2019/02666/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 5th September 2019
**NCN: [2019] EWCA Crim 1563**

B e f o r e:

LORD JUSTICE GROSS

MR JUSTICE STUART-SMITH

and

THE COMMON SERJEANT
(His Honour Judge Marks QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

---

**R E G I N A**

**- v -**

**ROBIN RAYMOND WARNES**

---

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)



*WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.*

---

**Mr R Butcher** appeared on behalf of the Appellant

---

**J U D G M E N T**
**(As Approved)**

Thursday 5th September 2019

**LORD JUSTICE GROSS:** I shall ask Mr Justice Stuart-Smith to give the judgment of the court.

**MR JUSTICE STUART-SMITH:**

1. On 27th June 2019, in the Crown Court at Ipswich before His Honour Judge Overbury, the appellant pleaded guilty on the morning of his trial to the offences we identify below and was sentenced as we now describe: on counts 1 to 4 of the indictment, making indecent photographs of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978, he was sentenced to sixteen months' imprisonment; and on count 5, making indecent photographs of a child, contrary to section 1(1)(a) of the 1978 Act, he was sentenced to sixteen months' imprisonment concurrent. Until the morning of the trial the court had constantly been told that the case would be contested and that experts should attend, and they did so. The appellant's defence statement for the court below made no admissions and required the prosecution to prove that he had knowingly accessed illegal material.

2. The appellant, who is 67 years of age, retired and of previous good character, now appeals against his sentence with the leave of the single judge.

3. Early on the morning of 26th April 2018, police executed a search warrant at the appellant's home address in Ipswich. That warrant had been obtained because police had received intelligence that the user of an internet connection associated with that address had been using it to download indecent images of children. The appellant, who was dressed in his pyjamas, opened the door and was told that he was under arrest. Officers allowed him to go upstairs to change. He was accompanied upstairs and, after taking some clothes from his bedroom into his study, he attempted to take his wallet with him. He was told to leave it. He got dressed and returned to his bedroom where he again tried to take his wallet, telling the police that he needed some medication from it. That was untrue. The officer explained to him that, because he was under arrest, he was not able to do so. He resisted handing over his wallet. The officer decided to have a look inside the wallet and found a small plastic case containing three memory cards. It subsequently transpired that each of those memory cards contained indecent images of children. Those images and those three cards formed the basis for counts 1 to 3.

4. In addition to the three memory cards the police took a number of other electronic devices, including a Toshiba laptop and an Acer desktop computer. In due course those devices were examined and found to contain prohibited images of children. It became apparent that the Acer desktop was the main device used by the appellant for obtaining and organising indecent images. The Acer desktop formed the basis of count 5. The Toshiba formed the basis of count 4.

5. Before examination of the computers, the appellant was interviewed under caution. He was asked a number of questions about his family and background, all of which he freely answered. When he was asked about his use of lawful pornography, he freely gave answers about his preferences. However, when he was asked to address something specific relating to the offences for which he was being investigated, he answered "No comment". For example, he was asked to address what was going to be found on the micro SD cards and whether he had seen indecent images of children on his computer; and when he was asked whether he had ever searched for indecent images of children, he also answered "No comment". He was told by officers that the devices would be looked at forensically and he was asked whether the police would find indecent images of children on them. Again, he answered "No comment".

6. The three cards had been formatted very recently, between 19th and 21st April. The first of the memory cards had been formatted five days before his arrest and their seizure. Images were then transferred from the Acer desktop to that memory card. Similarly, it appeared that the second card had been formatted and then images copied across and that some of those files had been accessed as recently as the day before his arrest. The third memory card had also recently been formatted and contained recent copies of indecent images.

7. Turning to count 5, from the Acer computer there was evidence of the appellant watching and downloading material. BitTorrent software had been used; it was the means by which most of that type of material was obtained. The appellant would make a selection as to what he wanted to keep, put it on a memory card and then, using secure forensic software, delete the remnants from his PC. However, his attempts to delete the material were not entirely successful.

