

IN THE CHILDREN'S COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Court Reference: K10730115

BETWEEN:

Commonwealth Director of Public Prosecutions

-v-

LS¹

JUDGE: HER HONOUR JUDGE CHAMBERS

DATES OF HEARING: 17 DECEMBER 2019, 25 FEBRUARY 2020, 25 MARCH
2020, 22 APRIL 2020

DATE OF SENTENCE: 22 APRIL 2020

CASE MAY BE CITED AS: CDPP v LS [2020] VChC 3

REASONS FOR SENTENCE

CRIMINAL LAW – State and Commonwealth sexual offences committed against offender's daughter aged 4-5 months of age – offender aged 17 at the time of the offending – general deterrence has no application to the sentencing of children pursuant to the *Children, Youth and Families Act 2005* – whether general deterrence applicable in sentencing a child for Commonwealth offences – offender sentenced to an aggregate sentence of 12 months' detention in a Youth Justice Centre.

APPEARANCES:

For the Informant

Mr K Armstrong

Ms Schmitz, CDPP

For the Accused

Mr A Waters

Ms Claudia Grinberg

¹ To ensure there is no possibility of identification, these sentencing reasons have been anonymised by the adoption of a pseudonym in the place of the name of the offender.

HER HONOUR:

Introduction

1. LS, on 17 December 2019 you pleaded guilty to five charges of producing child pornography contrary to s 474.20(1)(a)(ii) of the *Criminal Code Act 1995 (Cth)* (the *Criminal Code*) (charges 3, 7, 8, 9 and 10). The maximum penalty for that offence is 15 years' imprisonment.
2. You further pleaded guilty to five charges of transmitting child pornography using a carriage service contrary to s 474.19(1)(a)(ii) of the *Criminal Code* (charges 2, 11, 12, 13 and 14). The maximum penalty for that offence is 15 years' imprisonment.
3. You further pleaded guilty to two charges of sexual assault of a child under the age of 16 years contrary to s 49D of the *Crimes Act 1958 (Vic)* (charges 1 and 15) (the *Crimes Act*). The maximum penalty for that offence is 10 years' imprisonment.
4. You also pleaded guilty to two charges of sexual activity in the presence of a child under 16 years contrary to s 49F of the *Crimes Act* (charges 6 and 19). The maximum penalty for that offence is 10 years' imprisonment.
5. On 17 December 2019, you pleaded not guilty to three charges of sexual penetration of a child under the age of 12 years contrary to s 49A of the *Crimes Act*. Following a contested hearing that day, I found two charges of sexual penetration of a child under the age of 12 proved (charges 20 and 21) and dismissed the other charge (charge 4). The maximum penalty for that offence is 25 years' imprisonment.
6. The victim of these offences is your daughter [details removed]. The offences were committed by you between the dates of 19 November and 2 December 2018 when your daughter was aged between 4-5 months of age. Between those dates you made a series of six videos where you engaged in sexual activity either with or in the presence of your daughter. You then transmitted these videos on-line to an adult male offender in the UK.
7. You were born in 2001 and were 17 years of age at the time of the offending. You are now 19 years old. You have no prior criminal history.

Circumstances of the offending

8. In summary, the circumstances of your offending are captured in the following videos recorded by you between 19 November and 2 December 2018 which you then sent online to the UK offender:
- (a) [date removed] – the video runs for 42 seconds and depicts you topless and with your breasts exposed, standing over your baby who is awake and lying on her back on a bed, naked except for a bib. The video commences with your head between her open legs. Your arm is against her left leg, keeping it in place. You lower your head between her legs and lick her vagina and anus. As you perform this act, you look in the direction of the recording device. Your daughter can be heard crying however you continue to lick her vagina;
 - (b) [date removed] – a video that runs for 2 minutes and 1 second depicting you caress, fondle and rub your breasts, vaginal and anal areas. You are wearing a singlet style dress which you pull up to under your chest exposing a G-string. At one point you place your hands on each buttock, spreading them apart. The recording depicts a bedroom, in which there is a white baby cot. Although the baby cannot be seen, she is present in the room and can be heard making gurgling noises;
 - (c) Date not specified – a video lasting 7 seconds depicting you naked and seated near a cot holding the baby who is awake, also naked and in the crook of your arm. The video commences with you saying, “*I’m a dirty mummy pedo for you daddy*”. You then place your left hand on your daughter’s vagina;
 - (d) Date not specified – a video lasting 17 seconds depicting you digitally penetrating and masturbating your own vagina while holding the baby in the crook of your left arm. She is awake, naked and her vagina can be seen;
 - (e) Date not specified – a video lasting 38 seconds depicting you naked leaning over the baby who is awake, naked from the waist down and lying on her back on a bed. You can be seen licking the baby’s vagina for an extended period glancing up at the recording device whilst doing so; and

