Regina v D B

No: 201504500/C2

Court of Appeal Criminal Division

3 March 2016

[2016] EWCA Crim 474

(possible incorrect citation)

Judgment

Lord Justice McCombe:

1 On 26th August 2015 in the Crown Court at Harrow, after a trial before His Honour Judge Barklem and a jury, the appellant was convicted of possessing three extreme pornographic images in fact found on his mobile phone (counts 1 to 3 inclusive), contrary to section 63(1) of the Criminal Justice and Immigration Act 2008 . He was conditionally discharged in respect of those offences for a period of 12 months and was ordered to pay £700 costs. He was acquitted of a further three charges of the same offence in respect of the same images found on his laptop computer.

2 He advances through counsel, Mr Christopher QC and Mr Kesselman, (who appears with him this morning) two grounds of appeal against conviction and has been granted leave to appeal on the second of those grounds by the single judge who however refused leave on the first ground. Mr Christopher renews his application for leave to appeal on the first ground.

3 The charges all concerned the same three images involving, as set out in the indictment, a person performing an act of intercourse or oral sex with an animal, each having been received onto the appellant's telephone and laptop computer respectively in circumstances which we will shortly set out.

4 The images were found when in July 2014 the appellant was being investigated for an entirely different matter in respect of which he was exonerated without any charge being brought. However, in the course of that investigation his telephone and computer were routinely examined and the images in question were by chance discovered. He was arrested on suspicion of possession of extreme images but was not immediately interviewed about that matter pending further expert examination of the devices in question. However, there was a short exchange, during the interviews relating to the separate investigation, in which the images were raised and the appellant said this:

> "…some of my friends do send me the most atrocious pictures and videos. It doesn't impress me some of it. I'm on there for the funny ones but some of it I just never just deleted. It's not something I ever go and download or look at myself … it's what's sent to the group."

5 When the appellant was interviewed at a subsequent time in respect of the three images he was advised by his solicitor not to answer questions and did not do so. The circumstances relating to how the images got onto the devices were not significantly in dispute and are recited in the perfected grounds of appeal against conviction.

6 The facts were essentially as follows. As far as the iPhone was concerned, the images had been sent to the phone on 2nd December 2013 at about 9.30 in the evening, in a series of "WhatsApp" messages, one message per image, by someone known as "Nochum Pc" to a group of people, of whom the appellant was one, along with an image of a horse's member which immediately preceded them. These images were amongst a great many "WhatsApp" messages found on the phone which had been sent over a period of 9 months and covering some 19400 pages of download. The default setting for the "WhatsApp" application involved images being automatically stored on the iPhone's camera roll when messages were opened. The meta data showed that the messages had been opened, however this did not mean, of itself, that the images had been seen by the user of the phone, since all the messages in the conservation on "WhatsApp" will be opened at once without necessarily the user scrolling down to view each message contained in the thread. The images had in the end been deleted. There was no evidence on the phone as to when the messages had been opened or when they had been deleted. The WhatsApps messages were not in response to a request for them and there was no response to them sent by the appellant or onward transmission of the messages by him.

7 So far as the laptop was concerned, the images on the computer were created on 29th December 2013 and they were found in a folder with a characteristic series of identifying names. The files on the computer were created at the same time as hundreds of others in the same folder and had not been accessed since creation. The camera upload feature of Drop Box allows a user to upload their pictures and videos automatically to their computer. There is no evidence of any of the contents of the camera uploads folder ever having been accessed by the user. This is all to do with the computer.

8 There was no evidence from the examination of the computer (including its Internet usage) of any user related actions in relation to accessing, obtaining or distributing of extreme pornography and their presence was not in character with what the users of the computer appeared to be interested in. On the contrary, the forensic examiner concluded they appeared to be part of a collection of

assumed humorous content.

9 It was accepted that the jury could draw inferences that the appellant had seen the images on his phone because this would have been necessary, if nothing else, in order to delete them and the deletion must have taken place on 29th December 2013, otherwise they would not have been transferred onto the computer on that date. The images had of course arrived on the phone originally on 2nd December 2013.

10 It will be understood, as no doubt reflected by the conditional discharge imposed by the learned judge, that the appellant's viewing of these images on these facts may well have been taken by the judge to have been short. However, the issue for us is whether these convictions on counts 1 to 3 on this indictment are unsafe on either or both of the two grounds on his behalf. We will address first the ground of appeal for which the appellant has leave to appeal, namely ground 2 which is essentially a point of construction of section 63 of the 2008 Act.

