

Neutral Citation: [2019] EWCA Crim 698
No. 2018/02162/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 28th March 2019

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(The Lord Burnett of Maldon)

MR JUSTICE SPENCER

and

SIR BRIAN KEITH

R E G I N A

- v -

NICHOLAS BLEXMANN

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Mr A N Bajwa QC appeared on behalf of the Appellant

Mr T Devlin appeared on behalf of the Crown

J U D G M E N T
(Approved)

Thursday 28th March 2019

THE LORD CHIEF JUSTICE:

Introduction

1. This is an appeal against sentence brought with the leave of the single judge.
2. On 4th January 2018, following a three day trial in the Crown Court at Kingston upon Thames, the appellant, who is 37 years old, was convicted of three counts of making indecent photographs of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978. The three counts on the indictment covered the three different categories of images ranked by seriousness which underpins sentencing in this area.
3. Following the conviction, the Recorder proceeded immediately to sentence. He imposed a sentence of five years' imprisonment for making 1,107 images in category A, of which 96 were moving images (count 1); a concurrent term of three years' imprisonment for making 1,465 images in category B, of which fourteen were moving (count 2); and a concurrent term of two years' imprisonment for making 8,393 images in category 3, of which seven were moving (count 3). Category A images involve penetrative sexual activity; category B images involve other sexual activity; and category C images are otherwise indecent images. He made an indefinite Sexual Harm Prevention Order. The Recorder imposed those sentences by reference to the Sexual Offences Definitive Guideline issued by the Sentencing Council on the basis that this was a case which fell to be sentenced as "production" of indecent photographs of children. He did so at the invitation of prosecuting counsel, who was not contradicted by counsel who then appeared for the appellant.
4. The guideline covers possession of indecent images, the distribution of such images and

the production of such images, with the sentences escalating appropriately through that hierarchy.

5. The 1978 Act was passed long before the advent of the internet. Section 1(1)(a) criminalises the making of indecent photographs of children. It includes the simple downloading of images from the internet on to a computer. But it also covers the much more serious creation or production of images. Section 1(1)(b) of the 1978 Act criminalises the distribution of indecent photographs of children. Section 1(1)(c) criminalises the possession of such photographs with a view to distributing them.

6. On its face the guideline says:

"Making an image by simple downloading should be treated as possession for the purposes of sentencing."

7. Prosecuting counsel, with his customary candour, accepts that he was in error in suggesting that this was a case of production. He was perhaps over-generous before us in suggesting that the error was entirely his. In fact, it was a common error made by all those in court. It is regrettable that, the mistake having been made, neither the Recorder nor counsel then representing the appellant appear to have looked sufficiently closely at the guideline, despite its being referred to in court and the correct page having been identified to, to avoid falling into error.

8. Be that as it may, on 15th January 2018, prosecuting counsel realised the error that had been made and sent an email to the Recorder via the Crown Court office. He explained that he had been in a similar case subsequently, where the judge had applied the guideline correctly to the

downloading of indecent photographs of a child. Prosecuting counsel continued:

"In the case of Blexmann there was evidence that [the appellant] had used file-sharing software called Emule, and that a number of files had been uploaded from [the appellant's] computer. He was therefore to be sentenced for 'distribution' rather than 'production'.

That being the case, you might like to reconsider the sentence given during the period permitted by the slip rule. It looks as if the correct tariff should have been

Count 1 – three years

Count 2 – one year

Count 3 – thirteen weeks' custody."

That email was not copied to the appellant's representatives but, a few minutes after it was sent to the court office, prosecuting counsel forwarded it to counsel for the defence.

9. On 19th January 2018, the Recorder to whom the email had been provided by the Crown Court office replied in the following terms:

"Please alter the sentence under the slip rule as follows:

Count 1 – three years

Count 2 – one year concurrent

Count 3 – thirteen weeks concurrent.

Please ensure that not only are the court file and all necessary records amended, but please make sure that a copy of this entire email string is sent to [all representatives] to avoid them filing an appeal which now will not be needed."

10. As is apparent, the Recorder simply accepted the suggested sentences from prosecuting counsel. It follows that he must have accepted that this was a case of distribution. He did not

seek submissions from the appellant's representatives. It does not appear to have occurred to the Recorder that the case should be listed for a re-hearing. The fundamentally different sentence was not passed in open court and no reasons for it were given, as is required by section 174 of the Criminal Justice Act 2003. In short, regrettably, the procedure adopted by the Recorder was irregular.

11. Defence counsel had in fact acknowledged the email forwarded to him by prosecuting counsel. He indicated that he had noticed the error made by the Recorder in sentencing, but does not appear to have appreciated that on behalf of the appellant he should have become involved in the operation of the slip rule.

The Grounds of Appeal

12. Mr Bajwa QC, who now appears for the appellant (but did not appear below), submits that the Recorder should have invited submissions from the appellant before exercising the slip rule. He submits that the Recorder should have obtained a pre-sentence report. We observe that a pre-appeal report has been obtained to assist our deliberations. He draws attention to the failure of the Recorder to give any reasons for the revised sentence. We would add that the wholesale revision of a sentence of this nature should have been dealt with in open court: see *R v Perkins* [2013] EWCA Crim 323.