- (f) Date not specified – a video lasting 55 seconds depicting you naked with your breasts exposed leaning over the baby who is awake, naked and lying on her back on top of the bed. You repeatedly lick the baby’s vagina. The video depicts you spitting saliva onto her vagina and then continuing to lick her. At one point, you raise your head to look in the direction of the recording device and smile. The baby can be heard making a noise while you lick her vagina.
9. In finding charges 20 and 21 proved against you, I found the video footage clearly showed you licking the area of the baby’s clitoris (charge 20) and inside her labia majora (both charges 20 and 21). In respect of both charges, I found that you were doing so in a way that was vigorous and sustained.
10. Your offending came to the attention of authorities when the UK offender was interviewed by the National Crime Authority in March 2019. In that interview, the UK male admitted he had been engaged online with females mostly aged between 17-19 years, some younger. According to the prosecution summary, the UK offender had *“coerced them into filming themselves engaged in progressively degrading sexual acts, with the inference that if they refused, he would send the videos to their family and friends.”*
11. An examination of the UK male’s electronic devices led the police to you. When the Australian Federal Police forensically examined your mobile phone, they found a series of “WhatsApp” chats between you and the UK offender. In an online exchange on 19 November 2019, the UK male offers you £2800 for *“10 videos and a bunch of pics I’ll ask you for”*. You agree to this proposal, stating *“So tell me what videos you want so we can get this started”*. You then sent him 62 images and videos which show you performing sexual acts, that are not subject to any charge.
12. Following these exchanges, the UK offender become aware of the existence of your daughter and encouraged you to involve her in the offending, in circumstances set out in the following online exchange on 19 -20 November 2018:

LS: *Idk if I can do tomorrow morning I have a daughter*
UK male: *Her age?*
LS: *6 months*
UK male: *In your room*

LS: *Yes correct*
 UK male: *A selfy with her please*
 UK male: *I'd have given you easier tasks*
 LS: *I don't really tell anyone*
 UK male: *A live one next to her*
 ...
 UK male: *And again, with your tits showing.*
 UK male: *Do you get any child support*
 LS: *Ok an[d] no this is why I do this*

 LS: *Good morning x*
 UK male: *Tell me when you're able to poop*
 LS: *Can I do something else instead?*
 UK male: *Its either that or you be a naughty mummy for me?*
 LS: *Like what?*
 UK male: *Naughty mummy x*
 UK male: *Being naked around her and stuff*
 LS: *Doing?*
 UK male: *Playful stuff etc. Or my poop x*
 LS: *Look I can't do these I'm sorry*
 UK male: *Please*
 LS: *And I'll never bring my daughter into this stuff*
 UK male: *So it's poop then x*
 LS: *She's innocent. As I can't do that either*
 UK male: *Pick one. So I can pay you.*
 LS: *I can't*
 UK male: *Please think about it*
 LS: *Can't you pay me less*
 UK male: *No*
 LS: *Okay*

13. The UK offender continued to direct and encourage you in the offending behaviour, captured, for instance, by the following exchange:

UK male: *Are you going to be a naughty mummy for me? Properly x. Doing as I ask, so I can pay you today*
 LS: *Ok*
 UK male: *Tell me when you are with her and you're both naked. And I'll tell you some quick things to do now.*

LS: *Ok I am*

UK male: *Take a quick pic with your tits and face showing first stick you tongue out please next to her. Then a pic of her naked x and you naked faces down. Show her pussy too.*

LS: *No I can't*

UK male: *You can, no-one else will see. X. All my girls do this for me.*

LS: *Okay and what else do you want, Just tell me please.*

UK male: *Show her naked next to you Pussy too. And your own.*

...

