Court of Criminal Appeal
Supreme Court

New South Wales

Case Name:	SH v R
Medium Neutral Citation:	[2026] NSWCCA 35
Hearing Date(s):	18 February 2026
Date of Orders:	13 April 2026
Decision Date:	13 April 2026
Before:	Mitchelmore JA at [1] Dhanji J at [2] Coleman J at [3]
Decision:	See [88]
Catchwords:	SENTENCING — appeal against sentence — whether sentencing judge erred in approach to applicant's plea of guilty under s 16A(2)(g) — utilitarian value of a guilty plea — whether the prosecution can resile from written concessions made in sentence hearing — whether strength of the prosecution's case is relevant to utilitarian value of a guilty plea — whether sentencing judge can take into account the subjective value of the applicant's guilty plea — impermissible and irrelevant factors taken into consideration — error found — appeal allowed — resentence
Legislation Cited:	Crimes Act 1914 (Cth) Criminal Appeal Act 1912 (NSW) Criminal Code Act 1995 (Cth) Crimes (Sentencing Procedure) Act 1999 (NSW)
Cases Cited:	Baden v R [2020] NSWCCA 23 Bae v R [2020] NSWCCA 35 Betka v R; Ghazaoui v R; Hawchar v R [2020] NSWCCA 191 Chuang, Chih Wen v R; Chen, Chun Hung v R [2020]

	NSWCCA 60 Director of Public Prosecutions (Cth) v De La Rosa [2010] NSWCCA 194; (2010) 79 NSWLR 1 DPP (Cth) v Thomas [2016] VSCA 237; (2016) 53 VR 546 Giles-Adams v R; Preca v R [2023] NSWCCA 122 Huang v R (2018) 96 NSWLR 743; [2018] NSWCCA 57 Huang v R [2018] NSWCCA 70; (2018) 332 FLR 158 Hudson v R [2025] NSWCCA 194 Kentwell v R (2014) 252 CLR 601; [2014] HCA 37 Lazarus v R [2023] NSWCCA 214 R v Borkowski [2009] NSWCCA 102; (2009) 195 A Crim R 1 R v Hutchinson [2018] NSWCCA 152 R v Thomson; R v Houlton (2000) 49 NSWLR; [2000] NSWCCA 309 Singh v R [2018] NSWCCA 60 Waters v R [2025] NSWCCA 226 Xiao v R [2018] NSWCCA 4; (2018) 96 NSWLR 1 Zreika v R [2012] NSWCCA 44; (2012) 223 A Crim R 460
Category:	Principal judgment
Parties:	SH (Applicant) The Crown (Respondent)
Representation:	Counsel: T Bicanic (Applicant) A McGrath (Respondent Solicitors: Hannay Lawyers (Applicant) Solicitor for Public Prosecutions (Respondent)
File Number(s):	2023/00461369
Publication Restriction:	An order was made pursuant to section 7 of the Court Suppression and Non-Publication Orders Act 2010 on 14 August 2025 at Gosford Sydney District Court, as follows: 1. Non-publication order in respect of the name of the offender and any information that may lead to his identification

Decision under appeal:

Court or Tribunal:	District Court
Jurisdiction:	Criminal
Citation:	Nil
Date of Decision:	22 August 2025
Before:	Judge Wilson SC
File Number(s):	2023/00461369

HEADNOTE

[This headnote is not to be read as part of the judgment]

The applicant, SH, was convicted after entering a plea of guilty to the offence of use carriage service to access child-abuse material, contrary to s 474.22(1) of the *Criminal Code Act 1995* (Cth).

On 22 August 2025, after taking into account the plea of guilty and giving a 20% discount on sentence, the sentencing judge imposed a term of imprisonment of two years, with the applicant to be released on a recognizance release order after serving 12 months imprisonment. The applicant sought leave to appeal against this sentence.

There is one ground of appeal, namely, that the sentencing judge erred in the approach to the applicant's plea of guilty pursuant to s 16A(2)(g) of the *Crimes Act 1914* (Cth) by taking into account two impermissible and therefore irrelevant factors to the applicant's detriment:

(a) First, that the plea of guilty was entered in the face of an extremely powerful Crown case in circumstances where, in the sentencing judge's view, a finding of guilt was inevitable.

(b) Secondly, that notwithstanding the applicant's plea of guilty, the applicant still maintains he inadvertently came across the offending material which he found disgusting.

While not expressly stated, the complaint relates to the utilitarian value of the plea. The applicant's counsel submitted that it was impermissible and therefore irrelevant for his Honour to take into account these two factors in arriving at a

reduced discount of 20%. The Crown conceded that the sentencing judge erred in taking into account subjective matters.

The Court held (Coleman J, Mitchelmore JA and Dhanji J agreeing) granting leave to appeal the sentence, allowing the appeal, and resentencing the applicant:

In relation to the applicant's appeal against sentence

(1) Identification of the utilitarian value of a plea of guilty involves an objective assessment to be undertaken for the purposes of s 16A(2)(g). The strength of the Crown's case is not relevant to the assessment of the utilitarian value of the plea of guilty: [45]-[47].

(2) When considering the utilitarian value of the plea, the sentencing judge's rejection of the applicant's explanation that he inadvertently accessed the material and found it disgusting was also not relevant to the quantification of any discount under s 16A(2)(g): [49].

(3) The sentencing judge erred when taking into account the subjective value of the applicant's guilty plea when assessing the discount to his sentence for the utilitarian value of the plea: [50].

