Walker v The Queen [2008] NTCCA 7

PARTIES:	WALKER, CARL FRANCIS 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 11 of 2007 (20707565, 20708856, 20722578 & 20722582)
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JUDGMENT OF:	ANGEL ACJ, MILDREN & THOMAS JJ
APPEAL FROM:	Sentencing Remarks, 8 October 2007

CATCHWORDS:

CRIMINAL LAW – sentencing – sentencing factors – offences against children – weight given to prior good character – general deterrence – totality principle – whether sentences were manifestly excessive – appeal allowed

Statutes:
Crimes Act (Cth), s 16A(2)(g), s 16A(2)(h)
Crimes Act 1914 (Cth), s 50BC(1)(a)
Criminal Code (Cth), s 474.19(1)(a)(i) and (b)
Criminal Code (NT), s 125B(1)(a)
Sentencing Act, s 5(2)(e), s 6

Citations:
Followed:
Ryan v The Queen (2001) 206 CLR 267

Referred to:
R v Gent (2005) 162 A Crim R 29
R v Oliver [2003] 2 Cr App R (S) 15

REPRESENTATION:

Counsel:

Appellant:	C McDonald QC with I Read
Respondent:	M McCarthy

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Commonwealth Director of Public Prosecutions

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

Walker v The Queen [2008] NTCCA 7
No. CA 11 of 2007 (20707565, 20708856, 20722578, 20722582)

BETWEEN:

CARL FRANCIS WALKER
Appellant

AND:

THE QUEEN
Respondent

CORAM: ANGEL ACJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 4 July 2008)

THE COURT:

[1] This is an appeal against sentences imposed on four separate indictments to which the appellant had entered pleas of guilty, leave to appeal having previously been granted by a single Judge.

[2] The grounds of appeal are that the sentences imposed are manifestly excessive and that the learned sentencing Judge did not make sufficient allowance for the principle of totality in the orders made for concurrency and accumulation.

The Four Indictments

[3] The four indictments charged the following offences:

(1) **Indictment 1 August 2007** – this contained two counts of possessing child abuse material on 22 February 2007 contrary to s 125B(1)(a) of the Criminal Code (NT). The maximum penalty for a breach of this sub-section is imprisonment for 10 years.

(2) **Indictment 15 August 2007** – this contained two counts of committing an act of indecency whilst outside of Australia on a person under 16, contrary to s 50BC(1)(a) of the Crimes Act 1914 (Cth). The first offence was committed between 27 June 2006 and 18 July 2006. The second offence was committed between 30 December 2006 and 20 January. The maximum penalty for a breach of this sub-section is imprisonment for 12 years.

(3) **Indictment 12 September 2007** – this contained 17 counts of using a carriage service to access to child pornography material contrary to s 474.19(1)(a)(i) and (b) of the Criminal Code (Cth). These offences took place between 23 May 2005 and 7 February 2007. The maximum penalty for a breach of this sub-section is imprisonment for 10 years.

(4) **Ex Officio Indictment 4 October 2007**– this contained seven further counts of using a carriage service to access child pornography material contrary to s 474.19(1)(a)(i) and (b)of the Criminal Code (Cth). These offences took place between 2 June 2007 and 8 July 2007 whilst the

appellant was on bail for the offending comprised in the previous three indictments.

The Facts

[4] Following the execution of a search warrant at the appellant's home on 20 February 2007, police seized a laptop computer located in the master bedroom and an external hard drive located in a filing cabinet on a broom closet under the staircase. The appellant opened an ADSL Telstra Bigpond internet account on 11 May 2005. Initially the appellant had a prepaid Telstra dial-up account which was changed to broadband access a few weeks before his arrest on 20 February 2007.

[5] The appellant had installed two web browsers, Mozilla Firefox (Firefox) and Microsoft Internet Explorer (Explorer). Firefox was set to clear all private data when the browser was closed, including internet browsing history, download history, save form information and cached data. Firefox was not set to clear information used to authenticate websites and some websites were set to "never save" login information for particular sites. One such site was a Russian site which was used to access child pornography material.

[6] The appellant had added bookmarks which linked to websites and web pages which contained child pornography material. Also saved on the hard drive was a document entitled "Bandit Wrote". This article which states that to "love angels in that way is forbidden" and that the author is "not a monster, only a slave to the beauty of young girls", describes itself as a security

guide. It detailed methods, software and technology which can be installed and used to minimise or avoid detection from law enforcement agencies when accessing and viewing material which the author describes as "Dangerous Stuff".