UK male: *And again, have your hand on her pussy x. Then again show your pussy x. A few more pics naked with her with your faces shown. Will you be comfortable filming her.*

LS: *Filming what? Please don't ever show anyone this stuff. And don't send these as examples to other girls. OK what do you want me to film.*

14. At the end of the WhatsApp chat on 20 November 2018 the following exchange occurred:

UK male: *I need your name*

LS: *Why? Tell my why. I need to know. My name is (insert name) Hello*

LS: *So when we finish this off. Are you really gunna pay me*

...

UK male: *Make a 5 minute sex video with her filmed portrait. Do anything and everything. Both of you naked. Do your best.*

LS: *idk what you mean. Like what.*

UK male: *Be a pedo mummy*

LS: *Like play with myself and everything with her in it*

UK male: *Playing with her too both you naked.*

LS: *Nooooo*

UK male: *Wait what. What do you mean it's not nice. You ate her ass*

LS: *To touch her*

UK male: *? You already did*

LS: *Yeah but that's not putting things on her*

UK male: *I'm just asking for a long ass video*

LS: *Good night. I'm just going to hand myself in. So she can go live a better life with someone else.*

UK male: *You'll be fine*

15. You were arrested on 20 March 2020 and interviewed by police during which you made a 'no-comment' record of interview. You were granted bail subject to strict conditions including supervision by Youth Justice on 23 March 2020.
16. On 15 November 2019 I refused a prosecution application to uplift the charges pursuant to s 356(3) of the *Children, Youth and Families Act 2005 (Vic.) (CYFA)*. In a separate decision I have provided my reasons for refusing that application.²

Gravity of the offending

17. The offences for which you are being sentenced are very serious. The maximum penalties for the offences, being 25 years, 15 years and 10 years respectively, are only one indication of their seriousness. You committed multiple acts of sexual offending against your child who was only 4-5 months of age. Your daughter was highly vulnerable and entirely reliant upon you, her mother, for her care and protection. Your offending fundamentally and repeatedly breached that duty of care and the relationship of trust expected of you as her parent.
18. An aggravating feature of your offending is that it was committed by you in the expectation of being paid. Once you produced the exploitative material you then transmitted it to the UK offender knowing that, in all likelihood, he would share the videos with others. Those images, once transmitted, will unfortunately remain in cyberspace and be available for viewing and transmission by other offenders. Your conduct in transmitting the videos will contribute to the market in child exploitation material that fuels child abuse elsewhere.
19. I accept that when you first began your involvement with the UK offender it was not your intention to involve your daughter in the sexually explicit material you were prepared to make for him. However, once he made this suggestion, despite initial reluctance, you ultimately make a choice to do so when other unpalatable choices were

² *CDPP v LS* [2019] VChC 7.

suggested by the UK male. Your on-line chat responses indicate that you understood the abhorrent nature of his requests for you to engage in sexually explicit activity with your daughter. You ultimately chose to offend against her, and repeatedly, in the expectation of being paid.

20. I am satisfied that the UK offender played a key role in encouraging and directing your offending behaviour and that he groomed you for this purpose. I accept that it was the UK offender who instigated the offending and that you were susceptible to his grooming behaviour due to your personal circumstances. The role he played is relevant in reducing your overall moral culpability for your offending, however your responsibility for the offending remains significant for the reasons I have explained.
21. There is no victim impact statement before the Court. Fortunately, given her tender age, your daughter is unaware of the offending against her. However, Dr Brys, Forensic Paediatrician, has assessed that if she does find out about the offending in later years, it could well “*impact [on]her psychological wellbeing and could result in maladaptive behaviour*”. I accept that, if she were to discover the offending in later life, the impact on her long-term wellbeing could be significant.
22. The prosecution submits that the circumstances of the Commonwealth and State offences are such that they must fall at the top end, or at least the higher end, of the range of such offending. In response, the defence submissions accept the offending is serious but dispute the characterisation of the offending as being at the top or near the top end of offending of this nature, particularly in relation to the penetrative offences. The defence submit that significant weight should attach to the “masterful manipulation” of you by the UK offender in persuading, pressuring and directing your offending.
23. As stated, I find that the grooming by the UK offender is relevant in reducing your moral culpability for what is clearly objectively serious offending. This must be balanced against the evidence of financial motivation for your offending. Further, I do not accept the defence submission that the penetrative offences, viewed objectively, are at the lower end of the range for such offences. In my view, the age and vulnerability of the victim, and her relationship to you, make this a particularly serious instance of penetrative offending. For the reasons I have given, I find that your offending, viewed

objectively, is at the higher end for offences of this kind. However, in sentencing you other factors personal to you remain relevant in mitigation of sentence.

