

Judgment 18/2004

**Kevin Peter Mauger – Royal Court –
11 February and 31 March, 2004**

Criminal appeals from the Magistrate’s Court – Protection of Children (Bailiwick of Guernsey) Law, 1985 - possession of indecent film of a child – as respects conviction the test was whether the decision was obviously and palpably wrong – appeal against conviction dismissed by the Deputy Bailiff – appeal against sentence subsequently dismissed by the Deputy Bailiff and Jurats.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

11th day of February, 2004 before Geoffrey Robert Rowland, Esquire, Deputy Bailiff; sitting alone.

In the action of THE LAW OFFICERS OF THE CROWN against KEVIN PETER MAUGER (“the Appellant”) to pursue the appeal of which the said Mauger gave notice against the conviction imposed upon him by the Magistrate’s Court on the 10th day of December, 2003;

THE COURT, having heard Advocate A. M. Merrien for the Appellant, and Advocate G. D. McKerrell for the Crown DISMISSED the appeal and this day handed down written reasons in the attached terms.

S. M. SIMMONDS
Her Majesty’s Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

Before Geoffrey Robert Rowland D.B.

Appeal – 11th February 2004

Kevin Peter Mauger

1. I have carefully considered the succinct submissions made on behalf of the Appellant Mr Kevin Peter Mauger by Mr Merrien and the very brief submissions made by Mr McKerrell on behalf of the Law Officers.
2. The Appellant was convicted by the Magistrate on 10th December 2003 after a relatively short hearing.
3. The Magistrate had to determine whether the image or images on the video tape were of a person appearing to be under the age of 16 and whether they were indecent.
4. It was common ground at the hearing in December 2003 and before me in this Appeal that in England in a case before a Jury it would be for that Jury to determine an issue of indecency without hearing from witnesses professing special expertise as to what might or might not be indecent. That was in essence what the Court of Appeal in England held in 1972 (Vol 56. Criminal Appeal Reports) in the case of John David Stamford.
5. In the absence of a definition of “indecent” in the Protection of Children (Bailiwick of Guernsey) Law 1985 I am also of the view that whether or not a film is indecent would be a matter for the Magistrate to determine.
6. In so doing the Magistrate would have to satisfy himself whether the relevant brief section of video film footage was such that it offended against recognised standards of propriety in the times that we live. As such he would be, as it were, the custodian of the standards and good sense of the community.
7. It was common ground on 10th December 2003 and in this appeal that it was also a matter for the Magistrate to determine the age of the person concerned again without hearing from witnesses professing special expertise as to age.
8. The Magistrate concluded that the images were indecent.

9. Furthermore in his judgment he stated that in his view the images were manifestly those of a child. It was his view that the child's age was in the region of 10 to 12 years, no older than 13. He was of the view that this was plainly evident on the video footage. In his judgment she was nowhere near 16 or apparently 16. He stated the reasons why he came to that conclusion.

10. He had of course the benefit of viewing a short extract of the footage which the Appellant had retained. I viewed this extract twice, the second time after a brief pause for reflection. I noted as did the Magistrate that the view of the person was not that of a person fleetingly walking across the field of view but was a clip which focused on the person towelling herself and dressing. That is the image which could clearly be seen.

11. In this case it was common ground that the issue for me to determine was whether the Magistrate's decision was obviously and palpably wrong.

12. Turning to the three revised grounds for appeal filed by Mr Merrien on behalf of the Appellant my judgment is as follows:

13. *First Ground of Appeal*

With regard to the First ground of Appeal I have come to the same conclusion as the Magistrate. I am in no doubt whatsoever that the prosecution evidence was such that the Magistrate could be satisfied beyond reasonable doubt or so that he was sure that the young person evident in the video footage was of an age in the region of 10 to 12 years, certainly no older than 13. She was no where near 16 or indeed apparently 16. I adopt and concur with the reasons stated by the Magistrate. I therefore cannot and do not conclude that the Magistrate was obviously and palpably wrong.

14. *Second Ground of Appeal*

With regard to the second ground of appeal I am also satisfied on the criminal standard of proof that the video footage in which the child is clearly visible offends against recognised standards of propriety in the times in which we live and are indecent. I adopt and concur with the reasons stated by the Magistrate. I therefore cannot and do not conclude that the Magistrate was obviously and palpably wrong.

15. *Third Ground of Appeal*

From my judgment on the first and second grounds of appeal it follows that with regard to the third ground of appeal that I am also satisfied that there was clear evidence which could reasonably support the conclusion reached by the Magistrate.