In relation to the resentence

(1) The principal issue on resentence is the impact of the early guilty plea entered by the applicant. In the circumstances of the sentencing judge impermissibly considering the subjective factors, the sentencing judge concluded that a reduction in sentence of 20% was appropriate. However, having formed the view that the plea was entered at the first reasonable opportunity, this Court assesses the utilitarian value of the plea to be 25%: [58]-[60], [74].

(2) The Crown should not be allowed to resile from its acceptance at the sentence hearing that the plea of guilty was entered at the first reasonable opportunity, citing *Zreika v R* [2012] NSWCCA 44; (2012) 223 A Crim R 460: [61]-[69].

(3) The applicant continues his denial of sexual interest in children, and until he accepts he does have such an interest and undertakes appropriate treatment for it, his prospects of rehabilitation are guarded: [81].

JUDGMENT

1 **MITCHELMORE JA**: I agree with Coleman J.

2 **DHANJI J**: I agree for the reasons given by Coleman J that the sentencing judge erred in his treatment of the utilitarian value of the plea of guilty and the factual finding that the plea was entered at the first available opportunity. I agree with the orders proposed by his Honour.

3 **COLEMAN J**: SH[1] (the applicant) seeks leave pursuant to s 5(1)(c) of the *Criminal Appeal Act 1912* (NSW) to appeal against the sentence imposed on him for one Commonwealth offence on 22 August 2025 in the District Court of New South Wales. At that time, the applicant had entered a plea of guilty to the offence of use carriage service to access child-abuse material, contrary to s 474.22(1) of the *Criminal Code Act 1995* (Cth). That offence carries with it a maximum penalty of 15 years imprisonment.

4 After taking into account the plea of guilty and giving a 20% discount on sentence, the sentencing judge imposed a term of imprisonment of two years, commencing 22 August 2025 and expiring on 21 August 2027, with the applicant to be released on a recognizance release order on 21 August 2026 after serving 12 months imprisonment. The recognizance release order was subject to the following conditions:

(1) the applicant must accept supervision by Community Corrections and obey all directions;

(2) the applicant was to contact Community Corrections within seven days of release, initially by telephone;

(3) the applicant must engage in whatever rehabilitation and treatment is directed by Community Corrections;

(4) the applicant must be of good behaviour for a period of two years from 22 August 2025 to 21 August 2027; and

(5) the applicant must enter into a recognizance without security in the sum of $1.

Ground of Appeal

5 There is one ground of appeal, namely, that the sentencing judge erred in the approach to the applicant's plea of guilty pursuant to s 16A(2)(g) of the *Crimes Act 1914* (Cth) (*Crimes Act*) by taking into account two impermissible and therefore irrelevant factors to the applicant's detriment:

(a) First, that the plea of guilty was entered in the face of an extremely powerful Crown case in circumstances where, in his Honour's view, a finding of guilt was inevitable.

[1] There is a non-publication order in respect of the name of the offender or any information which may lead to his identification.

(b) Secondly, that notwithstanding the applicant's plea of guilty, the applicant still maintains he inadvertently came across the offending material which he found disgusting.

6 In the applicant's written submissions (AWS), counsel submitted that it was impermissible and therefore irrelevant for his Honour to take into account the two factors identified in sub paragraphs (a) and (b), in arriving at a reduced discount of 20%. While not expressly stated, the complaint relates to the utilitarian value of the plea. Further, at [42] of the AWS, the applicant confirms that in this appeal, he challenges only the discount afforded to him for his plea of guilty. He submits a discount of 25% is warranted.

7 The Crown concedes that the sentencing judge fell into error by taking into account the subjective value of the applicant's guilty plea when assessing the discount for the utilitarian value of his guilty plea. The Crown's written submissions (CWS) properly notes that although s 16A(2)(g) of the *Crimes Act* neither requires nor prohibits a specified discount, a specified discount may only be given in respect of the utilitarian value of an offender's guilty plea. The Crown accepts that the subjective value of an offender's guilty plea is a matter that may only be taken into account in mitigation in the instinctive synthesis.[2]

8 For the reasons below, the Crown was correct to concede that the sentencing judge erred. Error having been identified, this Court must exercise the sentencing discretion afresh and resentence the applicant, unless no lesser sentence is warranted at law: *Criminal Appeal Act 1912* (NSW), s 6(3)*; Kentwell v R* (2014) 252 CLR 601; [2014] HCA 37 at [43].

9 I have formed the view that leave to appeal should be granted and the applicant resentenced as set out below.

The Remarks on Sentence (ROS)

10 Because it will be necessary to resentence the applicant afresh, and as none of the findings made by the sentencing judge are challenged (apart from the

[2] The Crown refers to Bae v R [2020] NSWCCA 35 at [57] per Johnson J (Bell P and Walton J agreeing); Chuang, Chih Wen v R; Chen, Chun Hung v R [2020] NSWCCA 60 at [19] per Basten JA (Rothman and Cavanagh JJ agreeing); Betka v R; Ghazaoui v R; Hawchar v R [2020] NSWCCA 191 at [62] per Fullerton J (Wilson and Ierace JJ agreeing); Giles-Adams v R; Preca v R [2023] NSWCCA 122 at [78]. per Yehia J (Wright and Chen JJ agreeing); Waters v R [2025] NSWCCA 226 at [43]-[57] per Adamson JA (Ward P and RA Hulme AJ agreeing).

discount to be applied), it is convenient to refer to the ROS, and the findings made, in detail.

11 The applicant was born in 1981, and the offending took place in 2021 and 2022. The applicant was arrested on 20 December 2023 and was committed for sentence from the Local Court on 15 November 2024.

12 On 5 December 2021, the applicant accessed a “mega.nz” online link within which there was a folder containing 1463 files comprising child-abuse material. There were 1439 images and 24 videos. It is not known, and could not be found, how many of those files were accessed by the applicant.