Personal background

24. You were born in 2001 and lived with both parents until they separated when you were 6 years old. You had no contact with your father from the age of 12 until you were 17. The pre-sentence report of Youth Justice dated 31 January 2020 states that your childhood was “*marked by chaos, instability, significant neglect and physical and emotional abuse from your mother*”. By the time you were ten years of age, you had already come to the attention of child protection authorities. Between 2011 – 2017 there were a total of ten separate notifications to authorities arising from concerns about your welfare.
25. These notifications, outlined in the report of Youth Justice, include reports that you and your younger siblings were often unsupervised due to your mother’s poor mental health and ongoing drug and alcohol abuse, and a history of ice use by your father. Other reports concerned poor school attendance, inappropriate discipline by your mother and prolonged periods of neglect. In 2014 a referral was made by Child Protection to SOCIT due to concerns about you being sexually exploited by older males. In 2017, a report was made that you had been abandoned and left to the care of older siblings. Despite these significant concerns, Child Protection did not intervene further or seek to make a protection application on your behalf.
26. You attended [location removed] Primary School to Grade 6 but struggled in secondary school. You ceased attending school altogether in Year 8. Since that time, you have worked on and off in cafes. Your limited education means you have poor literacy and communication skills.
27. You were in a relationship with your daughter’s father, aged in his late 20s, for three years before she was conceived. You told Youth Justice that the father asked that the pregnancy be terminated but you refused. You subsequently left the relationship. Youth Justice report that following the baby’s birth in July 2018 you suffered depression and suicidal thoughts.

28. On 21 May 2019, Professor Anne Buist, Women’s Mental Health, assessed your mental health and parenting capacity on behalf of DHHS. In her report dated 22 May 2019, Professor Buist diagnosed you with a “*Borderline Personality Disorder (Complex PTSD)*” stating:

“[LS]’s severe neglect and childhood abuse means that her personality was developing through a time when she did not have a safe base and trauma and fear of a vulnerable child was up front and centre in this process. As such, she is best understood as having complex PTSD – ie. Chronic post-traumatic stress disorder which has integrated itself into how she sees and operates in the world. She fits the DSM V borderline personality disorder criteria with a poor sense of self, fear of being alone, self-harm, anxiety and transient dissociative symptoms (the pseudo-hallucinations) but with noticeable strengths in ability to manage anger, maintain relationships and work, and impulsivity (sexual) appears more associated with poor judgement.”

29. It is against this background that your offending in 2018 occurred.
30. Professor Buist’s conclusions are consistent with the expert opinion of Dr Sophie Reeves, clinical and forensic psychologist with the Children’s Court Clinic, who assessed you on 7 January 2020. In her report dated 29 January 2020, Dr Reeves found that you presented “*with a complex mix of personality traits typically found in individuals with a diagnosis of Borderline Personality Disorder as well as symptoms consistent with Complex Post-Traumatic Stress Disorder*”. Dr Reeves also assessed you as experiencing a significant level of trauma-related symptoms, including anxiety and depression. Dr Reeves attributes the development of your “*personality difficulties and trauma symptoms*” to “*enduring a combination of sexual, emotional and physical abuse*” having “*grown up in a largely dysfunctional family environment characterised by inconsistent parenting, parental drug use and family violence*”.
31. The personality traits associated with a Borderline Personality Disorder (BPD) are expanded upon in the report of Dr Reeves. In her report, she states that this mental illness is characterised by dysregulation of emotions and impulses, an unstable sense of self, difficulties in interpersonal relationships that are usually intense and unstable, often accompanied by suicidal and self-harming behaviour and other risk-taking

behaviours. Although Dr Reeves does not make a direct diagnosis of a BPD, I have regard to her opinion that you present with the mix of personality traits “typically found” in people with a BPD diagnosis.

