitations upon the manner in which it will be exercised have been formulated. Lord Alverstone LCJ said that it must appear that the judge imposing the sentence had proceeded upon wrong principles or given undue weight to some of the facts (*R v Sidlow*). Lord Reading LCJ said the court will not interfere because its members would have given a less sentence, but only if the sentence appealed from is manifestly wrong (*R v Wolff*). Lord Hewart LCJ has said that the court only interferes on matters of principle and on the ground of substantial miscarriage of justice (*R v Dunbar*).

[15] In *Hili v The Queen*, the plurality reasons contain the following observations concerning the assessment of manifest inadequacy, in the absence of any assertion of specific error, on the basis that the sentence subject to appeal was unreasonable or plainly unjust:[38]

> [A]ppellate intervention on the ground that the sentence is manifestly excessive or manifestly inadequate "is not justified simply because the result arrived at is markedly different from other sentences that have been imposed in other cases". Rather as the plurality went on to say (72) in *Wong*, "[i]ntervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes there must have been some misapplication of principle, even

38 *Hili v The Queen* [2010] HCA 45; 242 CLR 520 at [59] and [60].

> though where and how is not apparent from the statement of the reasons.
>
> […] But what reveals manifest excess, or inadequacy, of sentence is consideration of all the matters that are relevant to fixing the sentence. The references made by the Court of Criminal Appeal to the circumstances of the offending and the personal circumstances of each offender were, therefore, important elements in the reasons of the Court of Criminal Appeal.

[37] In the present appeal, it is important to bear in mind also the observations made by the plurality in *Markarian v The Queen*, extracted below:[39]

> Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) informing the conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And Judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies. [Citations omitted]

[38] Having regard to the relevant principles, we are not persuaded that the sentence imposed on count 7 was manifestly inadequate. In relation to the particulars of Ground 1 relied on, the appellant has not established that the sentence imposed does not adequately reflect the serious nature and circumstances of the offending; the appellant has not established that the sentence does not adequately reflect the principles of general deterrence, specific deterrence, punishment and denunciation; and the appellant has not

---

39 *Markarian v The Queen* (2005) 228 CLR 257 at [27], per Gleeson CJ, Gummow, Hayne and Callinan JJ.

established that the sentence demonstrates that too much weight was placed on subjective factors. In brief, the appellant has not established that the sentence was unreasonable or plainly unjust.

[39] As mentioned in [35] above, the appellant contends under Ground 2 that "the individual sentences, the total effective sentence and the non-parole period imposed are manifestly inadequate", deriving from the asserted manifestly inadequate sentence imposed on count 7 and for a number of additional reasons particularised. The additional reasons are the asserted failure to adequately reflect the serious nature and circumstances of the overall offending, including the maximum penalty prescribed for the offences; the asserted failure to adequately reflect the principles of general deterrence, specific deterrence, punishment and denunciation; the asserted failure to give due regard to "the principle of totality in sentencing in accordance with *Pearce v The Queen*"; insufficient cumulation which failed to reflect the "distinct instances of serious offending on the different aspects of the criminality", and disproportionate weight placed on subjective factors.

[40] Leaving aside the criticism of the sentence on count 7, the appellant's arguments on the hearing of the appeal merged in the proposition that, with the orders for concurrency and cumulation made by her Honour for all the remaining offences, the respondent was only required to serve a further 12 months in prison, that is, an additional 12 months to the three years and nine months sentence imposed on count 7.

[41] The relevance of the High Court's decision in *Pearce v The Queen* to the appellant's case on ground 2 is unclear. The decision related to the possibility of an abuse of process where an offender was charged and sentenced for two crimes with overlapping elements. In that context, the plurality posed the rhetorical question, "Does that matter if, as was the case here, an order was made that the sentences be served concurrently?" Part of the answer to that question was then given in the passage extracted below:

> A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality.