13 The offending was discovered in the following way. In November 2022, New South Wales Police (the police) located a mega.nz link containing a significant amount of child-abuse material in a folder “NEWW”. “Mega” is a New Zealand-based publicly available website which provides end-to-end encrypted cloud storage. Any person with an account can upload material to the platform which can be shared and accessed via a unique URL. The material discovered by the police depicted the sexual abuse of children as young as 1-2 years old, together with the torture and dismemberment of babies. The police downloaded material from the mega.nz site to identify files containing child-abuse material.

14 The police then received information relating to Australian accounts that had accessed at least one of the files identified in the NEWW folder that constituted child-abuse material. Some of these accounts were associated with email addresses, the subscriber details for which identified the applicant. The names, addresses, and dates of birth associated with these accounts were false, and the sentencing judge found that this was done by the applicant to avoid detection. However, police obtained subscriber information from Google for two of the accounts, which showed that it had been logged into on 20 August 2023 using an IP address which revealed the applicant’s true name, his accurate date of birth, and addresses associated with him from where he accessed the internet. The police obtained Commonwealth search warrants and orders requiring the applicant to provide assistance and information to them.

15 On 20 December 2023, the police attended the applicant's residence in Terrigal, New South Wales. The applicant cooperated with the police, producing and unlocking a mobile phone he identified as his own. The applicant indicated he had a number of Google email accounts including those the police had found as described above. Certain matters were seized from the applicant's premises.

16 The police accessed the email inbox for one of the email addresses on the applicant's phone. There was evidence that the applicant had opened and then closed an account on mega.nz. Additionally, using the password provided by the applicant, the police gained access to a mega.nz account associated with the applicant. Within that account, the police located a folder named "Telegram CP2333" (the "CP" referring to child pornography). This folder contained 1.4 terabytes of data which had been added to the account on 5 December 2021 at 9:25pm.

17 The police accessed data that had been downloaded from the relevant mega.nz account with an email address associated with the applicant and determined that the material included:

(1) 976 category 1 child-abuse material images;
(2) 17 category 1 child-abuse material video files;
(3) 463 category 2 child-abuse material images; and
(4) 7 category 2 child-abuse material video files.

18 The police noted that the files contained within the accounts depicted children ranging in age from toddlers to young teenagers. The files included photographic depictions of female children in solo sexual acts/poses, and with other children and adults. The material depicted various explicit sexual acts which do not require description. The sentencing judge also described the explicit sexual content of a sample of the videos that were found on the files. Again, it is unnecessary to describe them in any detail.

19 The sentencing judge noted the applicant does not have a criminal record and was otherwise a person of good character. His Honour said that good character in the context of this type of offending is given less weight than it otherwise might have in terms of a mitigating factor for sentence.

20 The sentencing judge described the contents of the sentencing assessment report (SAR) dated 14 April 2025. The report described the applicant as a dedicated husband and father, with prosocial support networks within his family. The sentencing judge noted the applicant to be an educated man with consistent and lengthy employment in a media company.

21 The sentencing judge rejected the applicant's report to the author of the SAR that he stumbled across the material in question, and that he found it debilitating, disconcerting and disgusting. The sentencing judge said that the fact the applicant returned to the site on a second occasion spoke against such findings. The applicant reported his offending as an unintended byproduct of his desire to seek out content related to extreme violence and despair, and he denied any sexual pleasure or arousal. The sentencing judge rejected those statements, finding that the applicant accessed the material on the occasions he did for his own sexual gratification.

22 The sentencing judge noted the SAR recorded the applicant describing a long history of anxiety, depression and complex trauma associated with childhood experiences. The sentencing judge rejected the SAR author's conclusion that the applicant had demonstrated significant insight into the offending. The sentencing judge found the applicant had downplayed his involvement in the offending and attempted to suggest he came by the material accidentally. The Crown's case was that the applicant accessed the material intentionally or at least recklessly. The sentencing judge found that having done it on two occasions, it was intentional. His Honour accepted the assessment of the applicant as being at a low risk of re-offending.

23 The sentencing judge had before him a report of Dr Christopher Lennings (Dr Lennings), clinical psychologist, dated 20 February 2025. The report recorded the applicant as being a deeply depressed and distressed man on presentation to Dr Lennings. The report recorded the applicant's maintenance of the position that the downloads of the material were inadvertent and incidental to an intention to download other material, and that most of the material was not viewed. The sentencing judge rejected the assertion by the applicant that he inadvertently or incidentally accessed the material. His Honour expressed a

reluctance to accept that the material was mostly not viewed by the applicant, however, accepted that the Crown could not establish beyond reasonable doubt the extent to which it was accessed.

24 The sentencing judge found that there was an inconsistency between the applicant telling Dr Lennings that once he became aware of the material, he deleted it, and the fact that when the police accessed the account there remained 1463 images in folders attached to the applicant's email account. The sentencing judge also rejected the applicant's reporting to Dr Lennings that he denied any sexual arousal from the material and viewed the files he saw as disgusting and horrible and created an awful emotional experience for him. His Honour found that the applicant returning to the material on a subsequent occasion suggested that he was in fact seeking sexual gratification.

25 The sentencing judge described as "plainly false" the explanation given to Dr Lennings by the applicant as to the circumstances which led him to access the material, being searching for violent material as a form of both self-disgust and self-harm on the one hand, but emotionally soothing on the other hand. His Honour found that this explanation was inconsistent with the fact that the applicant had to take a number of deliberate steps in order to access the child-abuse material, and that he returned to the site on a subsequent occasion and did the same.

