APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 72
HCA/2018/000283/XC

Lord Justice Clerk
Lord Glennie
Lord Woolman

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

THE REFERENCE FROM THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION

by

JOHN DOHERTY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Macintosh; John Pryde & Co
Respondent: Meehan, AD; Crown Agent

20 November 2018

[1] On 11 January 2017, the appellant pled guilty at Glasgow sheriff court to charges of possessing and distributing indecent images of children, contrary to sections 52A and 52(1)(b) of the Civic Government (Scotland) Act 1982. The possession charge related to (i) 152 moving images, of which 74 were at Category A and 65 at category B, and (ii) 61 still images, of which 47 were at category A and the remainder at category B. One category A

clip lasted 19 minutes. It showed the most extreme abuse of a 6 month old child. The distribution charge related to 86 still images, of which 61 were at category A and 22 at category B. The appellant had shared these images with 14 individuals and two groups, one of which contained 50 members.

[2] The sheriff sentenced the appellant to 12 months imprisonment on the possession charge. He imposed an extended sentence of 37 months on the distribution charge, comprising a custodial element of 22 months and an extension period of 15 months. He directed both sentences to run concurrently. According to the appellant, he did not receive proper advice to mark an appeal within the relevant time limit. He therefore submitted his case to the Scottish Criminal Cases Review Commission ('SCCRC').

[3] The SCCRC accepted that the custodial elements of the sentences passed were within the range which might be expected for the offences in question, but referred the case to this court on the basis that it was arguable that an extended sentence was not appropriate. It queried whether the test for risk of serious harm to the public could be met, standing the observations in *Wood, Tennant & McLean* v *HMA* 2017 SCCR 100 and *DS* v *HMA* [2017] HCJAC 12.

[4] In *Wood*, extended sentences had been imposed on the basis that the period of licence would not otherwise be sufficient for the appellants to complete offence-focused remedial courses within the community. On appeal, it was held that this was not a legitimate consideration. A court could only impose an extended sentence where it considered that the period of licence would not otherwise be sufficient to protect the public from the risk of serious harm. In the individual *Wood* cases, which concerned possession of indecent images only, that test was not met:

> "In order to reach a contrary conclusion, a somewhat convoluted course of reasoning would require to be adopted, whereby a connection would have to be established between accessing the pornographic images and the risk to those who might appear in similar images in the future. Such a connection does exist, in general terms, but to classify it as involving a "serious risk of harm" to the public in the sense intended in the legislation is an error." (para 27)

The SCCRC considered that when assessing "serious harm", the same rationale should apply to both possession and distribution offences.

The Sheriff's report

[5] Unlike the position in *Wood*, the sheriff in this case did apply the correct test. He referred to *HMA* v *Graham* 2010 SLT 715, had regard to the Definitive Guideline, and noted the pain and distress of the child in the sample category A moving image. He took into account that the appellant was a first offender, that the charges related to a restricted period, and that the total number of images was not large.

[6] In concluding that the period of licence would not sufficiently protect the public from serious harm, the sheriff formed his own judgement. He had regard to the Risk Matrix 2000 assessment, which described the appellant as presenting a medium risk of sexual re-offending. He also had regard to the Criminal Justice Social Work Report, which suggested (a) that by virtue of his sexual attraction towards children, the appellant might present a risk to children in the community, (b) that he appeared to lack empathy or an understanding of the impact and consequence of offending behaviour of this type, and (c) that his attitudes, and the risk he presented, were unlikely to change unless he fully engaged with a programme of offence focussed work.

[7] The sheriff had particular regard to two factors. First, the offending went beyond possession to include distribution to a large group. Secondly, "such was his absorption with

this material that he was prepared to go to the length of discussing it over the internet with individuals of like-mind." Such behaviour from "a man whose life appeared quite full, with a long term partner and stable career following tertiary education suggested that the pro-social and protective factors in his life might very well be eclipsed by compelling urges to further offend".

Submissions for the appellant

[8] The primary submission for the appellant echoed the terms of the referral. Counsel for the appellant recognised that the question whether a risk of serious harm existed was one for the court. Nevertheless the court required to have an evidential basis for its conclusion. The reasoning in *Wood* as to the existence of a risk of serious harm applied equally in cases involving distribution "as long as the distributor has not procured the creation of the images or created them himself". In other words a clear distinction should be drawn between (a) distribution and (b) creation or procurement of the images. The former fell outwith the category where a finding of a risk of serious harm might be made, because a distributor does not actively procure the images. For these reasons the sheriff's reasoning was flawed and the extension part of the sentence should be quashed.

[9] Counsel suggested that, if the court accepted his submission, a practical quandary arose. The appellant has been released on licence and has been participating in the *Moving Forward: Making Changes* programme. The current expiry date of his licence is March 2020, which would be sufficient to enable him to complete the programme under supervision. Should the extension period be quashed, his licence would expire on 8 December 2018, which would not leave sufficient time for him to complete the programme under supervision, although he has committed to doing so voluntarily. Accordingly, counsel

submitted that, standing the relatively small number of images, the court could for "good practical reasons" quash the entire sentence and substitute an onerous non-custodial sentence so that the appellant can complete the course under supervision.

