JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	REID -v- THE STATE OF WESTERN AUSTRALIA [2009] WASCA 237
CORAM	**:**	McLURE P OWEN JA WHEELER JA
HEARD	**:**	4 DECEMBER 2009
DELIVERED	**:**	22 DECEMBER 2009
FILE NO/S	**:**	CACR 63 of 2009
BETWEEN	**:**	MARK REID Appellant AND THE STATE OF WESTERN AUSTRALIA Respondent

ON APPEAL FROM:

Jurisdiction	**:**	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	**:**	GROVES DCJ
File No	**:**	IND 1587 of 2008

Catchwords:

Criminal law - Sentencing - Cyber predator offences in s 204B of the *Criminal Code* - Using electronic communications with intent to expose child to indecent material - Using electronic communications with intent to procure child to

engage in sexual activity - Aggregate sentence of 3 years 9 months infringed totality principle

Legislation:

Criminal Code (WA), s 204B(3)(b)

Result:

Appeal allowed
Appellant resentenced
Aggregate sentence of 2 years 3 months' imprisonment imposed

Category: B

Representation:

Counsel:

Appellant	:	Mr T F Percy QC & Mr S Nigam
Respondent	:	Ms L Petrusa

Solicitors:

Appellant	:	S C Nigam & Co
Respondent	:	Director of Public Prosecutions (WA)

Case(s) referred to in judgment(s):

Lauritsen v The Queen [2000] WASCA 203; (2000) 22 WAR 442
Speering v The State of Western Australia [2008] WASCA 266
The State of Western Australia v Collier [2007] WASCA 250; (2007) 178 A Crim R 310
The State of Western Australia v Freemantle [2008] WASCA 98
The State of Western Australia v Johnson [2009] WASCA 224
The State of Western Australia v Porter [2008] WASCA 154

1 **McLURE P**: I agree with Wheeler JA.

2 **OWEN JA**: I agree with Wheeler JA.

3 **WHEELER JA**: This appellant was convicted, by his own plea of guilty, of a total of 14 counts under s 204B(3)(b) of the *Criminal Code* (WA) (the Code). Four counts related to using electronic communication with intent to expose a person believed to be under the age of 13 years to indecent matter, and 10 counts related to using electronic communication with the intent to procure a person believed to be under the age of 13 years to engage in sexual activity. A sentence of 15 months' imprisonment was imposed in relation to each count, with three of these being cumulative, giving a total aggregate sentence of 3 years and 9 months, with parole eligibility.

Grounds of appeal

4 Grounds 1 and 3 of the grounds of appeal are in substance identical; they allege that the sentence (I assume the individual sentences) was manifestly excessive in all the circumstances of the case, and that the sentence imposed was outside the range of a broad discretionary judgment, having regard to sentences usually imposed for offences of this type. Ground 2 asserts that his Honour gave insufficient weight to the personal antecedents of the offender.

5 Grounds 1 and 3 cannot be made out. Counsel appearing for the appellant did not press them in his oral submissions. In four cases considered by this court in the past, which I discuss shortly, sentences of 12 to 18 months have been imposed in relation to individual counts of offending of this kind. A sentence of 15 months' imprisonment is within that range. It is hardly to be considered excessive, even in relation to a first offender, when regard is had to the statutory maximum of 10 years.

6 There is some interaction between grounds 1 and 3, and ground 2, which is concerned with the personal antecedents of the appellant. A ground complaining that the "weight" given to a factor was inadequate, or excessive, will rarely be successful: see ***Speering v The State of Western Australia*** [2008] WASCA 266 at [4]. In any event, ground 2, which was also not pressed, suffers from the difficulty that the appellant's antecedents were poor, especially when compared with the offenders in other relevant cases. He had a record which included offences of stealing, an attempt to pervert the course of justice (in relation to which he received a sentence of 12 months' imprisonment, suspended for 18 months),

unlawful wounding, traffic offences, and offences relating to breaches of court orders upon which he had been placed. Having breached his suspended sentence, by offences of fraud and stealing, he had been sentenced on 1 December 2005 to 9 months' imprisonment. The psychological and pre-sentence reports relating to the appellant were not favourable. Any weight which the learned sentencing judge gave to the appellant's antecedents would not have been likely to have resulted in any reduction of sentence.