32. The expert opinions expressed by Professor Buist and Dr Reeves were not challenged. I give considerable weight to their professional assessment of the impact of your dysfunctional childhood and exposure to abuse, neglect and family violence on your development and the development of personality traits and symptoms consistent with a borderline personality disorder and complex PTSD.
33. There is no evidence upon which I can conclude there is a direct connection between these disorders and your offending. This was accepted by your counsel. However, these matters are important context to your offending behaviour and accordingly, remain relevant to my sentencing considerations. Specifically, I accept that these factors influenced the degree to which the UK offender was successful in grooming you by encouraging, manipulating and pressuring you to engage in the offending behaviour. Although I accept that you made choices in respect of your behaviour, these findings remain relevant to reduce your overall moral culpability. The expert opinion evidence leads me to reduce the sentence I would otherwise have imposed.

Other relevant matters

34. For the purposes of sentencing, it is relevant that you have no prior convictions and are to be sentenced as a person who – other than for this serious offending – has been of good character.
35. Your plea of guilty to many of the offences charged, including the Commonwealth offences, is also relevant to my sentence. In pleading guilty to those offences, you acknowledged your responsibility for that offending. The plea also saved the Court and the community the expense of a hearing for those charges. You are entitled to a sentencing discount for your plea. However, no sentencing discount applies in relation to the two serious penetrative offences I found proved following a contested hearing.
36. Your plea to many of the offences is also an indication of your remorse for those offences. However, the full extent of your remorse has been difficult to assess. It is

reported by Youth Justice and Dr Reeves that you become highly distressed when discussing the offending and that you have difficulty talking about your actions. In my view, you are yet to fully appreciate the seriousness of your offending against your daughter. This assessment, however, is undoubtedly complicated by your complex PTSD and the BPD personality traits discussed by Dr Reeves.

37. It is also relevant that upon the detection of your offending, you suffered the immediate and ongoing consequence of having your daughter removed from your care under an Interim Accommodation Order made by the Children's Court. [details removed]
38. Because you were 17 years old at the time of the offending, the charges are heard and determined in the Children's Court. The sentencing considerations that apply are those provided for by the CYFA, which are very different to those that apply when sentencing adults. I note however, that you were 17 years at the time of the offending which places you were at the upper limit of the age range for children sentenced under the CYFA.
39. The difference between an "adult" court and the system established under the CYFA for sentencing young offenders was discussed by the Court of Appeal in *Webster v The Queen* [2016] VSCA 66, where Maxwell P and Redlich JA stated at [7]:

"What is so distinctive, and so important, about juvenile justice is that it requires a radically different balancing of the purposes of punishment. The punitive or retributive considerations which are appropriately applied to adults must be largely set aside".
40. The law has always recognised the importance of rehabilitation as a sentencing principle for young offenders – particularly, young first-time offenders. Here however, the importance of rehabilitation must be balanced against the other relevant sentencing considerations under the CYFA.
41. Section 362(1) of the CYFA sets out the relevant sentencing considerations for the Court when sentencing a child. These include the need, as far as practicable, to strengthen and preserve the relationship between the child and their family, to continue to live at home and to continue in education or training without disruption. Where appropriate, as here, it is also necessary that the sentence "*ensures*" the child is aware

that he or she must bear responsibility for their criminal actions and operates to protect the community.

42. Assessing your prospects of rehabilitation is also not easy.
43. Dr Reeves assessed your risk of general re-offending to be low. In her opinion, your offending behaviour is best understood against the background of your dysfunctional upbringing. At paragraph [74] of her report, Dr Reeves states:

“[LS]’s history suggests that her sexual offences took place on a background of her growing up in a dysfunctional family environment comprised of exposure, and being a victim of, emotional and physical abuse and neglect, parental drug use, a poor sense of self and low self-esteem, and her being victim of repeated sexual abuse and early sexualisation.”

44. Dr Reeves makes a series of recommendations about the factors that would address your risk of reoffending. These include the need to address accommodation instability, poor mental health and *“the risk of her continuing to engage in self-destructive behaviours”*. She states at paragraph [75] of her report:

“Addressing [LS]’s coping mechanisms, improving her sense of self, her relationships with her family members, increasing her social connections and reducing her trauma and anxiety symptoms will all collectively contribute significantly to...improving her mental health and reducing her risk of general re-offending and her engagement in a range of self-destructive behaviours.”