[7] Over the period between 22 May 2005 and February 2007, the bookmarks revealed that sites containing child pornography material were accessed by the appellant and images were downloaded with a special file called "SORT", which was password protected. Within SORT there were sub-files which the appellant created to categorise the images, into one of eight different categories depending upon what the images depicted. These sub-files contained still images, movies and texts. Approximately 80 per cent of the offending material was stored on both the laptop's hard drive and the external hard drive.

[8] In order to assist in determining the level of seriousness of the offending, the Crown had prepared a table which separated the material into 5 categories or levels of offending in ascending seriousness based upon the decision of the Court of Appeal in *R v Oliver*[1]. The learned sentencing Judge observed that the table provides a convenient guide as to where particular images sit in the scale of seriousness and the category levels are a guide only as to the seriousness of the offending. This table was the basis for the two counts of possessing child abuse material and we set it our hereunder.

[1] *R v Oliver* [2003] 2 Cr App R (S) 15

Level	Description	Typology	External HDD			Laptop		
			Images	Movies	Text	Images	Movies	Text
1	Images depicting naked/sexual posing, with no sexual activity	• Deliberate posing suggesting sexual content • Deliberate sexual or provocative poses • Explicit sexual posing with emphasis on genital area	4771	12	0	3839	11	0
2	Sexual activity between children or masturbation of self by child	Explicit sexual activity not involving an adult	1342	66	10	1091	69	10
3	Non-penetrative sexual activity between adult(s) and child(ren)	Sexual assault by adult(s) or child(ren)	1029	14	4	932	15	4
4	Penetrative sexual activity between child(ren) and adult(s)	Sexual intercourse by adult on child	930	17	15	859	22	15
5	Torture, cruelty or abuse	Sexual images involving torture, etc	32	0	3	31	0	3
		Total:	**8104**	**109**	**32**	**6752**	**117**	**32**

[9] As to the indictment of 15 August 2007, the appellant's practice over many years had been to visit Indonesia for pleasure a couple of times a year. The appellant has an extended family in Kupang with whom he often stayed over the last 20 years and had the use of single room bed sitter where he often resided when visiting Indonesia.

[10] On 27 June 2006 the appellant travelled to Kupang. On 7 July 2006 the appellant approached a 13 year old male child who was asleep and felt his penis inside his shorts. He pushed up the leg of the shorts to fully expose the penis which he manipulated with his left hand whilst taking a series of

photographs with a digital camera. The second offence was very similar. It occurred on 12 January 2007 and also involved a 13 year old sleeping male child whose penis and scrotum the appellant manipulated whilst taking photographs.

[11] The appellant emailed the photographs to his internet address and removed the memory card which he left in Indonesia to avoid detection by Customs officers.

[12] The precise circumstances of this offending was not elaborated upon; whether one or both of these incidents occurred in the appellant's room, who the boys were, how the appellant came to be in their presence and the relationship between the appellant and the boys was not revealed by the appellant. The learned sentencing Judge observed that the appellant was not to be punished for declining to inform the Court of the circumstances, but that left him without any evidence to mitigate his conduct and he would be sentenced on the basis of the material before the Court.

[13] As to the fourth indictment, following the appellant's arrest on 15 March 2007, he was granted bail. On 3 April 2007 he purchased a new laptop computer and over the period 2 June to 8 July he committed seven further offences of using the internet to access child pornography material. Some of the images were enlarged on the screen and viewed for between one and 30 seconds. The sites accessed included images of children including child pornography and images which were not pornographic and adult homosexual

pornography. The child pornography included images of naked boys and girls in sexual poses, young boys engaged in sexual acts, a comic about a 14 year old boy engaged in pornographic acts and images of sexual organs and the anal regions of young boys. The sites were navigated for various periods ranging from 35 seconds to two and half hours, but the time accessing the child pornography sections of the galleries is not clear. No child pornography images were saved on the laptop hard drive. The learned sentencing Judge said that this was a very deliberate and sustained course of conduct committed whilst on bail for similar offending and whilst undergoing a program of management by his psychiatrist.

Personal Circumstances

[14] The appellant was born in the United Kingdom in 1944 and was aged 63 at the time of sentencing. He migrated to Australia with his mother in 1952. He became an Australian citizen in 1974. He did not know his father. His mother did not remarry so he had no stepfather. In 1965 when he was 21 his mother returned to the United Kingdom. He kept in touch until she died at the age of 80 several years ago. He has no living relatives.

