

Neutral Citation Number: [2020] EWCA Crim 1333

Case No: 202001808/A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Luton Crown Court
HHJ L Tayton QC
T20190488

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2020

Before :

LORD JUSTICE GREEN
MR JUSTICE SPENCER
and
HIS HONOUR JUDGE MENARY QC

Between :

REGINA
- and -
Paul Michael BATEMAN

(Transcript of the Handed Down Judgment.
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Mr Shaun Esprit (instructed by **Lawton Solicitors**) for the **Appellant**
The Crown was not represented

Hearing date: Thursday 8th October 2020

Judgment
As Approved by the Court
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Lord Justice Green :

Introduction

1. This is an appeal against sentence. The issue on the appeal concerns the distinction between “*possession*” and “*production*” in the Sentencing Council Definitive Guidelines on Sexual Assault (possession of indecent photographs of a child). It also concerned the application of the totality principle where there is included amongst the images in issue a small number which involve production.
2. On 28th February 2020 the Appellant pleaded guilty to 5 counts of voyeurism and 10 counts of making of indecent images (each count comprising multiple individual images). There were two victims of the offending. The Appellant was sentenced to a term of 4 years imprisonment on 19th June 2020. The judge granted the Appellant a reduction of a third for the image offences and one quarter for the voyeurism offences.
3. For sentencing purposes, count 8 (which was an image offence) was treated as a headline count and the four year sentence was imposed for that offence, but all other sentences were made to run concurrent with that sentence. Count 8 was treated as the headline offence because the judge classified the relevant image as falling within the “*production*” category of the Guidelines. She described the count as involving “*the making of two category A pseudo-images*”. She said that this was “*clearly an offence of creating Category A images*”. In the Investigating Officer’s statement of 27th February 2020, the images are described as being of “*two women where Bateman has put [the complainant child’s] face on one of them. The women are engaging in oral sex.*” The source or original image is of two adults and had been ‘*made*’ by downloading the images from a peer to peer website or something similar. This source image contained adult sexual activity and was then altered by way of the superimposition of an image of the complainant’s face.
4. An indefinite Sexual Harm Prevention Order was made together with a restraining order prohibiting the Applicant from contacting directly or indirectly various affected persons and their children until further order.
5. The Appellant is 39 years of age and at the time of sentencing had one previous conviction for driving a motor vehicle with excess alcohol, an offence committed on 4th May 2003

The Facts

6. The Appellant’s sister-in-law was L and her daughter was IA. At the time of these offences IA was 12. At some point during 2016 IA began attending the Appellant’s home address so that he could provide her with tuition in IT. Over time, the tuition decreased, and the visits increasingly became social.
7. In August 2018, IA disclosed to a school friend that the appellant had taken a photo up her skirt whilst she was using a Virtual Reality headset. In her ABE interview, she told officers that on another occasion she saw the appellant with his penis exposed, standing next to her as she played the game. On another occasion, the Appellant persuaded her to wear inappropriate silk night- clothing. She said that she did not feel

comfortable telling her parents about these incidents. On 9th November 2018, however, IA disclosed these events to her mother describing the Appellant's behaviour towards her, in particular, that he had taken a picture up her skirt.

8. The Appellant was confronted on 10th November 2018 and denied the allegations, after which a complaint was made to the police. On 11th November 2018, the police conducted an ABE interview with IA.
9. The Appellant was arrested on 11th November 2018 at his home address and various computers and storage devices were seized and forensically examined, including a tower computer and external hard drive. Indecent images of children were recovered from both devices, including indecent images and pseudo-photographs of IA and images of IA and her mother using the toilet at the Appellant's home address. The discovery of these latter images prompted a further police attendance and search at the address.
10. Subsequently, police discovered duct tape on the back of a radiator in the main bathroom. The Crown contended that the Appellant used this to affix and place a hidden camera that captured the images of IA and her mother. This formed the basis of the voyeurism counts.
11. The Appellant was interviewed by the police on 11th November 2018 and denied wrongdoing. Following his further arrest on 20th November 2019, he was interviewed again. He answered no comment to all questions. The Appellant attended Luton Magistrates Court on 28th November 2019 for his first appearance. The Prosecution and Defence reached agreement as to acceptable pleas ahead of the arraignment at the adjourned Plea and Case Management Hearing on 28th February 2020.

The Categorisation of Count 8 as a 'production' offence

12. The judge categorised the offence in count 8 as being one of "*production*" for sentencing purposes, i.e. falling within the highest category under the Guidelines and hence attracting a more severe sentence. Under the Guidelines (Step 1) the court must determine the offence category. Category A involves possession of images involving penetrative sexual activity. Category B involves non-penetrative sexual activity. Category C concerns other indecent images.
13. In Category A, the most serious offending is that involving "*Production*" which is equated in the Guidelines with "*creating images*".
14. In relation to production the Guidelines clarify that:

"Production includes the taking or making of any image at source, for instance the original image. Making an image by simple downloading should be treated as possession for the purposes of sentencing."

The Guidelines then explain the link between the character of an image and the categorisation:

"In most cases the intrinsic character of the most serious of the offending images will initially determine the appropriate

category. If, however, the most serious images are unrepresentative of the offender's conduct a lower category may be appropriate. A lower category will not, however, be appropriate if the offender has produced or taken (for example photographed) images of higher category."