13. On behalf of the appellant, Mr Bajwa has substantive grounds of appeal beyond the obvious procedural irregularities that occurred. First, he submits that this was not a case of distribution but was from beginning to end a case of possession. Secondly, he submits that by reference to the guideline, the starting point for the appellant should have been one year's imprisonment. He further submits that a reduction from that starting point was appropriate to reflect the mitigation available – in particular, the good character of the appellant and absence of previous convictions.

He draws our attention to the observation of the Recorder that there were no aggravating features in this case. We will return to that. Thirdly, he submits that the indefinite Sexual Harm Prevention Order made by the Recorder is wrong in principle or manifestly excessive; and that if the prison sentence is reduced, then the Sexual Harm Prevention Order should not extend beyond the relevant notification period under the statutory scheme. Moreover, he submits that there is a technical error in one of the prohibitions.

14. Before us, prosecuting counsel has candidly accepted that this was, in truth, a case of possession. In the course of the trial there was an admission that the appellant had software on his computer that could facilitate distribution. But there was never sufficient evidence to charge him with that. Counsel readily accepted that the only case which was capable of proof to the requisite standard was one of possession.

The Facts

15. On 1st March 2016, officers from the Metropolitan Police Paedophile Unit executed a search warrant at the appellant's home. A total of seven devices were seized. The images to which we have referred were found on two of them. On 17th February 2017 (almost a year later) the appellant was charged with the offences.

16. The period during which the images were downloaded extended from 1st October 2015 to the date on which the computers were seized.

17. The appellant's defence, which was rejected by the jury, was that he was not responsible for downloading the images in question.

18. Mr Bajwa's essential submission, which is no longer disputed, is that a defendant in criminal

proceedings cannot be sentenced for an offence of which he has not been convicted. It follows, he submits, that it was wrong to sentence the appellant for distributing indecent photographs because he was not charged with, or convicted of, distributing indecent photographs. Distribution of indecent photographs is a much more serious offence than possession of such photographs. He observes that the prosecution could have charged the appellant with distribution if there was any proper evidence to support such a charge.

19. The prosecution have not sought before us to contradict the arguments which we have just summarised and which are much more fully set out in the comprehensive written materials placed before us by Mr Bajwa on behalf of the appellant. We consider that the stand taken by the prosecution before us was correct. In short, we consider that this was always a case of possession for the purposes of the guideline.

20. The guideline, as we have indicated, suggests a starting point for possession of one year's custody. That said, we are unable to accept that this offending was not accompanied by aggravating features. The guideline contains a non-exhaustive list of aggravating features which include the age or vulnerability of the child depicted. The guideline makes clear that that feature should be given significant weight. The children in this case ranged between the ages of 2 and 7 years. The period over which the images were possessed – effectively downloaded – is a potential aggravating feature. Here it was six months. Moreover, the high volume of images possessed is also an aggravating feature, as is the fact that the collection of images includes moving images. We have set out the figures. It is fair to observe that the number of moving images, as compared with the totality, represented a small proportion, but, nonetheless, the number of moving images, particularly in category A, was not insignificant. A further aggravating feature is that the images depict a large number of different victims.

21. The principal mitigating factor in this case is the good character and absence of previous convictions of the appellant. Moreover, there was no further offending during the protracted time the legal process took to complete.

22. Having regard to all these factors, we consider that the appropriate sentence in this case is one of eighteen months' imprisonment. We quash the sentence on count 1 and substitute a sentence of eighteen months' imprisonment. We quash the sentence on count 2 and substitute a sentence of six months' imprisonment, to run concurrently. We leave the sentence on count 3 unaffected. The total sentence is, thus, one of eighteen months' imprisonment. The appellant has, in fact, been released from custody under a scheme that enables the removal from the United Kingdom of foreign nationals.

23. We turn briefly to the Sexual Harm Prevention Order. As a result of our approach to the overall sentence of imprisonment, the consequence is that the period during which the appellant is required to comply with the notification provisions found in the Sexual Offences Act 2003 is ten years. It is uncontroversial before us that the Sexual Harm Prevention Order should not extend beyond the period of notification. The order made by the Recorder was indefinite. In those circumstances, we will substitute a period of ten years.

24. In addition, Mr Bajwa raises a technical argument on the wording of the sixth prohibition in the order. That, too, has not been the subject of controversy before this court. The current wording of prohibition 6 is:

"Using any Apple manufactured device to access the internet unless he has made the device available to his PPU [Public Protection Unit] officer and the officer has adjusted the settings on the device to prevent future installation of prohibited software."

25. There are two amendments suggested on behalf of the appellant. The first is to change "he has made" to "he makes". That simply brings it into line with the wording of the prohibition relating to other equipment. But the more substantial complaint is that, as currently drafted, were the appellant to be back in the United Kingdom and in possession of an Apple device, he might make it available to his PPU officer who, for good or bad reason, might choose not to adjust the settings. In those circumstances the appellant would be prohibited from using his device. We accept the submission made on behalf of the appellant that that is not an appropriate restriction.

26. In those circumstances we quash prohibition 6 and substitute the following wording:

"Using any Apple manufactured device to access the internet unless he makes the device available to his PPU officer in order for the officer to adjust the settings on the device to prevent future installation of prohibited software."

27. Accordingly, and to the extent we have indicated, the appeal is allowed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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