7 Ground 4, however, is concerned with totality, and, in my view, it has merit.

<u>Circumstances of the offences</u>

8 On 28 February 2007, the appellant was logged in to an online chat room. He engaged a police officer in conversation. The adult male police officer was, for the purposes of detecting offences of this kind, purporting to be a 12-year-old female. I refer to him below as "her" or "the child", since that was his persona.

9 The appellant asked for the child's Windows Live Messenger address and they continued their conversations through that programme, having further online conversations on 3 March 2007 and 9 May 2007. The appellant told the child that he was 21 years old and was informed that she was 12 years old. No offending occurred on any of those occasions.

10 The first offence took place on 19 June 2007, and the last on 20 July 2007, a period of a little under five weeks. The offences fell into three categories. In some, the appellant engaged the child in conversation about sexual matters. For example, in the first conversation, he told the child that he would buy her a telephone (he had represented to the child that he had his own business, selling telephones), and that he was going to teach her lots of things, including kissing and watching pornographic movies. He said that while she was watching these movies, he would show her his cock and have her play with it. Conversations of this type resulted in the counts of intent to expose a child to indecent matter.

11 In other conversations, the appellant asked the child to masturbate, giving her instructions about how to do so. There were two of these conversations - counts 3 and 13 - and they resulted in charges of intent to procure a child to engage in sexual activity.

12 The remaining eight counts of intent to procure a person under the age of 13 to engage in sexual activity relate to conversations like the one

on 27 June 2007 (count 6) in which he told the child that he was going to take her to his house, show her his penis, undress her and have oral and vaginal intercourse with her. Despite the expressions of intent in those conversations, and the discussions about meeting the child for the purposes of having sex with her, the State conceded at the time of the appellant's sentencing that he did not, in fact, make any attempt to meet the child. Further, between July 2007 and March 2008, when police attended his home and seized his computer tower, he made no further attempts to contact or converse with the child.

13 No attention seems to have been given, in the submissions on sentence made to the learned sentencing judge, to the question of precisely what the appellant's intention was in relation to this last category of conversations. His Honour made no finding about the appellant's intention.

14 By his plea, the appellant must be taken to have accepted that he had an intent to procure a child to engage in sexual activity. The indictment was in form defective, containing no reference to the appellant's intention, but before us senior counsel for the appellant declined to take any point in relation to the form of the indictment. The appellant's plea must therefore be regarded, for the purpose of sentencing, as if it had been a plea to an indictment in proper form.

15 It is perhaps not surprising that the appellant did not attempt to set up a positive case before the learned sentencing judge as to what his intention may have been, since the stance he had taken in the conversations with the Community Corrections Officer who prepared the pre-sentence report, and with the psychologist who prepared the pre-sentence psychological report, was that he had little or no recollection of the details of the conversations. He attributed his memory difficulties to his heavy use of methylamphetamine and associated lack of sleep at the time of the offending.

16 The State did not appear to assert, either before his Honour or before us, that it should be inferred that the appellant's intention was actually to engage the child in any of the sexual behaviour described in the conversations. That would not seem to be an inference reasonably open, having regard to the conceded lack of any actual attempt to make physical contact with the child for the purpose of engaging in such behaviour, and having regard to the fact that the appellant voluntarily ceased contacting the child, without making any attempt to meet her. For present purposes, therefore, I would conclude that the intention to be attributed to the

appellant in relation to this category of offences is no more than a general intention to procure the child at some time to engage in some sort of sexualised behaviour.

The appellant's antecedents

17 The appellant was 21 and 22 years of age at the time of the offending, and 23 years of age at the time at which he came to be sentenced. He had poor antecedents. He had left school part way through year 12 and had only worked briefly since that time. It appears that at some times since leaving school he had viewed drug dealing as his "job". He had a history of alcohol abuse and had been a heavy user of ecstasy and amphetamines. I have noted earlier his record of convictions. He was assessed as being in the medium to high risk category of reoffending, and the psychological report recommended inclusion both within a sex offender treatment programme and a substance abuse programme.