Analysis

[10] From *Wood* and *DS*, we draw the following propositions:

a) the purpose of an extended sentence is to allow the court to make provision for public protection when an offender is released back into society,

b) such sentences have a penal effect, given the power to revoke the licence and recall the offender to prison,

c) before imposing an extended sentence, the court must be satisfied that the period (if any) for which the offender would otherwise be subject to a licence would not be adequate to protect the public from serious harm from the offender,

d) before forming a view on "serious harm", the court must have first considered a CJSWR and any other relevant material,

e) in the case of sex offenders, such sentences can only be imposed on those convicted on indictment of a sexual offence that is listed in section 210A(10) of the Criminal Procedure (Scotland) Act 1995, and

[11] It is important to keep in mind the terms of section 210A(1) of the Criminal Procedure (Scotland) Act 1995. An extended sentence may only be imposed if the court considers "that the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender." Before passing an extended sentence the sentencing court must be satisfied that release of the offender without supervision for an extended period would give rise to a risk of serious harm to the public, i.e. the public at large or a section of that public, and that the imposition of an extended sentence would provide some measure of protection against that risk. Decisions in cases such as *Wood* and *DS* provide helpful

illustrations of how that test falls to be applied on the facts of those particular cases, but they are not to be taken as narrowing the ambit of the statutory provision.

[12] We accept that the appellant did not procure or make the images, and that his conduct did not involve any direct contact offences. However, there are three troubling aspects of his behaviour. First, he participated in extreme discussions about the images with others in which he commented on his wish to have sex with children and infants. He thus appears to have a propensity himself to engage in future indecent conduct with children Secondly he not only accessed the images, but also distributed them. The act of distribution magnifies the demand for such material. Third, his engagement in online discussions not only about the images but about abusing children generally may induce others to engage in such behaviour. All three elements bear upon the question of risk.

[13] It is in our view instructive to have regard to the terms of the social work reports. The sheriff had one CJSWR available to him and a further report has been made available during the currency of the appeal. The report before the sheriff contained the following material:

- The appellant befriended online others who were seeking child abuse images. He quickly became addicted to his participation in this group and was actively sourcing indecent images, passing comment on the images with other users, chatting about them and passing them on (p4). He deliberately shared the images and discussed their content which was "very extreme in terms of abuse towards victims at various ages including infants" (p8).
- In the course of these chats he discussed his sexual fantasies (p8). This is referred to in the subsequent report (p4). Although he denied being sexually attracted to children, the writer did not accept that denial, standing the behaviour spoken to, causing the writer concern that he may present a risk to children within the community (p5). This is also

adverted to in the subsequent report in which the appellant is reported as stating that he did suggest to others in the messaging service that he was interested in having sex with children but that he did this only to retain their interest (p4).

- He had initially begun by accessing adult male pornography, but had developed an interest in seeking images concerning sexual abuse of male children (p5). He became motivated to seek images that were deliberately shocking and admitted that this was often the subject matter of his discussions with others (p8).
- There was little empathy for the victims and poor insight into the harm caused (p4; p7; p8; p10).

The author of the second CJSWR repeated that the appellant felt a degree of responsibility towards those children "who were sexually abused during live-streaming events that he watched", but had no such feelings in respect of the viewing of pre-recorded material (p4).

[14] This material suggests an intensifying pattern of offending on the part of the appellant, moving from possession to distribution; progressing to discussing these images, and expressing a desire to have sexual images of children; watching live-streamed images as well as pre-recorded ones; and developing a motivation to seek out ever more extreme images. Given these factors, and the risk assessment contained in the CJSWR, we conclude that the sheriff was entitled to reach the conclusion that he did. There was a sufficiently established connection between the appellant's offending and the risk to the public.

[15] Accordingly, we refuse the appeal. Had we been minded to allow the appeal, we would not have acceded to counsel's alternative submission. Had we done so, we would have ourselves fallen into the error of imposing a lighter sentence than the offences merited for a practical and laudable purpose. This case very clearly merited a custodial sentence and the periods selected were entirely appropriate, as was recognised by the SCCRC. This case

again highlights some of the difficulties facing those sentencing sexual offenders. We note that in *Wood* the court observed that it is not currently possible to combine a custodial term with a community disposal, adding (para 27):

> "..the utility of using a deterrent custodial sentence combined with a period of extended supervision thereafter would, in cases such as those under consideration, seem clear, even if the current statutory tests for doing so are not met. This is a matter which the Scottish Government and/or the Scottish Sentencing Council may wish to consider in due course."

We agree with these observations, merely adding that the introduction of such a sentencing option would require primary legislation.