26 With respect to the applicant's background, he told Dr Lennings that he was brought up in an unloving and emotionally neglectful family. There were many location shifts, and he attended some 12 schools. He referred to his father as a volatile, verbally violent and abusive person who was easily triggered into a rage. As a result, the applicant reported he was always on edge and had low self-esteem. He portrayed himself to Dr Lennings as having had a dysfunctional childhood which caused him to use cannabis as a means of managing his increasingly depressed mood and social isolation. He experimented with other drugs.

27 The applicant described other issues with his family situation, including with his wife. He described himself as being very depressed at the time of the interview and experiencing intense anxiety.

28 Dr Lennings diagnosed the applicant as having a Pervasive Depressive Disorder punctuated by episodes of major depression (recurrent), and generalised anxiety disorder. There was no obvious paraphilia on display.

29 The sentencing judge did not accept Dr Lennings' opinion. His Honour said that this was because it was not a psychiatric diagnosis, but based on self-reporting, and, consistently with the way the applicant had presented himself to others who had assessed him, he denied having a sexual interest in children – a matter which the sentencing judge again rejected.

30 The sentencing judge noted Dr Lennings' conclusion that at the time of the offending, the applicant suffered from both a severe degree of depression and anxiety in the context of long-standing identity issues. His Honour rejected a submission made to him during the delivery of the remarks on sentence, that this condition materially contributed to the offending such that it would reduce the applicant's moral culpability (*Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194; (2010) 79 NSWLR 1 (*De La Rosa*)). His Honour accepted, however, that the applicant was a troubled person, and at the time of testing, was suffering depression and anxiety. His Honour took that into account as a mitigating factor.

31 There was also a psychological report from Mr Graeme Randall (Mr Randall), registered psychologist, dated 30 March 2025, before the sentencing judge. The applicant had been in therapy with Mr Randall from 27 February 2024. He undertook some psychometric testing which concluded that the applicant's overall level of personality function was quite impaired, marked in particular by a strong sense of negative affectivity associated with traumatic stress, depression, anxiousness and rigid perfectionism. Mr Randall opined that through a detailed exploration of the applicant's sexuality and sexual interest, he had zero interest in minors and zero paraphilias of any description. The sentencing judge wholly rejected that opinion.

32 The sentencing judge noted that the focus of the therapy with the psychologist was not suppression of the applicant's sexual interest in children, but his emotional suppression. Thus, the sentencing judge held that it was not a case where the applicant had sought rehabilitation for sexual interest in children and remained in denial that he has paedophilic tendencies.

33 His Honour observed that the sentence to be imposed must be one of a severity appropriate in all the circumstances of the offence. He considered the matters in s 16A(2) of the *Crimes Act*. He considered that no sentence other than one of imprisonment was appropriate. His Honour, in taking into account the maximum penalty for the offending, found it was very serious offending. He acknowledged the applicant did not engage in sexual conduct with children, but by accessing the material, encouraged others to engage in apparent sexual offending with children.

34 His Honour referred to the decision of this Court in *R v Hutchinson* [2018] NSWCCA 152 at [45]-[46], where a number of factors were set out which the Court should have regard to when sentencing for these types of offences. His Honour found:

(1) actual children were involved in the images and videos;

(2) the children depicted were young, ranging from one year of age to young teenagers;

(3) the sexual activity depicted was graphic involving penetrative acts;

(4) at least some of the children were additionally subjected to cruelty and physical harm;

(5) the overall quantity of the files, being over 1400, are substantial and the offender viewed the material on two known occasions;

(6) there is no indication of any payment being made by the offender;

(7) there is no indication the offender was proximate to the people creating the material; and

(8) there was some degree of planning and deception involved given the false information used to create the accounts which were then used to access the material.

35 His Honour found that the offending fell just below the mid-range of seriousness for offences of this type.

36 His Honour regarded general deterrence as being an important consideration in sentencing a child sex offender, referring to *Lazarus v R* [2023] NSWCCA 214 at [76].

37 His Honour then said the following:

> I have taken into account the guilty plea of the offender. He pleaded guilty on 15 November 2024 in the Local Court; he is entitled to a discount for the value of his guilty plea. *I do note though the guilty plea was entered in the face of an extremely powerful Crown case in circumstances where a finding of guilt was in my view, inevitable. In considering the discount, I have had regard to that fact. There is also the subjective aspect of the offender's plea in that, notwithstanding his plea, he still maintains that he inadvertently came across this material, which he found disgusting.* In the circumstances I consider a reduction in sentence of 20% to be appropriate. (Emphasis added.)

38 His Honour confirmed weight to the opinions of the psychologists which I have described above. His Honour declined to find that the applicant was contrite or that he had displayed remorse.

39 His Honour referred to the requirement under s 16A(2AAA) of the *Crimes Act* of the need to encourage rehabilitation of an offender as an important sentencing consideration. His Honour said that, unfortunately, by his denial of any paraphilic interest, the applicant has not had the advantage of receiving counselling or treatment. His Honour felt that this would continue so long as the applicant denied his sexual interest in children. His Honour found that the applicant's prospects of rehabilitation are poor so long as he remains in denial as to his sexual interest in children.

40 Whilst the sentencing judge was provided with a number of comparable cases, he did not find any particularly applicable.

41 With respect to the impact on the applicant's family if he was to go into custody, the sentencing judge accepted his family relied on him financially, emotionally and practically, but there was nothing out of the ordinary which would permit a finding of hardship to the family as a result of a custodial sentence.