45. You have now been on strict conditions of bail supervised by Youth Justice since March 2019. On a positive note, you have built a rapport with your Youth Justice worker in supervision sessions and have engaged with Ms Chan, a psychologist for much of that time.

46. However, when you appeared before me on 25 February 2020, Youth Justice reported that you had recently missed two appointments with them without a valid excuse, you had not attended a care team meeting with professionals as directed and had failed to

attend hospital for review as recommended by Youth Justice. You had also missed two appointments scheduled with Ms Chan in February 2020. You had reported illicit substance use to Youth Justice, being use of Valium and cocaine, telling Youth Justice you used these “*as a way to feel numb*”. Further, Youth Justice report that you had been “*significantly non-compliant*” with the conditions attached to the transitional housing found for you and your father and the directions of the property manager. As a result, you were at risk of eviction and homelessness. You moved to that emergency accommodation when you could no longer continue living with your mother due to concerns about family violence.

47. Given that report, on 25 February 2020 I deferred sentencing to 24 March 2020 pursuant to s 360(2) of the CYFA. The purpose of the deferral was, as I indicated, to determine your suitability to be sentenced to a Youth Attendance Order (YAO) having indicated that the gravity of the offending warranted a sentence of detention.
48. On 24 March 2020 I was provided with a further Youth Justice report dated 19 March 2020. Youth Justice reported that you failed to engage or attend any scheduled meeting with the housing worker in March and had failed to sign a new lease or engage with their program. On 5 March 2020 you were directed to undergo a drug screen by AFP but failed to do so. You told police and Youth Justice you were unable to do so as your brother was missing interstate.
49. When the matter returned before me on 24 March 2020 you were ill with a fever and appeared by audio link. Sentencing was again deferred to 21 April 2020³. You were again warned about the importance of complying with all bail conditions.
50. However, the further report of Youth Justice dated 15 April 2020 states that you were arrested by police in [location removed] and questioned on 25 March 2020, the day following your court appearance by audio-link. A police statement made by Detective A/Sergeant Maliko dated 3 April 2020 states that she attended a [location removed] address to execute a search warrant into “a large-scale drug trafficking investigation” and found you at the property with the male who was the target of the operation. You told the Detective you had met the male at [location removed] that day. Five empty zip

³ You did not attend Court that day, and subsequently provided a medical certificate. The hearing was adjourned to 22 April 2020 and bail extended in your absence on 21 April 2020.

lock bags were found in your possession together with \$815 suspected of being the proceeds of crime. You were released pending summons.

51. The police statement says there is evidence from mobile phone usage to suggest you had previously been in contact with the male in December 2019 and January 2020. CCTV footage shows that you arrived at the [location removed] address on 24 March 2020 at 7.30pm and remained there until your arrest the next day, in breach of the residential and curfew conditions of your bail. I emphasise that at present, these are the allegations made against you.

52. Affidavits relied upon by the prosecution also raise a number of serious concerns about your non-compliance with bail conditions. In summary, the affidavits of the informants contain evidence relied upon by the prosecution to demonstrate:
 - repeated failures by you to respond to messages and calls left for you by police;
 - a failure to comply with directions to attend for drug testing on 26 March 2020 and 15 April 2020 contrary to your conditions of bail;
 - two positive test results - one of 11 March 2020 when you tested positive for amphetamine, methylamphetamine and MDMS, and the other on 18 March 2020 when you tested positive to amphetamine and methylamphetamine;
 - that you have provided police with improbable explanations for your failure to comply with your conditions of bail. For instance, enquiries with police interstate did not substantiate a missing person report being filed for your brother. You told police you could not contact them because you had left your phone at your sister's place, but your sister told police this was not the case;
 - a failure to live at the address to which you were bailed and to comply with the bail imposed curfew, with evidence from mobile phone data placing you in other areas, including [details removed] and at other locations between 3 April to 11 April 2020 (a total of 14 nights over a four week period); and