8. He was interviewed again and again adopted a "No comment" approach when asked to comment on the indecent images found on his devices and how they came to be there.

9. The prosecution case was that this involved category A possession, as we shall detail in a moment. The number of images, as agreed on the morning of trial, were as follows: on count 1 (the first memory card), there were 33 category A, 3 category B and 20 category C images, making 56 images in total; on count 2 (the second memory card), there were 29 category A, 9 category B and 120 category C images, making 158 images in total; and on count 3 (the third memory card), there were 97 category A, 32 category B and 52 category C images, making 181 images in total. On the Toshiba laptop (the subject of count 4), there were 10 category A, 27 category B and 7 category C images, making 44 images in total. On the Acer desktop computer (the subject of count 5), there were 44 category A images, 30 category B and 77 category C, making 154 images in total. The file names for many of the images were graphic and explicit. It is obvious that they could not have been and were not downloaded by mistake. The forensic evidence demonstrated that the Acer desktop had been used to source, download and move illegal images across devices since 2014 and right up to the day before the appellant's arrest.

10. The judge sentenced the appellant without a pre-sentence report. The Court Probation Service indicated to the judge that the appellant would be a suitable candidate and would benefit from the Horizon Programme which is designed to re-educate internet sex offenders. She also confirmed that this programme is available to those who are serving custodial sentences.

11. The judge explained that he would treat count 5 as the lead count and impose concurrent sentences on all others. He correctly identified that the case fell within category A, with a starting point under the relevant guideline of twelve months' custody and a category range from six months to three years.

12. The judge first explained why he considered that the custody threshold was passed. He said:

> "I am satisfied that the period over which the offending took place, the nature of the images and movies downloaded by you, the methodology adopted by you to cover your internet searches and downloads over the years, and your attempts, when police arrived at your home, unannounced, to frustrate the investigation – you were determined to see if you could hide those discs that were secreted in your wallet – I am perfectly satisfied that the custody threshold is passed.

> The aggravating features in this case, which I will come to in a moment, escalate, in my judgment, the nature of this case into a category where I am satisfied that custody is the only sentence. You have known that as a distinct possibility for months and yet it is submitted on your behalf, because of your wife's health and your son returning home whilst these proceedings were pending, that because of them I should suspend the sentence. I do not find that either of those reasons are sufficient for me to do so.
>
> You clearly have a sexual interest – and a very unhealthy sexual interest – in young girls, particularly preteen and, as is demonstrated by the expert analysis of your computer and equipment, as young as two years old. In the main, they are somewhere between seven and twelve. The searches demonstrate that you trawled the internet for images and movies of, in my judgment, the most serious kind, involving incest [and] abuse of young children."

He then explained his approach, which was to aggregate all the aggravating features in the case, to balance them against the mitigation and then to give ten per cent credit for the late plea of guilty. No criticism is or could be made of this approach. In applying it, he said:

> "The aggravating features are the age and vulnerability of the children depicted; the period over which you have downloaded, therefore, possessed and produced these images and then downloaded them onto your computer, and then downloaded them again onto portable devices; the collections – and I say collections because … one particular collection contains particularly vile images, include moving images.
>
> You attempted to dispose of or conceal evidence by using evidence elimination software. This was deliberate and systematic searching by you and downloading of images of very young girls. You have demonstrated very little remorse. Your plea of guilty has come at the day of trial where, at your solicitor's request, both experts have had to attend court.
>
> In mitigation, you have no previous convictions and, therefore, a person of previous good character, and you have some health issues, and I take into account – but it is not a factor which assists you to any great extent – the plight of your wife and son.
>
> I see absolutely no reason why I should not start at the starting point of twelve months' custody. That is substantially increased by the number of aggravating features to which I have already referred. That sentence is then decreased a short amount by your good character, your health and your family circumstances, and then further decreased by ten per cent in accordance with the sentencing guidelines for your ... pleas of guilty".