15. In the Appellant's written submissions it was argued that the passage cited above from the Guidelines on "*production*", though drafted as non-exhaustive, reflected the fact that the means by which the original image was made was a very relevant factor in determining whether an image was properly classifiable for sentencing purposes as a '*production*' rather than a '*possession offence*.' It was said that the image which formed the basis of Count 8, which we have already described, was not "*produced*" by the Appellant as he clearly did not "*take*" or "*make*" the original source pornographic image. It followed therefore that the image in Count 8 should have been considered as a case of "*possession*." Such a classification would have been more proportionate to the actual level of culpability which involved the alteration of an initially legal, though pornographic, image which in its concluded form, did not involve the recording or depiction of actual abuse. The materially higher sentencing bracket attributable to production offences with a starting point of 6 years and a category range of 4 – 9 years reflected the greater culpability of a defendant who captures images of child sexual abuse.
16. It was accepted that the nature of the images for Count 8 posed a risk or potential risk of indirect harm, but there was nonetheless an absence of the specific harm which arose from images of actual abuse, i.e. the risk to children through the perpetuation of the market or distribution networks for indecent images.
17. In the case of *Oliver* [2003] 2 Cr App R (S) 15 at paragraph [11] guidance in respect of indecent photographs was given which was subsequently replicated in the sentencing guidelines. It was highlighted that the following factors were relevant when assessing the gravity of such offences:

"... As to the nature of the offender's activity, the seriousness of the individual offence increases with the offender's proximity to, and responsibility for, the original abuse ..."
18. These considerations inform the Sentencing Guideline which, it was argued said, reflected the fact that the making of the original image was a highly relevant factor in determining whether an image was properly classifiable for sentencing purposes as a '*production*' rather than "*possession*" offence. For these reasons it was submitted that the sentence imposed on the Appellant was manifestly excessive.

Analysis and Conclusion

19. The argument based upon the distinction between "*possession*" and "*production*" appeared to rest upon the assumption that an image must be either a possessed image or a produced/created image, and that there is nothing between.
20. We do not read the Guidelines this way and, moreover, it does not make sense to construe them in this rigid, compartmentalised, manner. It seems to us that it is possible from the Guidelines to draw some general conclusions: (1) mere

downloading without more amounts to possession; (2) the taking of an image at source (for example the original image) is producing or creating that image; (3) because of the word “*include*” in the explanatory note in the Guidelines (see paragraph [14] above) the description is (2) is not a definitive statement of the circumstances when an image is produced or created; (4) the divide between possession and production/creation is not fixed in stone and the concepts are not mutually exclusive; common sense indicates that an image might start as a merely downloaded copy (and be possessed) but then be produced into something altogether different and more offensive. There are in real life innumerable permutations.

21. It follows that an image might be a hybrid of a possessed image and a created or produced image. When determining the correct categorisation, a judge will thus need to form a view about the nature of the image and the extent to which is its merely downloaded, and/or the extent to which some creativity or production has been applied to it. That analysis will then enable the judge to apply the Guidelines in a calibrated manner which takes account of the different applicable starting points and ranges as between possession and production/creation in the Guidelines. We accept the analysis of the judge that this was a production or creation offence since it involved the juxtaposition of faces on to a copied image for the sexual gratification or advantage of the appellant and its nature moved from being lawful to unlawful. The end result was a different creation, and served a different purpose, to the initially downloaded image. We acknowledge of course that there could be many more serious illustrations of such a production offence, for instance where the defendant produces a film or image of an actual child being abused. It is right that we record that, having reflected on these points, Mr Esprit for the Appellant accepted this reasoning and analysis and he ultimately did not contend that there was a clear divide between “*possession*” and “*production*”. His oral submissions involved a somewhat modified argument. He accepted that there was no strict, binary, divide between “*possession*” and “*production*” but argued that, nonetheless, even if there was an element of production or creation, the image was still right at the least serious end of production and contained strong elements of possession and that the Judge, by treating count 8 as the headline offence for the purpose of sentencing, exaggerated the importance of the image and this led to an artificially inflated sentence.
22. It is also of some relevance, in a case such as this, that the Guidelines acknowledge that there may be cases where the most serious offending might not be representative of the offending patterns as a whole (see the second quotation at paragraph [14] above).
23. In the present case, the judge used count 8 as the headline count but, in effect, stood back and determined what from the perspective of totality the sentence should be for all the offending which she then attached to the count. This was 6 years prior to plea and 4 years after applicable discount.
24. It is quite possible that another judge might have structured the sentences differently, perhaps because the production images were a small part of the total offending. Another judge might, for instance, have centred the sentencing exercise around the voyeurism offences and made some of the other sentences consecutive.
25. Nonetheless, the important point is that the judge stood back and, as she put it, sought to determine the proper sentences from the perspective of “*overall fairness*”. She

clearly took into account all of the relevant facts including: the age of the child; the familial context to the offending and the resultant abuse of trust, the number and nature of the images, the invasion of privacy caused by the acts of voyeurism and the fact that it concerned 2 individuals; and, the significant adverse impact upon the victims. She was aware of the nature of the offending and did not exaggerate its nature or severity.

26. We are conscious, as was argued by Mr Esprit for the Appellant, that when there is included amongst the charges an isolated production count, as here, a judge should be astute to the need to avoid that count skewing the sentencing exercise and making the final sentence unfairly severe. We do not however consider that the judge in this case fell into that trap.
27. We are grateful to Mr Esprit for his measured and thoughtful submissions, nonetheless, we can detect no error in the approach adopted by the Judge, and we do not consider that the sentence imposed was excessive or manifestly so given the totality of the offending in question.
28. We dismiss the appeal.