18 At the time of sentencing, he was said to be in a supportive relationship with a woman who was aware of the charges against him. His parents remained supportive. He acknowledged to the author of the pre-sentence report that he had taken advantage of their generosity in the past.

Totality

19 The purpose of s 204B of the Code, which created these offences, and the relevant sentencing principles have been discussed in a number of decisions in this court, most recently in ***The State of Western Australia v Johnson*** [2009] WASCA 224 (particularly at [30] - [36] and [92] - [95]). It is not necessary to repeat that discussion here.

20 At the hearing of this appeal, counsel for the appellant handed up a table reflecting sentences which had been imposed in relation to other similar offences, in four preceding decisions of this court. It usefully sets out a number of the relevant factors, allowing for a convenient comparison of cases. I have amended it to include reference to two other factors relevant to sentence, and to the case of ***Johnson***. A copy of that table, as amended, is an appendix to these reasons.

21 Tables of that kind should, of course, be approached with caution, for a number of reasons. They can only set out in broad form some of the relevant factors. The table does not reveal, for example, the very favourable pre-sentence reports in ***Johnson*** which were available to the sentencing judge, nor does it record the fact that her Honour found that

those factors, together with others, "only just" tipped the balance in favour of suspending the sentence there imposed. Nor does the table reveal that, at the time of resentencing the appellant in ***The State of Western Australia v Freemantle*** [2008] WASCA 98, the court noted that not only was it a State appeal, but that the respondent in that case had already performed 80 hours of work under the intensive supervision order which the court quashed. It does not capture Steytler P's description of the sentence in ***Speering*** as "severe" (at [13]).

22 Even allowing for the inevitable inadequacies of comparisons of the type carried out in the attached sentencing table, however, it appears to me that the total effective sentence in the present case is inconsistent with standards of sentencing in comparable cases.

23 Although there were more offences committed by the appellant, there was present in his case the mitigating factor that he had voluntarily desisted from contact with the child, and there was absent both the potential aggravating factor of an attempted meeting, and the aggravating factor of the sending of sexually explicit material. The period over which the offending occurred was neither brief nor particularly prolonged. It would appear to me that the offending overall could fairly be described as towards the lower end of the range of seriousness, although this factor was offset to an extent by its repetition.

24 So far as antecedents were concerned, the appellant was younger than any of the other offenders. In common with most of the of the other offenders, he had entered a plea of guilty, although his plea was later than most. Otherwise, his personal circumstances appear to have been significantly worse than the other offenders.

25 Allowing for the fact that offenders in other cases generally had the benefit of significantly better antecedents, and earlier pleas of guilty, and allowing for the fact that the sentences in ***The State of Western Australia v Collier*** [2007] WASCA 250; (2007) 178 A Crim R 310, ***Freemantle*** and ***The State of Western Australia v Porter*** [2008] WASCA 154 resulted from the application of the principles which were then applicable to State appeals, an effective sentence somewhat longer than any of the other sentences might have been justified. However, a sentence which is 21 months in excess of the most severe of them (***Speering***, which was itself described as a "severe" sentence), is, in my view, clearly inconsistent with these cases. I am satisfied that the total effective sentence is disproportionate to the total criminality of the appellant's offending.

26 During the course of argument on the appeal, counsel for the State submitted that his Honour had had regard to all of the cases to which I have referred (save for ***Johnson*** which was decided later) and had carefully considered the relevant factors which emerged from them. The difficulty with this submission is that, although his Honour referred to those cases, he concluded that in relation to each of the matters which distinguished the appellant from those other cases, the appellant's circumstances were "more, and substantially more, unfavourable" than for all the other offenders. Although no complaint of express error is found in the grounds of appeal, this conclusion does appear to me to be an error which may explain why the total effective sentence was disproportionate. By way of example, his Honour was plainly in error in finding, as he appeared to do, that the age differential between this appellant and the "child" was greater than in the other cases; rather, this appellant was younger than any of the other offenders, while the child's age was the same as in most of the other cases.

