No: 2004/0356/B3

Neutral Citation Number: [2004] EWCA Crim 2211
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2

Friday, 30 July 2004

B E F O R E:
LORD JUSTICE LATHAM
MR JUSTICE ASTILL
SIR CHARLES MANTELL

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R E G I N A

-v-

ARTHUR ALAN MURRAY

- - - - - -

Computer Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

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MR D CLARK appeared on behalf of the APPELLANT
MR J ATTWOOD appeared on behalf of the CROWN

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J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE LATHAM: On 16th December 2003 in the Crown Court at Birmingham, before His Honour Judge Alan Taylor, this appellant was convicted of possessing an indecent photograph, namely a video of a child, and was sentenced to three months' imprisonment. He appeals against conviction with leave of the single judge.

2. The circumstances are somewhat unusual in that the video in question was one which was seized from the appellant on 9th May 2003 and consisted essentially of two parts. The first part of the video was of a television programme showing scenes of a doctor examining the genitalia of a naked boy who suffered from a genital defect; and that programme had a commentary which explained what the doctor was doing. The next part of the video consisted of some of the previous pictures, minus the commentary, slowed down and in particular showed manipulation by the doctor of the penis. That recording focused clearly on the penis and its manipulation. It was in those circumstances that the prosecution brought the charge under section 160 of the Criminal Justice Act 1988.

3. There was argument before the judge on the basis that the part of the video which the prosecution said was indecent could not be indecent because it (that is the prosecution) had accepted that the original programme including the commentary was not indecent. Accordingly, it was submitted, that which had been abstracted from what was not indecent could not itself be indecent and that all that had happened was that abstracted from that video had been parts of the video which could have been watched separately by slowing down or otherwise controlling the video.

4. The judge held that by altering the original video, that is by removing the commentary, and by slowing down and focusing on the particular part where the penis was being manipulated, that video contained a part which could be separated from that which had been accepted by the prosecution not to be indecent and which the jury could, if it thought right, find to be indecent. He directed the jury in the following terms:

> "What is said here is that by altering the video recording with the use of a second video recorder, the person concerned must have, by separating off particular images, or slowing down the sequence - that kind of thing - transformed that which was not indecent into an indecent article. The defence say that is not an accurate, satisfactory or valid argument. If it was not indecent originally, how can it be made indecent by simply highlighting it in the mind of the person who is making the recording in that way? It is rather like looking at a particular part of a programme again and again and again. As I say, motive is not for you to consider. It is simply: is it (<u>is</u> it) indecent? So the circumstances in which it came to be taken as you see it are not relevant. You simply have to apply recognised standards of propriety. That is the law."

5. Before us Mr Clark on behalf of the appellant has submitted that that direction was wrong in law and he repeated the submissions which had been made to the trial judge. In other words, he submitted that that which was merely a replication of that which was not indecent could not itself be indecent.

6. We disagree. The fact is that, as the judge indicated to the jury, what the jury was being asked to look at was quite a separate set of images to the images which were those which constituted the programme; and it was entitled to look at those images independently from the programme and to determine whether, objectively speaking, they were indecent, applying what they considered to be recognised standards of propriety. We consider that the judge accurately directed the jury both in identifying the fact that there were separate images which

they were entitled to consider and as to their approach to the question of whether the images were indecent. As this court said in R v Smethurst [2002] 1 Cr.App.R 6 at paragraph 21, the question is whether or not what is seen either in the video or the photograph is indecent, objectively assessed; and that was the clear effect of the judge's direction. Accordingly there is, in our judgment, no basis upon which the passage in the summing-up could be criticised.

7. Mr Clark has added a further submission which is that this court, when giving guidance as to sentence in cases such as this, in Oliver, Hartrey and Baldwin [2003] 1 Cr.App.R 28, did not suggest that within the category of material which could be described as pornographic material involving children, there is one which constitutes an abstraction from material which is otherwise decent. Ingenious though that argument is, a case dealing with sentencing guidelines cannot affect the meaning of the statutory provision setting out the ingredients of the offence. Accordingly, we dismiss his appeal.