42 His Honour referred to the submissions made by counsel for the applicant that there were exceptional circumstances justifying a sentence other than a term of imprisonment. His Honour found that the circumstances identified did not rise to the level of exceptional circumstances and therefore a term of imprisonment

was warranted. The sentencing judge imposed the sentence referred to in [4] above.

Section 16A(2)(g) of the Crimes Act

43 When sentencing an offender for a Commonwealth offence, in determining the appropriate sentence, in addition to any other matters, the Court must take into account the matters listed in s 16A(2) of the *Crimes Act* as are relevant and known.

44 Section 16A(2)(g) provides as one of the matters to be taken into account:

> (g) if the person has pleaded guilty to the charge in respect of the offence:
>
> (i) that fact; and
>
> (ii) the timing of the plea; and
>
> (iii) the degree to which that fact and the timing of the plea resulted in any benefit to the community, or any victim of, or witness to, the offence…

45 This section gives effect to aspects of the utilitarian value of a plea of guilty: *Xiao v R* [2018] NSWCCA 4; (2018) 96 NSWLR 1 (*Xiao*); *Bae v R* [2020] NSWCCA 35 (*Bae*). In *Bae,* from [49]-[57], Johnson J (with Bell P and Walton J agreeing) helpfully surveyed authorities such as *Baden v R* [2020] NSWCCA 23, *Huang v R* (2018) 96 NSWLR 743; [2018] NSWCCA 57 (*Huang*) and *R v Borkowski* [2009] NSWCCA 102; (2009) 195 A Crim R 1; (*Borkowski*), dealing with s 16A(2)(g). A summary of the relevant principles from that survey is:

(1) The utilitarian value of a guilty plea, and the discount to be applied depends primarily upon the timing of the plea: *Huang* at [81] per Beazley P, [69] per Bellew J citing *R v Thomson; R v Houlton* (2000) 49 NSWLR; [2000] NSWCCA 309 (*R v Thomson; R v Houlton*);

(2) In *Borkowski,* Howie J (McClellan CJ in CL and Simpson J agreeing) in considering the utilitarian value of a guilty plea in State matters, said at [32]-[33]:

> *"32 It should not be necessary to do so, but, because there appears to be discrepancies in the application of the discount for the utilitarian value of the plea, it is apposite to set out in point form the principles laid down by this Court and to be applied by sentencing courts. Of course these are principles of general application …:*
>
> *1. The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount: Thomson at [154]; Forbes [2005] NSWCCA 377 at [116].*

2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: Thomson at [154].

3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse: Thomson at [119] to [123]; nor is it affected by post-offending conduct: Perry [2006] NSWCCA 351 .

4. The utilitarian discount does not take into account the strength of the prosecution case: Sutton [2004] NSWCCA 225.

5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: MAK and MSK [2006] NSWCCA 381; Kite [2009] NSWCCA 12 or for the 'Ellis discount'; Lewins [2007] NSWCCA 189; S [2008] NSWCCA 186.

6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: SY [2003] NSWCCA 291.

7. There may be offences that are so serious that no discount should be given: Thomson at [158]; Kalache [2000] NSWCCA 2; where the protection of the public requires a longer sentence: El-Andouri [2004] NSWCCA 178.

8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: Stambolis [2006] NSWCCA 56; Giac [2008] NSWCCA 280.

9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain: Dib [2003] NSWCCA 117; Ahmad [2006] NSWCCA 177; or where the offender is waiting to see what charges are ultimately brought by the Crown: Sullivan and Skillin [2009] NSWCCA 296; or the offender has delayed the plea to obtain some forensic advantage: Stambolis [2006] NSWCCA 56; Saad [2007] NSWCCA 98, such as having matters put on a Form 1: Chiekh and Hoete [2004] NSWCCA 448.

10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value: Oinonen [1999] NSWCCA 310; Johnson [2003] NSWCCA 129

11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: Lo [2003] NSWCCA 313.

12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.

The last of these principles is derived from the present judgment and is included for completeness.

33 There also appears to be some looseness in the use of the expression 'a discount' that is apparent in the exchange between the prosecutor and the Judge set out above. Since Thomson and Houlton a 'sentencing discount' should be taken to mean a reduction in

the otherwise appropriate sentence by a quantifiable amount due to a specific policy consideration. Such a discount is applied after the otherwise appropriate sentence has been determined. There are two sentencing discounts that have been identified: a discount for the plea of guilty and a discount for assistance. Where both these discounts apply they should be combined: R v SZ [2007] NSWCCA 19; 168 A Crim R 249 at [11]. The High Court has indicated that there should be limited use of 'arithmetical deduction' in determining an appropriate sentence: Markarian v The Queen [2005] HCA 25; 228 CLR 357 at [39]."

(3) The approach in *Borkowski* applies to the assessment of the utilitarian value of a guilty plea for State offences. Nevertheless, in the same way as *R v Thomson; R v Houlton* has provided guidance for Commonwealth offences, the decision in *Borkowski* assists in a practical understanding of the features of the utilitarian value of a guilty plea, a factor which *Xiao* states can be taken into account for the purpose of s 16A(2)(g) of the *Crimes Act*: *Bae* at [53];

(4) Identification of the utilitarian value of the plea of guilty involves an objective assessment to be undertaken for the purposes of s 16A(2)(g);

(5) A demonstration of contrition by the offender involving the facilitation of the course of justice may be taken into account in the offender's favour on sentence under s 16A(2)(f). This is a subjective factor which involves an inquiry as to the attitude of the offender and an assessment of contrition;

(6) There is no bright line test to distinguish between these objective and subjective factors which may overlap: *Singh v R* [2018] NSWCCA 60;

(7) The utilitarian value of a plea of guilty is an objective factor to be considered and preferably quantified (*Xiao* at [280]; *Huang v R* [2018] NSWCCA 70; (2018) 332 FLR 158 at [9], [49], [55]), with the subjective side involving demonstration of contrition to be an unquantified factor assisting the offender on sentence as part of the process of instinctive synthesis, but with the sentencing court guarding against double counting of these aspects in a manner favourable to the offender.