13. Put shortly the Magistrate's decision was in my judgment entirely correct. It cannot be shown to be obviously and palpably wrong.
14. I dismiss the appeal
15. I note that revised grounds of appeal against Sentence will follow. If the Appellant is minded to continue with his appeal against sentence then I would expect revised grounds of appeal to be filed within 10 days so that an early date can be set for the Jurats to assemble to hear that appeal.

G R Rowland
Deputy Bailiff

IN THE ROYAL COURT OF GUERNSEY

The 31st day of March, 2004 before Geoffrey Robert Rowland, Esquire, Deputy Bailiff; present:- David Charles Lowe, Laurence Lenfestey Guille, Derek Martin Le Page, Stephen Edward Francis Le Poidevin, David Michael Jory, Keith Bichard, OBE, Esquires, The Reverend Peter Gerald Lane, Michael Henry De La Mare, Michael John Tanguy, Esquires, and Susan Mowbray, Jurats.

In the action of THE LAW OFFICERS OF THE CROWN against KEVIN MAUGER (“the Appellant”) to pursue the Appeal of which the said Mauger gave notice against the sentence imposed upon him by the Magistrate’s Court on the 10th day of December, 2003 in the terms attached hereto;

THE COURT having heard Advocate A. M. Merrien for the Appellant and Advocate G. D. McKerrell for the Crown DISMISSED the Appeal.

S M SIMMONDS
Her Majesty’s Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

Before Geoffrey Robert Rowland D.B.

Kevin Peter Mauger

Appeal against Sentence

31st March 2004

1. The Court has given most careful consideration to all points which you have raised on behalf of the Appellant.
2. Although a person who from time to time was the partner of the Appellant had placed a video camera in a bag in the female changing room of a local sports club that partner could not have been certain that a young girl might walk across the camera's field of view and hence what age she might be.
3. What the Appellant did on receipt of the video recording was to view all that had been recorded, note that it included a section focused on a young girl, retain it and include it on a VHS tape. That was a very deliberate course of conduct. His partner, apparently, was not involved in editing for retention what had been recorded.
4. Other images from other sources were to be included at some time on that tape.
5. The Magistrate was clearly concerned with the retention by the Appellant of the recording of a young girl in different stages of drying herself and dressing, wholly oblivious to the fact that she was being videoed. The retention of the recording of an indecent image of a young girl adjudged to be less than 16 constituted a criminal act. It rightly resulted in the Appellant being prosecuted for having in his possession an indecent film contrary to Section 3(a)(i) of the Protection of Children (Bailiwick of Guernsey) Law 1985. The Magistrate was satisfied that the young girl was in the region of 10-12 years, certainly no older than 13 and that the images were indecent images. The Appellant's appeal against conviction was dismissed.
6. The maximum sentence for an offence under Section 3(a)(i) of the 1985 legislation in respect of an offence committed in 2001 was a Level 5 penalty that is to say a maximum fine of £5,000.
7. This Court is of the view that the conduct of the Appellant's partner in placing the video recorder in a changing room and causing it to record whilst deplorable was far less serious than the Appellant's conduct. She was reckless in regard to the capturing of the indecent image of a young girl on video. There was no evidence of intent to film the young girl. She was therefore not dealt with for an offence under the Protection of Children legislation. She was dealt with in relation to the videoing of adults. Her conduct so far as recording images of adult women was concerned was likely to cause a breach of the peace. She was cautioned in respect of that offence.

Any right thinking person acquainted with all of the facts relating to the Appellant and his partner would consider that there was a considerable disparity between the seriousness of their conduct.

8. The Magistrate did not take into account any distribution of the tape to other persons when determining the appropriate sentence for the Appellant. This Court in considering the appeal has disregarded the limited distribution of the tape.
9. The Court has also noted that the Appellant claims that he understood that he would not be prosecuted. This has been put forward as a factor to be taken into account in mitigation of sentence. The Court does not consider that there is significant mitigation in this point.
10. The Court concurs with the view of the Magistrate, who when sentencing, referred to the Appellant's conduct concerning the young girl as being deliberate bad behaviour for which the Appellant had no excuse. The privacy of the young girl was violated and it was reprehensible to incorporate the recording in question on another tape. The image should have been destroyed.
11. The Magistrate took account of the fact that the Appellant was of previous good character and that he did not retain the captured indecent images of a young girl for commercial gain. The Magistrate saw fit to deal with the Appellant's offending behaviour by way of a fine of £1,500 after a not guilty plea trial.
12. The Court does not consider that the fine was wrong in principle or was excessive in any way. It was proportionate to the gravity of the offence.
13. Indeed the Court having taken all relevant factors into account gave anxious consideration as to whether it might be proper to increase the fine.
14. The appeal is dismissed.