11 In this respect Mr Christopher argues that for the purposes of that section images are only pornographic if they were such that they must reasonably be assumed to have been produced solely or principally for the purposes of sexual arousal. That is essentially no more than a recital of section 63(3) . However Mr Christopher goes on to say that the learned judge wrongly rejected a submission on his part that the relevant purpose had to be that of the person who sent the image to the appellant rather than that of the photographer or photographers who took the original images.

12 In its relevant parts section 63 of the Act provides as follows:

> (1) It is an offence for a person to be in possession of an extreme pornographic image.
>
> (2) An 'extreme pornographic image' is an image which is both–
>
> (a) pornographic, and.
>
> (b) an extreme image.
>
> (3) An image is 'pornographic' if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.
>
> (4) Where (as found in the person's possession) an image forms part of a series of images, the question whether the image is of such a nature as is mentioned in subsection (3) is to be determined by reference to–

(a) the image itself, and.

(b) (if the series of images is such as to be capable of providing a context for the image) the context in which it occurs in the series of images. (5) So, for example, where–

(a) an image forms an integral part of a narrative constituted by a series of images, and.

(b) having regard to those images as a whole, they are not of such a nature that they must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.

the image may, by virtue of being part of that narrative, be found not to be pornographic, even though it might have been found to be pornographic if taken by itself.

(5A) In relation to possession of an image in England and Wales, an 'extreme image' is an image which—

(a) falls within subsection (7) or (7A), and.

(b) is grossly offensive, disgusting or otherwise of an obscene character.

(6) [Northern Ireland.]

(7) An image falls within this subsection if it portrays, in an explicit and realistic way, any of the following–

(a) an act which threatens a person's life.

(b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals.

(c) an act which involves sexual interference with a human corpse, or.

(d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive).

and a reasonable person looking at the image would think that any such person or animal was real.

(7A) An image falls within this subsection if it portrays, in an explicit and realistic way, either of the following—

(a) an act which involves the non-consensual penetration of a person's vagina, anus or mouth by another with the other person's penis, or.

(b) an act which involves the non-consensual sexual penetration of a person's vagina or anus by another with a part of the other person's body or anything else.

and a reasonable person looking at the image would think that the persons were real.

(7B) For the purposes of subsection (7A)—

(a) penetration is a continuing act from entry to withdrawal.

(b) 'vagina' includes vulva.

(8) In this section 'image' means–

(a) a moving or still image (produced by any means); or.

(b) data (stored by any means) which is capable of conversion into an image within paragraph (a).

(9) In this section references to a part of the body include references to

a part surgically constructed (in particular through gender reassignment surgery.)

(10) Proceedings for an offence under this section may not be instituted–

(a) in England and Wales, except by or with the consent of the Director of Public Prosecutions; or (b) [Northern Ireland]."

(1) Where a person is charged with an offence under section 63, it is a defence for the person to prove any of the matters mentioned in subsection (2).

(2) The matters are–

(a) that the person had a legitimate reason for being in possession of the image concerned;

(b) that the person had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image;

(c) that the person–

(i) was sent the image concerned without any prior request having been made by or on behalf of the person, and.

(ii) did not keep it for an unreasonable time.

(3) In this section 'extreme pornographic image' and 'image' have the same meanings as in section 63."

13 Amplifying his submission on the construction of the Act Mr Christopher says this. First, that the images were images by virtue of subsection 63(8)(b) ie they were data capable of conversion into an image, that data on the phone was produced by the sender. Secondly, subsection 63(4) requires consideration of the series of the images as found in the person's possession. The form in which they are found may well have been produced subsequent to and by a different person from the original producer of the individual images. Thirdly, a series of images may be found not to have been produced solely or principally for the purposes of

sexual arousal even though individually images within the series may have been so produced, as demonstrated by the example given in subsection 63(5) Act. This, he submits, can only be the case if the person whose purpose is being considered is the producer of the series not the producer of the individual images that may be contained within that series. Finally, in this case the producer of the images of which these three form part was the sender, ie the person identified as Nochum Pc and not the original taker of the images.

14 With respect to these helpful and interesting submissions to Mr Christopher we cannot follow them as being correct. The important subsections for present purposes are subsection 63(2) and subsection (3) of the Act which provides as follows. We recite this once more for immediate understanding of how we view this matter. Subsection (2) :

> "(2) An 'extreme pornographic image' is an image which is both–
>
> (a) pornographic, and
>
> (b) an extreme image
>
> (3) An image is 'pornographic' if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal."