46 In *Waters v R* [2025] NSWCCA 226, Adamson JA (with Ward P and RA Hulme AJ agreeing) at [46]-[57] reviewed the authorities relevant to Commonwealth sentencing and taking into account a guilty plea and applying s 16A(2)(g).

47 It is clear from these passages that the strength of the Crown's case is not relevant to the assessment of the utilitarian value of the plea of guilty. Reference was also made in the applicant's written submissions to *DPP (Cth) v Thomas* [2016] VSCA 237; (2016) 53 VR 546 where the Court said at [5]:

> …[T]he strength of the prosecution case has no bearing upon the discount to be allowed for the utilitarian benefit of the plea but it may be more fully

> reflected in the discount to be allowed for the willingness to facilitate the course of justice.

The Crown Concedes Error

48 Counsel for the applicant referred to the paragraph of the ROS I have set out at [37] above. Counsel submitted that the reference made by the sentencing judge to the plea of guilty being entered by the applicant in the face of a powerful Crown case was in error. It plainly was.

49 Counsel also submitted that when considering the utilitarian value of the plea, his Honour's rejection of the applicant's explanation that he inadvertently accessed the material and found it disgusting was also not relevant to the quantification of any discount under s 16A(2)(g). I agree.

50 As I have stated, the Crown has conceded that the sentencing judge erred in the manner in which he arrived at the discount to be afforded to the applicant by way of his guilty plea. The Crown concedes, correctly, that the sentencing judge took into account the subjective value of the applicant's guilty plea when assessing the discount to his sentence for the utilitarian value of the plea.

51 The Crown accepts that his Honour did this by taking into account both the strength of the Crown's case and the subjective value of the applicant's plea when rejecting the explanation of inadvertent access to the material.

52 The Crown points out that whilst the subjective value of the applicant's plea, including his contrition and acceptance of responsibility, cannot be taken into account in assessing its utilitarian value, such matters may be taken into account as part of the instinctive synthesis of the sentencing exercise (see *Bae* at [57]).

53 Error having been established, it is necessary to exercise the sentencing discretion afresh. If, following that resentence, the Court is satisfied that a lesser sentence than that imposed is warranted, then the appeal should be allowed: *Criminal Appeal Act 1912* (NSW) s 6(3)*; Kentwell v R* (2014) 252 CLR 601; [2014] HCA 37; *Hudson v R* [2025] NSWCCA 194 per Chen J (with Adamson JA and Coleman J agreeing) at [70].

Resentence

54 Sentencing for Commonwealth matters is governed by Part IB of the *Crimes Act.* In determining the sentence to be passed, the Court must impose a sentence that is of a severity appropriate in all of the circumstances. As observed, s 16A(2) provides the factors as relevant and known that must be taken into account.

55 There is no challenge by the applicant to any of the findings by the sentencing judge with respect to his offending. I have detailed those findings above. I will only repeat these findings again with respect to the s 16A(2) factors when necessary. I otherwise adopt the findings of the sentencing judge as to those factors.

56 I do note that the applicant does not challenge the sentencing judge's finding that he intentionally accessed the material for his sexual gratification. That finding followed his Honour's rejection of the applicant's explanation given to the author of the SAR and to a psychologist, that he inadvertently accessed the material which he found disgusting. His Honour declined to find that the applicant was contrite or had shown remorse.

57 As to the objective seriousness of the offending, His Honour considered that the offending was just below the mid-range (ROS, p 24). Again, this is not challenged. Nor is the determination by the sentencing judge that no other sentence other than one of imprisonment is appropriate (*Crimes Act,* s 17A(1)).

58 The principal issue on resentence is the impact of the early guilty plea entered by the applicant on resentence (s 16A(2)(g)). As the passages extracted above state, the timing of the plea will ordinarily determine the significance of the discount. The earlier the entry of the plea, the more significant the discount.

59 Unlike the statutory prescriptions in s 25D of the *Crimes (Sentencing Procedure) Act 1999* (NSW) for sentencing discounts in State matters, it is accepted that there is no specified norm or starting point for discounts for early pleas in Commonwealth matters.

60 The sentencing judge noted that the applicant pleaded guilty on 15 November 2024 in the Local Court. In the passage set out at [37] above, the sentencing

judge then (impermissibly) considered the subjective factors I have referred to. His Honour concluded that, in the circumstances, a reduction in sentence of 20% was appropriate.

61 At the sentencing hearing, the Crown conceded in its written submissions that the applicant's plea had been made at the first reasonable opportunity. There was no specified discount suggested by the Crown accompanying this concession. No submissions were made in writing or orally by the applicant's counsel at the sentencing hearing as to the timing of the plea or the amount of the discount that should be applied. There was no specific finding by the sentencing judge as to the timing of the plea other than that referred to in [60] above.

62 On appeal, the Crown sought to resile from the written concession that the applicant's plea was entered at the first reasonable opportunity. It was submitted that his Honour's findings in the ROS ([37] above) as to the timing of the plea were unclear and ambiguous. It was submitted that there is no express finding as to whether the plea was entered at the earliest opportunity.

63 It was submitted by the Crown that the earliest reasonable opportunity for the applicant to have entered a plea would have been on certification of the charges on 2 July 2024. This submission was made by reference to a chronology of events set out in the Crown's written submissions on appeal (see [27] CWS).

