APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 40
HCA/2018/000154/XC

Lady Paton
Lord Turnbull

OPINION OF THE COURT

delivered by LADY PATON

in

APPEAL AGAINST SENTENCE

by

JAMES MOORE

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Mitchell; Faculty Services Limited, Edinburgh
Respondent: H Carmichael, AD ad hoc; Crown Agent

12 June 2018

Appeal against sentence: indecent photographs of children

[1] On 31 January 2018 in Ayr Sheriff Court the appellant pled guilty to the following charges:

> "(1) between 11 November 2010 and 22 March 2017 … you … did take or permit to be taken or make indecent photographs or pseudo-photographs of children; CONTRARY to the Civic Government (Scotland) Act 1982 section 52(1)(a) as amended.

> (2) between 11 November 2010 and 22 March 2017 … you … did have in your possession indecent photographs or pseudo-photographs of children;
> CONTRARY to the Civic Government (Scotland) Act 1982 section 52A(1);
> (3) between 4 February 2014 and 25 February 2017 … you … did distribute or show indecent photographs or pseudo-photographs of children;
> CONTRARY to the Civic Government (Scotland) Act 1982 section 52(1)(b) as amended."

[2] There were 863 images in total, 799 still, and 64 moving. A large percentage in each case was category A. Of the moving images, 46 out of 64 were category A (i.e. about two thirds). Many images had been deleted, but were recovered by specialist forensic techniques.

[3] The sheriff (Sheriff Cunninghame) imposed a sentence of 27 months imprisonment, representing a starting point of 40 months discounted by one third to reflect the plea of guilty. The sheriff also imposed a Sexual Offences Prevention Order (SOPO) in terms of section 104 of the Sexual Offences Act 2003, for a period of 10 years, containing the following requirements:

1. That the appellant must not access the internet unless using a device that is capable of storing the internet search history and he is prohibited from deleting his search history on any internet capable devices.
2. That the appellant must not have installed on any device capable of accessing the internet, any software capable or designed to delete or disguise the internet search history.
3. That the appellant must allow officers from the Police Service of Scotland on request by them, access to any device used which is capable of accessing the internet to check the aforementioned conditions.
4. That the appellant must not have unsupervised contact with any child under the age of 16 years unless supervised by someone aged 21 or over.

[4] The appellant appealed against the sentence. He contended that the length of sentence was excessive; that a SOPO was unnecessary in the circumstances; and *esto* it was necessary, that its length and requirements were not justifiable.

The length of the custodial sentence

[5] We deal first with the length of the custodial sentence. We note that the appellant is aged 56 and that he is a first offender with no previous convictions. We also note that he has suffered considerably as a result of his offending and has lost his home life, his employment and his standing in the community. Further, counsel for the appellant drew our attention to the fact that many of the images were deleted by the appellant after being viewed, and images were recovered only by the use of specialist forensic techniques. Also any sharing of the images had been "peer-to-peer" rather than peer-to-group.

[6] We accept that all of the above can be regarded as mitigating factors.

[7] The English guidance (Sexual Offences: Definitive Guideline - England and Wales) suggests a starting point of 48 months for possession and distribution of category A images (i.e. 3 years for distribution, 1 year for possession, assuming a consecutive approach). Bearing in mind that the appellant's distribution and possession involved other categories (B and C) in addition to category A, the sheriff's starting point of 40 months falls well within the guidelines.

[8] However, we accept that it is possible, in certain cases, that the mitigating factors may outweigh any aggravating factors, resulting in an adjustment of the starting point. We have therefore carefully considered whether this could be such a case. In our view, however, it is not, for the following reasons:

First, the period of time over which the appellant actively searched for images was substantial, about 7 years;

Secondly, the appellant not only possessed images but shared them with others;

Thirdly, any subsequent deletion of the images by the appellant is not in our view a mitigating factor, as they had been viewed by him, and some were shared;

Fourthly, there were 863 images in total, 799 still and 64 moving. A large percentage in each case was category A and in particular of the moving images, 46 out of 64 were category A (i.e. about two thirds). As Lord Justice Clerk Gill pointed out in *HM Advocate* v *Graham* 2010 SLT 715 at paragraph [32], the "high hundreds" are properly described as a "large" number of images. Furthermore, as Lord Gill noted at paragraph [33], "a moving image may be more vivid and corrupting than a still". The net result in this case is a "significant amount of category A images" qualifying for a significant custodial disposal (*Wood* v *HM Advocate* 2017 SLT 190 paragraph [30]).

A fifth factor which we take into account is that the English guidance is simply that: it is "guidance". It should not be applied in a mechanistic fashion (*HM Advocate* v *Graham* 2010 SLT 715 paragraphs 21-22 and 51-59; *Archer* v *HM Advocate* 2014 SLT 133).

The sixth and final point we would make in this context is that in Scotland, no credit is given for time spent on bail.

[9] In this case, therefore, we are not persuaded that the mitigating factors outweigh the aggravating factors, nor are we persuaded that the sheriff erred to any extent in selecting a starting point of 40 months. We accordingly refuse the appeal so far as directed at the length of custodial sentence.

The Sexual Offences Prevention Order (SOPO)

[10] Section 104 of the Sexual Offences Act 2003 provides *inter alia*:

> "(1) A court may make an order under this section in respect of a person ("the defendant") … where …
>
> (b) … it is satisfied that it is necessary to make such an order, for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant."

[11] The appellant will serve a period of imprisonment. We would expect there to be a rehabilitative component to his time in custody, including relevant programmes and courses. After a maximum period of 13 ½ months, he will be released on licence. The conditions of his licence will be specified by the parole board and are likely to include conditions very similar to conditions 1-3 of the SOPO. He will, therefore, be subject to monitoring and management during his period of licence. If there is any concern arising from his behaviour during that period, an application can be made to the sheriff for a SOPO.

[12] As was pointed out in *EA* v *Procurator Fiscal Dundee* [2014] HCJAC 96 at paragraph 21:

> "When considering whether or not a SOPO is necessary, the court must have regard to the other protections which may be afforded to the public as a result of the conviction or other aspects of the offender's sentence. A SOPO will not be necessary if it would simply duplicate them."

In *R* v *Smith* [2012] 1 Cr App R (S) 82 at paragraph 8, the issue was focussed in the following three questions:

(1) is the making of an order necessary to protect from serious sexual harm through the commission of scheduled offences;

(2) if some order is necessary, are the terms proposed nevertheless oppressive;

(3) overall are the terms proportionate.

What is required, to quote paragraph 20 of *EA*, is "a proper and sound basis" for the imposition of a SOPO. There has to be a real risk that the offender may cause serious sexual harm to the public or any particular members of the public in order to satisfy the statutory test in section 104 of the Sexual Offences Act 2003.

[13] In this particular case, the criminal justice social work report at pages 2, 4, 5 and 7 makes a risk assessment using various tools. The resultant risk of sexual reoffending is categorised as "low" to "moderate" (the moderate level being at the lower end of the moderate range). It is noted that there was no indication that any escalation to contact offences was likely.

[14] Against that background, the issue in this case is whether the test of "necessity" (as opposed to "usefulness") has been met. We are not satisfied that the test has been met. Accordingly we shall quash the SOPO. The appeal is allowed to that extent.