- a failure to comply with curfew conditions of bail, for instance when police attended your home during curfew hours on 30 March 2020 and 18 April 2020 but there was no one home.
53. In the most recent report of Youth Justice, you disclose that you have been using methylamphetamine and other drugs so you can “feel numb”. Your statement to Youth Justice is consistent with the two drug screen results in March 2020. There is no suggestion that you were previously an ice user. Concerningly, this appears to be a recent development.
54. Mr Waters did not seek to challenge the evidence of non-compliance. However, he submits that these matters should not overwhelm my sentencing considerations and submits that a YAO, if not a Youth Supervision Order, is the suitable sentence having regard to the welfare oriented sentencing considerations in s 362 of the CYFA. However, for very serious offending, a significant sentencing consideration is to impose a sentence that ensures you understand you bear responsibility for that offending and for the sentence to deter you from future offending. For a YAO to be suitable, I need to be satisfied that it will achieve these important sentencing objectives whilst promoting and facilitating your rehabilitation.
55. Having regard to the prosecution evidence collectively, I am satisfied that despite significant compliance with conditions of bail from March – December 2019 for much of 2020 you have not done so. Of greatest concern to me is evidence of escalating drug use and of the circumstances leading to your arrest in [location removed] on 25 March 2020 one day after appearing in Court via audio link due to illness. As Dr Reeves stated, without stability, the risk of you continuing to engage in self-destructive behaviours will undermine your prospects of rehabilitation.
56. Despite the supervision afforded by Youth Justice, and the attempts by Youth Justice to refer you to services and programs to support your rehabilitation, I find that you have not demonstrated an ability to comply with the strict conditions necessary to best promote your prospects of rehabilitation and to reduce the risk of reoffending as identified by Dr Reeves. I am not satisfied a YAO is a suitable sentence.

Conclusion

57. In sentencing you, I have had to balance the very serious nature of your offending against the other important considerations to which I have referred that mitigate the sentence to be imposed. I have also had regard to the provisions of s 362 of the CYFA in determining the appropriate and just sentence to impose, and in particular, the need to ensure the sentence promotes your rehabilitation whilst also ensuring you understand that you bear responsibility for your serious offending behaviour. I accept that I must impose a sentence that, in the words of the Court of Appeal in *CNK*⁴ “fits the young offender as much as – or perhaps even more than – it fits the crime”.
58. On the question of general deterrence, I have determined that s 20C of the *Crimes Act 1914* (Cth) enables the Court to sentence pursuant to State law, namely the CYFA when sentencing a child in Victoria. In *CNK*⁵ the Court of Appeal determined that general deterrence has no application to the sentencing of children pursuant to the CYFA. This is the legislative framework that has been established for the sentencing of children in Victoria.
59. Support for this proposition is found in the decision of the Court of Appeal in *DPP (Cth) & DPP v Hutchinson*.⁶ That case involved an appeal against a non-custodial sentence imposed on an adult with respect to Commonwealth and State offences, some of which were committed when the appellant was a little over 16 years of age while other offences were committed when he was an adult. The victims in that case were his half-sisters who were 3 years old and 16 months’ old respectively at the time of the offending.
60. The facts in *Hutchinson* were also objectively serious. The respondent had used a camera to film and then distribute images of sexual abuse of his stepsisters, including images of him masturbating near the face and bottom of his step-sisters and touching them with his erect penis. This offending occurred in the context of online conversations with a person claiming to be a 17-year-old named “Sara” but was in fact an adult British male who was grooming the respondent. The appeal was brought by the

⁴ (2011) 32 VR 641.

⁵ *Ibid.*

⁶ [2018] VSCA 153.

Commonwealth and State DPP arguing that only an immediate term of imprisonment was appropriate to respond to the objective seriousness of the offending. In part, the Court of Appeal dismissed the appeal for the following reasons, stating at paragraph [56]:

“... there was the fact that the respondent was only a little over 16 years of age at the time he committed the offences in relation to his half-sisters. Rehabilitation was a powerful mitigating factor in relation to such a young offender, notwithstanding the objective seriousness of his offending. If the respondent’s offending had been detected at or about the time of his commission, he would have fallen to be sentenced under the provisions of the Children, Youth and Families Act 2005, where general deterrence would have played no part in the sentencing process. As the judge put it, there was every prospect that the respondent would have received ‘some form of order without conviction’.” (emphasis added)