64 Whilst there was no specific finding by the sentencing judge as to whether the plea was made at the first reasonable opportunity, the Crown accepted that it was in its written submissions. The Crown must have had good reason to make the concession. It may well be the case that counsel for the applicant below did not make any submissions as to the timing of the plea because of this concession by the Crown. It can be readily inferred that the sentencing judge was proceeding to make his findings on the appropriate discount taking into account the Crown's written submissions, including as to the timing of the plea.

65 It is necessary to consider whether the Crown can resile from this concession. In *Zreika v R* [2012] NSWCCA 44; (2012) 223 A Crim R 460 (*Zreika*), whilst discussing whether an applicant's counsel could take a point on appeal not

taken before, Johnson J at [80]-[82] (with whom McClellan CJ in CL and Rothman J agreed) said:

> [80] There is a practical expectation that an offender's legal representative will make submissions to the sentencing Judge at first instance, by reference to the particular factors which are sought to be taken into account in mitigation of sentence in the case at hand: *Edwards v R* [2009] NSWCCA 199 at [11]; *Dyer v R* [2011] NSWCCA 185 at [49]...
>
> [81] The Victorian Court of Appeal has emphasised recently, that in sentencing appeals, the Court is reviewing the exercise of a discretionary judgment and not rehearing a plea of mitigation. It is not the occasion for the revision and reformulation of the case presented below. *The Court will not lightly entertain arguments that could have been put, but were not advanced on the plea, and will have an even greater reluctance to entertain arguments that seek to resile from concessions made below or are a contradiction of submissions previously made. The Court spoke of the need for exceptional circumstances before this can be done, where it can be shown that there was most compelling material available on the plea that was not used or understood, and which demonstrates that there has been a miscarriage of justice arising from the plea and sentence*: *Romero v R* [2011] VSCA 45 at [11]; *Keane v R* [2011] VSCA 156 at [13],[18]; *Bayram v R* [2012] VSCA 6 at [28]-[29].
>
> [82] In rare circumstances, a factor which may operate in mitigation of penalty (and which appears clearly from the material before the sentencing Judge) may have been overlooked by defence counsel and the sentencing Judge. In such a case, this Court may be invited to have regard to it, often in circumstances where the Crown will accept that the relevant material raised a factor which should unequivocally operate in the offender's favour on sentence. As Warren CJ said in *Bayram v R* at [29], it may "render a serious injustice" if an offender was not able to correct the error in such a case. This approach reflects the primacy of the rule that appeal grounds should relate to arguments put, and decisions made, at first instance. At the same time, criminal appellate courts should be able to correct a miscarriage of justice, or serious injustice, in the clear and rare cases where the relevant matter has not been relied upon at first instance. (Emphasis added.)

66 I do not see any reason in principle why the Crown should be in any different position in this regard to an applicant's counsel. Whilst in *Zreika,* the ground of appeal related to whether on appeal the applicant could argue a point not taken at first instance, it can be seen from the passage extracted that a party ought not, without good reason, be able to resile from concessions previously made, or which contradict submissions previously made. There are sound reasons for such an approach. It prevents a party, including the Crown, from thereby recasting their arguments on appeal to that previously made. To allow parties to conduct appeals in this manner, without cause, would involve a departure from the usual rule that grounds of appeal should relate to arguments put, and decisions made at first instance. In sentence appeals, this Court is reviewing

the exercise of the discretionary sentencing judgment, not rehearing an applicant's plea in mitigation or the Crown's opposition to it.

67 It is also a matter of fairness. If the Crown had not made the concession at the sentence hearing, the approach of the applicant's counsel may have been different. Additional submissions may have been made or evidence led. The sentencing judge may have started from a different discount point. To allow the Crown to change its course now would be unfair to the applicant.

68 What constitutes good reason, and whether the circumstances need be exceptional for a party to be able to resile from an earlier position, need not be determined here. It may vary from case to case. If it is necessary to allow a party to adopt a different position on appeal to that on sentence so that this Court can correct a miscarriage of justice or serious injustice, then that should be done. That is not this case. No explanation was offered as to why the Crown now seeks to take a different position to that at the sentence hearing.

69 I would not allow the Crown to resile from its acceptance at the sentence hearing that the plea of guilty was entered at the first reasonable opportunity. In saying that, I accept that in Commonwealth matters there is no norm or specified starting point with a discount to be applied to reflect the utilitarian value of a guilty plea. However, it is clear from the authorities that the earlier the plea, the greater the utilitarian discount that should be applied.

70 In any event, I do not accept that on the material before this Court, the Crown has established that the earliest opportunity for the applicant to enter a plea was 2 July 2024. The significance of that date is that was the date on which the charges were certified. However, at that time the applicant had not received the Crown Case Statement. It is clear once that was served and the case conference occurred, there were negotiations which led to the applicant sending the Crown an amended Crown Case Statement as a proposed Agreed Statement of Facts on 16 October 2023. The Crown agreed to those amendments the next day. On 18 October 2024, the committal mention was adjourned for the applicant to sign the case conference certificate and Agreed Statement of Facts. The signed Agreed Statement of Facts was sent by the applicant to the Crown on 12 November 2024. He signed the case conference

certificate on 14 November 2024, and the same day he entered the guilty plea, and the matter was committed for sentence.

71 It is unsurprising in light of this chronology, extracted from [27] of the CWS, that the Crown in the sentence hearing previously conceded that the plea was entered at the first reasonable opportunity. The plea immediately followed amendments by the Crown of the case to be met by the applicant and a negotiation of agreed facts. Whilst those things were happening and until they were finalised in November 2024, the chronology provided by the Crown does not show any court dates at which the plea could have been entered.