> I determine that the particular aggravating features in this case which persuade me that the only sentence is immediate custody is that this was persistent determined and calculated downloading of child pornography in a way where you used your knowledge of computers and software, and the internet, to access indecent images and movies, and ... as I say, you then had these on portable devices."

13. In that last passage, the judge addressed the question whether the sentence could be suspended. We agree with the single judge that this passage demonstrates that the judge had in mind the guideline on the imposition of community and custodial sentences, and in particular page 8 of the guideline. After reminding himself of the need not to double count aggravating features and the principle of totality, he arrived at the sentence that he imposed.

14. At the direction of the single judge, we have the benefit of a pre-appeal report. It makes depressing reading. In interview the appellant is still evasive in answering questions that go to the offences, rather than background matters. He told the author of the report that he would search for "Young" when looking for Neil Young records, and for "Lolita" when searching for films. He admitted to looking on the internet for adult pornography, but not child pornography, despite using search terms such as "teen" and "girls". His explanation that he hoped to find images of 17 to 18 year old girls is, frankly, incredible in the light of the findings on his devices when arrested, not least because he continued to use those terms after he knew perfectly well what they would turn up. There is a complete failure to address the fact that he used software to try to disguise his actions and that he stored material on the portable devices that could easily be concealed and which he tried to conceal from the police on his arrest. He maintained in interview that he has no understanding as to why he downloaded the images and said that he has no sexual interest in children. He suggested that transferring the images to the memory cards was an attempt to delete them, which again is frankly incredible. In interview he maintained consistently that he did not know what he was downloading and that he pleaded guilty simply to reduce his sentence. Unsurprisingly, it is the view of the author of the report that these attitudes are likely to have an adverse impact on the effectiveness of any treatment programmes he might undertake. He is assessed as posing a medium threat of causing serious harm to children. In conclusion, the author provides little or no support for the likely effectiveness of courses to address his current attitudes and thinking. On the basis of her interview, she concurs with the judge's assessment of the aggravating features that are present. She points out that the period of release on licence in this case would enable the appellant to complete structured work with his probation officer should he be motivated to do so.

15. We have also been provided with a short report from a counsellor and psychotherapist who records that he saw the appellant bi-weekly from 25th May 2018 (that is after his arrest). He identifies various traumatic events which occurred over a period of twelve to thirteen years and which he considers would have contributed to the appellant's "resultant behaviour and post-traumatic symptoms". It is not explained how the events or the incidents of PTSD may have caused the appellant's sexual interest in children or his conduct over the period since 2014, culminating in the offences that have brought him before the court.

16. In advancing this appeal, the appellant accepts the length of the sentence imposed by the judge. The only question is whether it should have been suspended.

17. Counsel points to the appellant's personal mitigation, virtually all of which was before the judge and was expressly taken into account by him. Apparently, the judge was told that the appellant wished to rehabilitate – a submission that has to be seen in the light of the pre-appeal report. Counsel relies heavily on the appellant's attendance with the psychotherapist, which is not a factor that was mentioned by the judge in his otherwise clear and comprehensive sentencing remarks. He submits that the sentence of sixteen months' immediate imprisonment was wrong in principle because the judge failed to give any or sufficient weight to factors in accordance with the guideline on the imposition of community and custodial sentences.

18. We are unable to accept the submission that the judge fell into error or that the sentence was wrong in principle. As we have said, we agree with the single judge that the terms of his remarks show that he had the guideline well in mind. He correctly balanced the effect of a custodial sentence on other members of the appellant's family against the aggravating features that indicated that an immediate custodial sentence was required. He was entitled to come to the conclusion that he did, namely, that only an immediate custodial sentence was appropriate.

19. For the avoidance of any doubt, we have independently reviewed the criteria and guidance laid down by the guideline and would positively endorse the judge's decision, particularly in the light of the pre-appeal report. In our judgment, the balance falls clearly in favour of the view that appropriate punishment can only be achieved by immediate custody.

20. Accordingly, this appeal is dismissed.

---



---