61. I have also had regard to each of the cases referred to me by the prosecution which, it is submitted, are “relevantly comparable or instructively different” to the present case. The difficulty with the comparable cases is that the accused in each of the cases to which I was referred were sentenced as adults. As such, they were sentenced under the sentencing considerations applicable to adults, including general deterrence, denunciation and just punishment. As stated, when sentencing under the CYFA the principle of general deterrence has no application. In other words, the Court is not imposing a sentence to deter members of the public from offending in a similar or like manner: see *CNK*.⁷ In the circumstances, I have not been able to draw on these cases as a guide.
62. This has been a very difficult sentencing exercise. The gravity of the offending warrants the imposition of a sentence of detention. On the other hand, the mitigating factors to which I have referred are significant and operate to reduce your moral culpability for the offending or otherwise entitle you to a sentencing discount. However, having regard to my findings about your present inability to comply with a non-custodial order, I am not satisfied that a YAO is a suitable or appropriate sentence despite the recommendation of Youth Justice.

⁷ Ibid.

63. The sentence I must now impose is intended to reflect the gravity of the offending and to ensure that you are aware you must bear responsibility for your serious offending. I am satisfied that no sentence other than detention can meet the various factors to which I have had regard under s 362(1) of the CYFA, including the suitability of the sentence to you and the need to deter you from further offending, whilst still promoting your rehabilitation.
64. Having taken each of these matters into account, I sentence you with conviction to an aggregate sentence of 12 months' detention in a Youth Justice Centre pursuant to s 362B of the CYFA to reflect the totality of your offending. An aggregate sentence is available because the offences committed by you between 19 November 2018 and 2 December 2018 are of a similar character.
65. I declare three days of pre-sentence detention to be reckoned as served.
66. Pursuant to s 362A of the CYFA, I indicate that I have taken your plea of guilty to the offences (excluding charges 20 and 21 to which you pleaded not guilty) into account in sentencing you. Had you not pleaded guilty to those offences, the sentence I would otherwise have imposed would have been an aggregate sentence of 14 months' detention.
67. Finally, the prosecution has applied for an order under s 11 of the *Sex Offenders Registration Act 2004 (SORA)* for you to be placed on the Sex Offenders Register. For any person under 18, the Court may only make a sex offender registration order if after taking into account any matter it considers appropriate, the Court is satisfied beyond reasonable doubt that the person poses a risk to the sexual safety of one or more persons or of the community. It is not necessary for the Court to be able to identify a risk to particular people, or a class of people: s 11(4) of the SORA.
68. The burden of proof rests upon the prosecution. In brief, the prosecution relies upon the circumstances of your offending to establish that you pose a risk to the sexual safety of one or more persons in the community. The sexual offending committed by you was serious and repeated. The victim was highly vulnerable. However, the circumstances of the offending alone, whilst relevant to my assessment of future risk, are not conclusive.

In the context of the *Serious Sex Offenders Monitoring Act 2005*, the Court of Appeal in *RJE v Secretary to the Department of Justice*⁸ stated at paragraph [16]:

“Predicting whether a particular person will commit a criminal offence in the future is notoriously difficult...the making of such a prediction in a particular case requires expertise in observation and assessment of those who commit offences of the particular type, and a detailed knowledge of the types of factors, both personal and environmental, which increase or reduce the risk of further offending.”

69. In assessing your risk of further sexual offending, I have had regard to the various psychiatric and psychological assessments to which I have referred, including the risk assessment undertaken by Dr Reeves. In her report dated 29 January 2020 Dr Reeves assesses your risk of general re-offending to be low. Moreover, Dr Reeves considered the motivating factors that led to the offending were coercion (by adult UK offender) and financial gain. She states that, in her assessment, there *“is no evidence to suggest that her offences were driven by sexual interest in children or sexual arousal, were predatory in nature or that drug use played a contributing role”*.
70. Whilst I consider that your current risk factors, primarily your poor state of mental health, risk of homelessness and current drug use place you at risk of further offending behaviour, I am not satisfied beyond reasonable doubt that you pose an unacceptable risk to the sexual safety of others. Given the risk identified by the SORA must be an appreciable risk, I am not satisfied beyond reasonable doubt that the prosecution has established a risk of sexual offending into the future. Accordingly, I refuse the application for you to be placed on the Sex Offenders Register.

Judge A Chambers
President
Children’s Court of Victoria

⁸ [2008] VSCA 265.