72 There was also some debate at the hearing of the appeal as to whether, even if the plea was entered at the first reasonable opportunity, any discount over and above that ordered by the sentencing judge of 20% should be afforded to the applicant. The Crown submitted that it was unclear from the relevant paragraph in the ROS (see [37] above) that his Honour had viewed a figure higher than 20% as a starting point and then reduced that figure because he (impermissibly) took into account, adversely to the applicant, the strength of the Crown's case and his rejection of the inadvertent access submission (see Tcpt, 18 February 2026, 6(35)-7(50)).

73 I do not see how else the paragraph from the ROS can be read other than his Honour having reached 20% as a discount after taking into account the two impermissible factors adversely to the applicant. That is, because of those two factors, he reduced the discount he otherwise would have given.

74 Whilst there is no norm or starting point for a discount for an early guilty plea in Commonwealth matters, when dealing with the discount to be applied to the sentence on such matters, the language of "at the earliest opportunity" or "first reasonable opportunity" commonly results in a 25% discount. In the circumstances of this case, having formed the view that the plea was entered at the first reasonable opportunity, I assess the utilitarian value of the plea to be 25%.

75 As to other sentencing considerations, the sentencing judge concluded that the applicant's risk of re-offending is low. He correctly noted the importance of general deterrence for such offending.

76 In terms of the applicant's character, antecedents, and age, it is noted that the applicant does not have a criminal record, although, as the sentencing judge found, good character is given less weight in the context of such offending. He was 40 years of age at the time of the offending.

77 There is no challenge to the sentencing judge's rejection of a material connection between any mental health condition of the applicant and his offending (*De La Rosa*). It was accepted, however, that the applicant was a "trouble[d] person" suffering from depression and anxiety, and this should be taken into account.

78 On appeal, the applicant read, on the usual basis, an affidavit he affirmed on 30 January 2026. He was not cross-examined. The applicant talks of the difficulties he has experienced with family visits since he has been in custody. He is visited by his wife, parents and siblings and their partners, but not his children who, he says, he does not want to expose to the prison environment. The applicant has AVL calls with his wife and children. There is some hardship to his family occasioned by his imprisonment, although it is moderate in the overall scheme of things.

79 The applicant has plans for re-engaging with his employer on release, and is currently remaining on long leave with them. He will move back to the family home, and has said he will continue to see his psychologist regularly.

80 Whilst he has been in custody, the applicant says he has not completed any courses as none relevant to his situation were offered. He has no disciplinary matters in custody and has been working in the timber yard four days per week.

81 As assessed by the sentencing judge – a finding not challenged – the applicant's prospects of rehabilitation are poor. This is primarily because of his denial of sexual interest in children. It is necessary to consider s 16A(2AAA) of the *Crimes Act*, which requires the Court to have regard to the objective of rehabilitating the applicant, including considering if it is appropriate that rehabilitation or treatment conditions be imposed as part of the sentence. I accept the Crown's submission that the affidavit of the applicant does not contain anything from which it could be found that he accepts he has a sexual

interest in children. Whilst the applicant says he will continue with treatment from the psychologist, until he accepts he does have such an interest and undertakes appropriate treatment for it, I consider his prospects of rehabilitation as guarded.

82 I see no reason to interfere with the sentencing judge's imposition of the condition of the recognizance release order that the applicant engage in whatever treatment Community Corrections directs.

83 There is no challenge to the finding that no other sentence other than one of imprisonment is appropriate. That is understandable. Offending of this kind must be met with significant punishment. Child-abuse material is not a victimless crime. General deterrence is a significant consideration for offending of this kind. I also observe that there is nothing in the materials which would reduce the applicant's moral culpability.

84 The Crown submits that the appeal should be dismissed because no lesser sentence is warranted. The basis of that submission was that 20% was the appropriate discount to reflect the utilitarian value of the plea. I have found the appropriate discount is 25%.

85 I have come to the conclusion that, in the exercise of the sentencing discretion afresh, the undiscounted starting point imposed by the sentencing judge of two years and six months imprisonment is a sentence of a severity appropriate for the offending. I would impose the same sentence.

86 With the 25% discount, this gives a head term of 1 year, 10 months and 15 days. I would propose the applicant be released on a recognizance release order after serving a period of 10 months imprisonment, by entering into a recognizance, without security, in the sum of $1 with the same conditions as imposed by the sentencing judge, as mentioned in [4] above.

87 The sentence commenced on 22 August 2025 and the head term will expire on 6 July 2027. Having entered custody on 22 August 2025, the applicant should be released on the recognizance release order on 21 June 2026.

ORDERS

88 For the above reasons, the orders I would propose are:

(1) Grant leave to appeal;

(2) Allow the appeal;

(3) Quash the sentence imposed in the District Court on 22 August 2025 and in lieu thereof sentence the applicant to a term of imprisonment of 1 year, 10 months and 15 days, commencing 22 August 2025 and expiring on 6 July 2027; and

(4) The applicant is to be released after having served 10 months imprisonment, namely on 21 June 2026, on entering into a recognizance, without security, in the sum of $1 on the following conditions:

    (a) the applicant must accept supervision by Community Corrections and obey all directions;

    (b) the applicant is to contact Community Corrections within seven days of release, initially by telephone;

    (c) the applicant must engage in whatever rehabilitation and treatment is directed by Community Corrections; and

    (d) the applicant must be of good behaviour for a period of two years from 22 August 2025 to 21 August 2027.

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