[15] The appellant had a difficult time at school because he did not engage in sport and his school placed much emphasis on sport. He did not get along with other boys, apart from one or two equally marginalised friends. Whilst other boys played sport he spent his time reading. He was alone most of the time at weekends because he was too frightened to mix with other children. He had no sexual education and was given intense guilt by his church. At the

age of 12 he had a brief sexual contact with another boy of the same age. Apart from a brief dalliance with a young man in the early 1970's he had had no other sexual contact. The psychiatrist reported that he looked back on the contact with the 12 year old boy in an "idealised light". His sexual object of choice is boys of approximately that age or a bit older.

[16] On leaving school with only a bare pass, he obtained a teaching bursary and entered a teacher's college where he did well and joined drama and debating societies. On graduation he was posted to an isolated rural town and felt that he was a success as a teacher. Subsequently he worked in Adelaide as a teacher for 11 years before moving to Alice Springs where he was employed as a teacher for 16 years. He then moved to live and teach in Darwin.

[17] A number of references were tendered on his behalf from a wide variety of people who had been known to him over the years, some of whom had known him for many years. The authors of these references indicate that the appellant was a person of positive good character. As a teacher he had obtained the status through a rigorous peer assessment process of Master Teacher, now referred to as a Teacher of Exemplary Practice, and he was widely acknowledged by his peers as an outstanding educator. His career as an educator included contribution to the development of test items for the development and teaching of English in a Multi Level Assessment Program, established by the Department of Employment, Education and Training, in a national Indonesian language curriculum project, in the writing for the Department of the Indonesian Language and Culture curriculum, in

developing teaching materials for use by teachers throughout Australia, in teaching adult evening classes in Indonesian and in establishing and managing the Culture and Languages of Asia for Specific Purposes Program provided to senior public servants and Ministers from 1990 to 1999. The appellant retired in 2004 but continued teaching English to adult migrants at Charles Darwin University and Indonesian at adult night classes. After his arrest he found employment promoting a local art gallery.

[18] All of the referees referred to the appellant's remorse, shame and embarrassment and the steps he had taken towards rehabilitation. All but one those references were written before the offending the subject of the fourth indictment and none of the referees refer to that offending. The learned sentencing Judge referred to the references as having "an element of naivety… as to the gravity of your criminal conduct". We do not think that that is a fair or appropriate assessment of those references.

[19] The psychiatric evidence, both in the form of written reports and oral evidence, indicated that there were no signs of any psychotic disorder and nothing to indicate an organic impairment of brain function. He was assessed as having a minor reactive depression in a state of agitation, best characterised as an Adjustment Disorder with Depressed and Anxious Mood which had been building up for some years. The psychiatrist referred to the appellant's inability to form a sexual relationship with anyone:

> "Apart from the one sexual contact he described at age twelve, which became the nucleus for all his fantasies of acceptance, he has lived a

> solitary life, torn between his needs and his intense shame. On retirement, he lost his major social strut and the source of his self-esteem and became increasingly preoccupied with the thought of a lonely old age. In this frame of mind, he turned to child pornography which he gathered on the internet without regard for the consequences."

[20] The psychiatrist referred to him as a "frightened, guilt-ridden, naïve, lonely, older man…"

[21] As to the risk of re-offending, the psychiatrist thought this to be lower than most other sexual offenders as a group. He acknowledged that sexual offenders as a group had a high risk of re-offending. The learned sentencing Judge assessed his prospects of full rehabilitation as poor, but said that he recognised that it is almost impossible to predict how he would respond over the period of time he was in prison and subsequently.

[22] The learned sentencing Judge said in his very careful and fulsome sentencing remarks that he took into account, to a limited degree, that the appellant had lost his employment and had been the subject of publicity which misstated the facts in connexion with the offences in Indonesia and that he had had regard to the conditions under which the appellant is likely to serve his sentence, *viz* that it is likely that he would be classified as a sentenced protection prisoner which would limit his access to other prisoners and to education and other courses and, whilst so classified, would be unable to achieve the lowest security rating, thereby depriving him of the improved conditions available when housed in the lowest security section. The appellant has no prior convictions of any kind.

