APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 14
HCA/2018/000653/XC

Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

ROSS MORRISON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: J Keenan (Sol Adv); Paterson Bell Solicitors (for Allans, Lerwick)
Respondent: M Hughes, AD (*ad hoc*); Crown Agent

19 February 2019

[1] The appellant, Ross Morrison, is 46 years old. For practical purposes he is a first offender.

[2] On 24 October 2018, at the Sheriff Court in Lerwick, he pled guilty by section 76 procedure to a charge of taking or permitting to be taken or making indecent photographs of children, contrary to the Civic Government (Scotland) Act 1982, section 52(1)(a).

[3] After the case was adjourned for the preparation of a criminal justice social work report the sheriff imposed an extended sentence, comprising a custodial period of 20 months imprisonment, reduced from 30 months, with an extension period of a further 24 months. He ordered that the sentence was to date from 5 December 2018. The appellant has appealed, with leave, against the sentence imposed.

[4] The circumstances of the offending are these. On 18 January 2018, police officers took possession of a laptop computer from the appellant's home. On analysis a number of both moving and still indecent images of children were identified. 18 images at category A were identified, all of which were by that stage inaccessible. 49 images at category B were identified, all of which were again inaccessible by that stage. 22,112 images at category C were identified. All bar 178 of these were inaccessible.

[5] In his report to this court, the sheriff explained that, in his view, there were a number of significant aggravating factors in the appellant's case. These were:

- the large number of images involved
- that the period concerned, some 13 months, was lengthy
- that the appellant had taken steps to hide his identity by using software to anonymise his use of the internet
- that many of the images related to very young children, and
- that some involved extreme sexual acts.

[6] In addition, the sentencing sheriff took account of the fact that there were a further 60,043 indicative still and moving images. These were not classified as indecent images but the sheriff concluded that they portrayed a preoccupation on the appellant's part to search for indecent images and their presence alone indicated a time-consuming effort on his part throughout the period libelled. The sheriff also took account of the risk assessment exercise

carried out in the criminal justice social work report, which assessed the appellant's overall risk as being in the medium category for general offending. The sheriff noted the author of the report's explanation that although specialist sexual offender assessment tools had also been utilised, these ought not to be used to indicate categories of risk for an internet offender such as the appellant. In all of these circumstances the sheriff concluded that there was no alternative to a custodial sentence and that a significant sentence of that sort was appropriate in the appellant's case. He therefore selected the headline sentence of 30 months imprisonment from which he permitted a discount of one third to take account of the early guilty plea.

[7] Having noted what he considered to be all of the relevant factors, including the appellant's inability to explain his motivation and his denial that he was sexually attracted to children, the sheriff decided that it was reasonable for him to conclude that the appellant's behaviour could be classified as posing a "serious risk of harm" to the public. He therefore determined that an extended sentence was appropriate and selected an extension period of 24 months.

[8] On the appellant's behalf it was contended that the imposition of a custodial sentence was inappropriate. In the alternative, it was submitted that it was inappropriate to impose an extended sentence and that the custodial period selected was excessive. It was submitted that it was relevant to selection of the appropriate sentence to note that the overwhelming majority of the images were inaccessible, having previously been deleted by the appellant. It was also noted that the images at category A were few in number and were all inaccessible. The same could be said for the images at category B. Under reference to what was said at page 77 of the Definitive Guideline prepared by the Sentencing Council for England and Wales, it was submitted that the more serious images were unrepresentative of

the appellant's conduct and a lower categorisation for the purpose of sentence than had been settled on by the sheriff was appropriate.

[9] It was also submitted that the sheriff was wrong to have taken account of the substantial number of images which were described as indicative and did not fall to be classed as indecent in terms of the legislation. It was submitted that there was no basis for concluding that the test for the imposition of an extended sentence was met in the appellant's case.

[10] The appellant pled guilty to the offence of making indecent photographs of children. This was achieved, as is common in such cases, by downloading such indecent photographs from the internet. The fact that he subsequently deleted many of these, thus rendering them inaccessible, does not alter the fact that, in relation to those images, he committed the offence of making indecent photographs of children. Whilst it is not irrelevant that these images were subsequently deleted, we reject the suggestion that the deletion of these images should have a significant impact on the selection of sentence.

[11] The instructions as to the use of the Definitive Guideline for England and Wales explain that, 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"

It was this instruction to which Mr Keenan drew our attention on the appellant's behalf. However, the appellant possessed 18 inaccessible images at category A in addition to 49 at category B. In our opinion, the number of images possessed at category A was a sufficient number to warrant the use of this category in his case for the purposes of the guideline.

[12] We also note that in giving the opinion of the court in the case of *Wood, Tennant and McLean* v *HM Advocate* 2017 SCCR 100 at paragraph 30, the Lord Justice General stated that a custodial sentence ought generally to be imposed for possession of a significant amount of category A images and that there would require to be some particular circumstance, such as a relatively fleeting possession, or particularly compelling personal circumstances, such as extreme old age, in order to justify a community based disposal.

[13] Given the overall number of images in the appellant's case and the nature and number of the images at each of level A and level B, we are satisfied that a custodial sentence was appropriate. However we do consider that there is some force in certain of the other submissions advanced on the appellant's behalf.

[14] For the purposes of a comparison with the English guideline the offence to which the appellant plead guilty would fall within the category of possession. The guideline identifies a sentencing range for possession of category A images of between 26 weeks and 3 years in custody and a sentencing range of between a medium level community order and 26 weeks in custody for possession of category C images. Beyond explaining that he had taken account of the guideline, the sheriff does not explain why he selected a headline custodial period towards the top of the range envisaged for possession of category A images in a case involving what is in effect a first offender in which 18 of such images were recovered.

[15] In the case of *Wood, Tennant and McLean*, each of the appellants had pled guilty to offences of the same type as the present appellant. The first appellant in that case was found to have possessed more than 600 category A images and the third appellant to have possessed more than 300. All had been involved for a longer period than the present appellant. Each of the appellants in that case received extended sentences with custodial periods of less than was imposed in the present case.

[16] In giving the opinion of the court at paragraph 27 the Lord Justice General said this:

> "It is simply not possible to classify these appellants as posing a risk of serious harm to the public were they to be released during the course of or at the end of the period of custody imposed."

We do not consider that any valid distinction can be made between the position of the present appellant and the position of the appellants in that case. We do not consider that the sentencing sheriff has identified any basis upon which he would be entitled to conclude that the test for an extended sentence as set out in section 210A of the Criminal Procedure (Scotland) Act 1995 has been met. We would also observe that the test provided for in section 210A is whether the accused poses "a risk of serious harm" not, as the sheriff has identified, a "serious risk of harm".

[17] In all of these circumstances we shall quash the sentence imposed. In its place we shall impose a custodial sentence of 15 months imprisonment, which we shall restrict in light of the early plea to a period of 10 months imprisonment to date from 5 December 2018. The certification which the sheriff pronounced in relation to the Sexual Offences Act remains in place.