27 In my view, the totality ground, ground 4, is made out.

Resentencing the appellant

28 Error having been demonstrated, it falls to us to resentence the appellant. The appellant was granted leave to provide to the court a psychiatric report which had been prepared for the purpose of his sentencing in relation to other matters. It was accepted that this report might be relevant if the court was minded to allow the appeal and if it was therefore necessary to resentence the appellant.

29 In my view, the new psychiatric report adds little to the material previously before the sentencing judge. It is suggested in the report that there is a possibility that the appellant's difficulty in concentrating, impulsivity and some other factors may stem, at least in part, from cognitive problems arising from a motor vehicle accident when he was in year 3, in which he sustained a head injury. If that is so (and it is acknowledged in the report that further testing would be necessary before any conclusive diagnosis), then that explanation could, on the one hand, lessen the appellant's moral culpability. On the other hand, the fact that there is "no specific treatment" for cognitive problems of that kind would give rise to concern about the ability of the appellant to be rehabilitated in a manner which would ensure protection of the community: see ***Lauritsen v The Queen*** [2000] WASCA 203; (2000) 22 WAR 442.

30 The psychiatric report refers to some recent personal difficulties. It confirms, however, a generally antisocial disposition. It indicates that the

appellant has expressed the view that he looks forward to continuing his relationship with his girlfriend, who is a positive influence on him, and that he appears to have some desire for treatment which may modify his behaviour. However, the report also contains an explanation of the offending in this case, which is at odds with his earlier claimed lack of memory of the details of the offending.

31 Overall, the impression which emerges from the report is very similar to the impression which emerges from the reports which were before his Honour; that is, the appellant is a young man who has displayed extremely poor judgment in the past, resulting in drug abuse and a variety of other sorts of offending. He has some treatment needs, which if addressed, may reduce the risk he would otherwise pose to the community. He is prepared to engage in such treatment, but the depth of his commitment to it would, at this stage, appear to be questionable.

Conclusion

32 In my view, a total effective sentence of 2 years and 3 months' imprisonment would appropriately reflect this appellant's overall criminality. In order to achieve that result, I would leave undisturbed the sentences imposed by the learned sentencing judge of 15 months' imprisonment in relation to each of counts 1 to 13 inclusive, but order that they be served concurrently with each other. So far as count 14 is concerned, I would quash the sentence of 15 months' imprisonment and in lieu thereof, for totality reasons, impose a sentence of 12 months' imprisonment, to be served cumulatively upon counts 1 to 13. The sentence is to commence from 1 April 2009, and the appellant remains eligible for parole.

APPENDIX - SENTENCING TABLE

	*Collier** [2007] WASCA 250 *State Appeal	*Freemantle** [2008] WASCA 98 *State Appeal	*Speering* [2008] WASCA 266	*Porter** [2008] WASCA 154 *State Appeal	*Johnson** [2009] WASCA 224 *State Appeal	Present Case
Age of offender	24	28	29	24	26	21/22
Age of "Child"	12	12	12	13	13-14	12
Counts	3	5	3	7	10	14
Duration	2-3 weeks	5 weeks	1 week	3 months	10 months	1 month
Meeting	Attempted	Not attempted (and blocked the child from his computer)	Not attempted	Not attempted	Not attempted (Child deleted from computer contacts, child re-established contact)	Not attempted (Voluntarily desisted from contact 7 months prior to arrest)
Sexually Explicit Material Sent	Nil	Sexually explicit material sent (photograph)	Sexually explicit material sent (photograph)	Numerous sexually explicit material sent (webcam)	Nil	Nil
Plea	Guilty	Guilty	Guilty (fast-track)	Guilty (fast-track)	Not Guilty	Guilty (late)
Antecedents	Good	Good	Good	Good	Very good	Poor
Total Sentence	18 months	12 months	24 months (severe, but not outside range)	12 months	2 years, suspended with conditions for 2 years	45 months (The sentence subject to this appeal)