The Sentences Imposed

[23] In relation to the first indictment relating to possession of child abuse material his Honour imposed concurrent sentences of three years nine months on each count, after allowing a discount of 25 per cent in recognition of cooperation with the authorities and pleas of guilty.

[24] In relation to the second indictment containing 17 counts of using a carriage service to access child pornography, his Honour imposed an aggregate sentence of six years imprisonment after allowing the same discount of 25 per cent.

[25] In relation to the fourth indictment containing seven counts of using a carriage service to access child pornography, his Honour imposed an aggregate sentence of two years nine months, reduced from three years six months for the plea of guilty.

[26] In relation to the third indictment of committing an act of indecency, his Honour imposed sentences of three years on each count, reduced from four years for his plea of guilty.

[27] His Honour then considered the totality principle and made orders of concurrency and accumulation so as to arrive at a total sentence of imprisonment of 14 years with a total non-parole period of seven years, commencing from 21 August 2007.

The Submissions on Appeal

[28] It was not suggested by Mr McDonald QC that the learned sentencing Judge had failed to take into account any matter which should have been taken into account, but that the total sentences as well as the individual sentences arrived at were manifestly excessive. In support of this submission it was put that the individual sentences were higher than any sentence imposed for similar offending and that the sentences imposed, including the total sentence imposed, were so far outside of the range for a proper balanced sentence as to disclose error. In particular it was submitted that the sentences imposed were disproportionate to the appellant's objective criminality and that inadequate weight must have been accorded to the appellant's age, prior good character and other mitigatory circumstances.

The Respondent's Submissions

[29] Counsel for the respondent, Mr McCarthy submitted that the sentences were not manifestly excessive. In relation to the third indictment, he pointed out that the offending took place over a period of 21 months and the offending involved child pornography sites which were book marked and accessed over the period. The nature of the material accessed can be gleaned from the material downloaded and saved, which included movies as well as images which fell into levels 4 and 5. Mc McCarthy referred to the steps taken to avoid detection. He submitted that little weight could be given to the personal references which were written before the offending whilst on bail

and referred us to the observations of Hayne J in *Ryan v The Queen*[2]. He further submitted, relying on *R v Gent*[3], that general deterrence is the paramount consideration in offences of this kind. As to the comparative sentences referred to by Mr McDonald QC he conceded that there were no sentences which he could find which were as long as the sentences imposed in this case, but submitted that the tables provided were of little use as there were no cases of similar offending, particularly having regard to the number of images and movies involved in the possession charges, the length of the offending, the re-offending whilst on bail and including two counts of committing an act of indecency.

The Possession Charges

[30] In relation to the possession charges, counsel referred to a table of prior sentences imposed by various Judges of this Court, but the actual number of sentences imposed for a breach of the section for possession since the legislation was amended in 2004 is relatively small in number and it is not possible to establish a range from this material.

[31] Nevertheless, we consider that a starting point of five years for each offence, allowing for the matters put in mitigation and before allowing a discount for the plea and assistance to the authorities is manifestly excessive. In cases of this kind, whilst it is relevant to consider both the quantity and quality of the images it is also relevant to consider the

[2] *Ryan v The Queen* (2001) 206 CLR 267 at [149]
[3] *R v Gent* (2005) 162 A Crim R 29

appellant's motives for the possession, the possibility or likelihood that the material may be seen or become available to others, especially children, the prior criminal history of the appellant, his prospects of rehabilitation as well as all other matters which aggravate or mitigate the offending in order to arrive at a balanced and proper sentence.

[32] In this case, the images were stored on the appellant's computer's hard drive and in a second location on an external hard drive. There was no suggestion that the images had been produced in paper form or downloaded onto a CD Rom disc. The appellant's purpose in possessing the images was for his personal sexual gratification. The computer and the hard drive were located at the appellant's home. The appellant lived alone. The appellant had password protected the material. There is no evidence that the appellant was part of paedophile ring, or had any intention to give or sell the material to other persons. The risk of the offending material being seen by others was very low. The lifestyle and character of the appellant was strongly suggestive that he was not motivated to pass on the material or to sell it in the future. The appellant was 63 years of age, had no prior convictions and was otherwise of positive good character. He is entitled to have his otherwise prior good character taken into account: *Ryan v The Queen*[4]. In this case there was no breach of trust involved. The appellant did not use his position either as a person of good character to commit the offences or to come into possession of the material.