15 To our minds these are very simple provisions. Subsection (3) asks what is reasonably to be assumed that the purpose of the production of the image was: was it solely or principally for the purpose of sexual arousal. In other words, in our judgment, it means simply was it produced (and by whom is utterly immaterial) for the purpose of sexual arousal of anyone who comes to have it, be that the producer himself, a distributor or ultimate recipient. The section is obviously designed to prevent the possession of such images by whomsoever that may be. For that purpose the section has to define the images. It does so in subsections (2) in subsection (3) . That is all that the subsections do. These definition provisions are only telling us what images it is an offence to possess; they are not there to draw subtle distinctions between photographer, sender and an any ultimate recipient of images. The circumstances in which the images are received are immaterial. The purpose of the subsections is to tell us what type of images are pornographic. Later submission (5A) defines what is an extreme image for these purposes. There is no more to it than that.

16 With respect to Mr Christopher we do not consider that his arguments based on section 63(4), (5) and (8)(b) take the matter any further. We agree that

section 63(4) and (5) cater for an image or images that may be included in the series, which series, taken as a whole, may well not be of a nature to be assumed be produced for the purpose of sexual arousal. Clearly such a series may have been created by anyone other than the creator of the individual image or images in issue but that says nothing as to the purpose of the production of the images or the series as a whole. The word "pornographic", in our judgment, deals with the assumed purpose of the image and the identity or purpose of the producer is irrelevant. The important point is the inference to be drawn as to the purpose of production from the image whoever may have been the producer of it. Section 63(8) does no more than define what is meant by the word "image". It does nothing to suggest that the identity of the photographer, distributor or recipient is a relevant consideration for the purposes of the rest of the section.

17 Accordingly, with respect to Mr Christopher's interesting argument we reject ground 2 of the grounds of appeal and we turn to ground 1 which is the subject of the renewed application for leave.

18 Under this head Mr Christopher's argument is put this way. Given the appellant's acquittal on counts 4 to 6, that is the computer counts, it followed his evidence that he had not known of the transfer of the images to his computer was accepted by the jury. In these circumstances, he submits, there was no basis for an inference that he purposefully only deleted the images once he had stored them on his computer. Rejecting his account in relation to the iPhone could not make up for the lack of the evidence as to when the appellant saw and deleted the images and assessing whether the length of time between those events was unreasonable. He submits there is a danger that the convictions on counts 1 to 3 stem from the jury's disgust rather from any logical assessment of the evidence. There were also differing majorities in the case of counts 1 on both counts 1 and 2 and 3 but there would be no suggestion there was any material difference in the issues relating to those counts.

19 Mr Christopher, in his oral argument this morning, accepted that the verdicts on counts 1 to 3 were not logically inconsistent with the acquittals on counts 3 to 6 but he submitted that the convictions were evidentially inconsistent because the only evidence of the images being kept could be on the basis of a finding adverse to the appellant in relation to the computer. Such a finding the jury did not make.

20 In our judgment, however, we find ourselves in agreement with Mr Cranston-Morris' argument for the Crown and with the single judge's view of the application. The Single Judge adopted what Mr Cranston-Morris had argued in paragraph 2(3) of the respondent's notice and we find ourselves being unable to do better than what Mr Cranston-Morris said in that paragraph and we quote:

> "There is no proper basis for the applicant to assert that having acquitted the applicant on counts 4 to 6 (the computer) the convictions regarding to the iPhone were inconsistent. The circumstances under which the

> offending items came to be on the iPhone and the computer were different, the applicant's accounts as to what he knew of the presence of the relevant material on the phone and the computer were different. The applicant's evidence as to what he did in relation to the images on the phone and and the computer were different. The defence in relation to the presence of the images on each device was different. The fact that the items came to be on the phone on the 2nd December 2013 but were not transferred over to the computer from that same phone until at least 29th December 2013 … allowed the jury to make a logical distinction between the applicant's responsibility for the possession of the relevant images on each device."

It seems to us that essentially the question on counts 1 to 3 were essentially jury questions which they were entitled to reach on evidence that was different on those counts compared to the evidence on counts 3 to 6.

21 Accordingly, we find that this ground of appeal has also to be rejected. Therefore, for the reasons we have endeavoured to state we dismiss the appeal and refuse the renewed application.