[42] In its earlier decision in *Mill v The Queen*,[40] the High Court had discussed the totality principle and the related principles of concurrency and cumulation. The Court described the totality principle as "a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences".[41] The Court referred with approval to Thomas, *Principles of Sentencing*, and quoted the passage extracted below:[42]

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong ['']; 'when … cases of multiplicity of

40 Citing *Mill v The Queen* (1988) 166 CLR 59.

41 Ibid, p 62-63.

42 Thomas, *Principles of Sentencing*, 2nd ed (1979), pp 56 - 57

offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

After then referring to Ruby, *Sentencing*, 3rd ed. (1987), pp 38 - 41, the Court observed:

Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred.

[43] In *Postiglione v The Queen*,[43] Kirby J cited with approval the passage from Thomas, *Principles of Sentencing*, extracted in [42] above, and observed as follows:

> … The sentencing judge must first reach a conclusion as to what seems to be the appropriate sentence having regard to the maximum fixed by Parliament for the worst case and the norm that is appropriate to the objective criminality of the case. The judge must then adjust that sentence, where appropriate, for the factors personal or special to the offender, discounted by any relevant considerations (for example co-operation with authorities or absence of remissions). But it still remains for the judge to look back at the product of these calculations and discounts. It is then that the sentencing judge must consider whether the resulting sentence needs further adjustment. It may do so because it is out of step with the parity principle requiring that normally like cases should be treated alike. Or it may offend the totality principle because, looking at the prisoner's criminality as a whole, the outcome is, in its totality, not "just and appropriate". The last-mentioned conclusion will the more readily be reached where the judge comes to the conclusion that the outcome would be "crushing" and, as such, would not hold out a proper measure of hope for, and encouragement to, rehabilitation and reform. Obviously, the adjustments for the parity and totality principles, whether performed by a sentencing judge or an appellate court, involve subtle considerations which defy precision either of description or implementation. It has been recognised by this Court that the adjustments for totality will

43 *Postiglione v The Queen* (1997) 189 CLR 295 at 340

> sometimes result in a lower sentence which might even fail to reflect adequately the seriousness of the crime in respect of which it is imposed. Whilst this is unfortunate, it is to be preferred to imposing a sentence which is excessive in its totality or unfair when tested by parity in the punishment of comparable offenders

[44] Having regard to the principles referred to in [41] – [43], we do not consider that there was error in the approach of the sentencing judge. Her Honour gave effect to the principle of totality in the way preferred by the High Court in *Mill v The Queen*, namely by making the sentences wholly or partially concurrent, rather than lowering the individual sentences below what would otherwise have been appropriate. We reject the appellant's contention that the individual sentences were manifestly inadequate.

[45] As to the appellant's contention that the degree of cumulation was insufficient, we do not agree the adjustments made by her Honour resulted in a sentence which did not adequately reflect the seriousness of each and every offence. We are mindful of the exception to the general principles on concurrency and cumulation contained in s 19(5)-(7) of the *Crimes Act* 1914 (Cth) which apply to Commonwealth child sex offences committed on or after 23 June 2020. Subject to the exception in s 19(6), it is presumed there will be full cumulation in the service of the sentences. The requirement of full cumulation does not apply if the Court is satisfied that imposing the sentence in a different manner would still result in sentences that are of a severity appropriate in all the circumstances. There was a significant degree of both overlapping conduct and overlapping elements as between offences. In those circumstances full accumulation would result in a substantial

degree of double punishment. We are satisfied the sentencing Judge dealt with cumulation and concurrency appropriately.

[46] Finally, we find no error in the length of the non-parole period fixed by her Honour.

[47] We would dismiss the appeal.

[48] If we are wrong in our conclusion that the sentences are not manifestly inadequate, we would in any event decline to intervene in the exercise of the residual discretion. The prosecution below characterised the offending as in the "mid-range" of offences of this kind. It was acknowledged that the number of images in relation to count 12 was comparatively small. The prosecutor also accepted that imprisonment would be more burdensome on the respondent compared with other prisoners sentenced for like offending and that the respondent was more likely to serve the term in protective custody. The sentencing Judge's approach was influenced by those factors. As mentioned previously, her Honour was also erroneously told the maximum penalty for count 7 was imprisonment 15 years. Given those factors, we would dismiss the appeal in the exercise of the discretion even if the grounds had been made out.

Order

1. The appeal is dismissed.