[4] *Ryan v The Queen* (2001) 206 CLR 267; also *Sentencing Act* s 5(2)(e) and s 6

[33] Other matters to be considered in his favour are the loss of his employment, the significant fall from grace as a respected member of the community and the conditions under which he would undergo his sentence.

[34] On the other hand, deterrence, both general and special, and denunciation are very significant sentencing considerations. There are many cases which refer to the need to protect children from exploitation and corruption, that such crimes are not victimless and that people who possess such images encourage those who create, sell and distribute them. Without users, there can be no market. In this case, it would appear that the images were all accessed via the internet and, as far as we can tell, the children were both girls and boys of about 12 years of age from foreign countries. It may be doubted that the imposition of deterrent sentences in individual cases in the Northern Territory will have any affect on this international market, but the law denunciates this behaviour as it would otherwise encourage people living in this country from exploiting children in the same way and contribute to the growth of a local market. Also to be noted is that a not insignificant percentage of the images fell into categories 4 and 5.

[35] Finally there is the plea of guilty and the expressions of remorse and the appellant's prospects of rehabilitation, which the learned sentencing Judge described as poor, a finding which is not challenged.

[36] Taking all of these matters into consideration we consider that an appropriate head sentence for these offences was imprisonment for two

years six months, each sentence to be served concurrently, with a non-parole period of 18 months.

The Indictment of 12 September 2007

[37] We agree with the appellant that a sentence of imprisonment for six years for this offending is manifestly excessive following a discount for the plea and cooperation of 25 per cent. In our opinion an aggregate head sentence of three years is appropriate in all the circumstances.

The Indictment of 15 August 2007

[38] The offending in this case was at the lower to mid range of the scale of seriousness and, without any of the usual aggravating features such as breach of trust, proved. The facts show that in both cases the boys were asleep. There is no evidence that they ever became aware of what had occurred. On the other hand the offending is aggravated by the taking of photographs. It was submitted by Mr McDonald QC that a mitigating factor was that without the appellant's confession, a successful prosecution for these offences could not have been brought. Mr McCarthy submitted that charges could have been laid but it seems to us that without the appellant's confession the appellant would not have had a case to answer. This is a consideration which adds considerable weight to the effect of the plea of guilty and cooperation with the authorities[5]. On the other hand, the subsequent offending means, as the learned sentencing Judge found, that the appellant's prospects of rehabilitation were not good. Taking these matters

[5] See *Crimes Act (Cth)*, s 16A(2)(g) and s 16A(2)(h)

into account we think that a sentence in each case of three years was manifestly excessive and we would reduce each sentence to imprisonment for two years.

The Indictment of 4 October 2007

[39] In this case the period of offending was over a period of six weeks and involved visiting sites where the images visited were at levels 1 and 2 and, although this occurred on several occasions, the actual time involved in accessing the child pornographic material was not very long on each occasion. On the other hand, the offences were aggravated by the fact that they were committed whilst on bail for the other offending and whilst undergoing psychiatric counselling. This meant that the offending was, as the learned sentencing Judge described it, a very deliberate and sustained course of conduct. Apart from the plea, there was nothing by way of mitigation, although it is to be noted that none of the images were downloaded or otherwise saved. The learned sentencing Judge imposed an aggregate sentence of three years nine months for these offences, but even allowing for the lack of mitigatory circumstances, this seems to us to be manifestly excessive in all the circumstances and we would impose an aggregate sentence of 18 months.

Totality and Formal Orders

[40] For the reasons given we would allow the appeal and set aside the sentences imposed. The total sentence we have arrived at is 11 years. Applying the

totality principle we would reduce the total sentence to eight years as follows:

(a) The sentences of two years six months on indictment of 1 August 2007 be served concurrently with each other and are to commence from 21 August 2007. We fix a non parole period of 18 months commencing from 21 August 2007.

(b) The sentence of three years on the indictment dated 12 September 2007 is to commence at the expiration of the non parole period fixed in relation to the sentences imposed on the indictment dated 1 August 2007.

(c) The sentences of two years on the indictment dated 15 August 2007 are to be served concurrently with each other but cumulatively upon the sentence imposed on the indictment dated 12 September 2007.

(d) The sentence of 18 months on the indictment dated 4 October 2007 is to be served cumulatively upon the sentence imposed on the indictment dated 15 August 2007.

[41] In relation to the Commonwealth offences we fix a non parole period of three years six months to commence from the expiration of the non parole period of 18 months for the Territory offences. This makes a total non parole period of five years.
