

Judgment 22/2011

Mark Richard Gunter v Law Officers of the Crown
– Court of Appeal (File No. 423)
- 12th July, 2011

Protection of Children (Bailiwick of Guernsey) Law 1985 s.3A(i) – Possessing illegal images of children – application for leave to appeal against sentence. Sentencing guidelines set out. Appeal allowed in part.

IN THE COURT OF APPEAL OF GUERNSEY

The 12th day of July, 2011 before Jonathan Philip Chadwick Sumption OBE QC presiding, Sir de Vic Carey and Sir Hugh Bennett

MARK RICHARD GUNTER

(Appellant)

-v-

THE LAW OFFICERS OF THE CROWN

(Respondent)

On the application by the Appellant for leave to appeal against the sentence imposed by the Royal Court of fifteen months' imprisonment to be followed by an extended sentence licence of three years, on the 27 January 2011

THE COURT, having on the 11 July 2011 heard Advocate A M Merrien, for the Appellant and Crown Advocate G Perry thereon, GAVE JUDGMENT in the attached terms; and

- 1 GRANTED leave to appeal;
- 2 ALLOWED the appeal to the extent that the sentences on Counts 1 to 5 inclusive were SET ASIDE and no order made on those Counts; and
- 3 REDUCED the extended sentence licence period from three years to two years.

K H TOUGH
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY
CRIMINAL DIVISION – APPEAL NO 423

Before: **Jonathan Philip Chadwick Sumption OBE QC**
Sir de Vic Carey
Sir Hugh Bennett

Judgment delivered: - 12 July 2011

Between: **Mark Richard Gunter** (Appellant)

v

Law Officers of the Crown (Respondent)

Advocate A M Merrien appeared for the Applicant
Crown Advocate G Perry appeared for the Crown

This is the Judgment of the Court

Sumption JA

1. Mark Richard Gunter pleaded guilty on 28 March 2011 to an indictment containing seven counts of possessing illegal images of children, contrary to Section 3A(1) of the Protection of Children (Bailiwick of Guernsey) Law 1985. All seven related to images viewed on the internet and retrieved from one or other of two computers found in his possession at the time of his arrest. The Bailiff, sitting as President of this Court, remitted the Defendant's application for leave to appeal to the full court in the hope that we would give general guidance on sentencing in Guernsey in this class of case. Traditionally, the number of prosecutions has been small, but there are signs that it is increasing.

2. Section 3 of the Protection of Children (Bailiwick of Guernsey) Law 1985 (as amended) creates an offence of taking or making or permitting to be taken or made a photograph or pseudo-photograph of a child, or possessing such a photograph with a view to its being distributed, or causing or publishing an advertisement for such a photograph. Section 3A of the Law (which was added by the Administration of Justice (Bailiwick of Guernsey) Law, 1991 with effect from 28th May, 1991) creates an offence of mere possession of an indecent photograph of a child under, or apparently under, the age of sixteen, i.e. whether or not with a view to distribution. By Section 9(4) of the Law, a photograph includes 'data stored on a computer disc or by other electronic means which is capable of conversion into a photograph.' These offences correspond to the English statutory offences created by, respectively, Section 1 of the Protection of Children Act 1978 and Section 160 of the Criminal Justice Act 1988, from which they are plainly derived.

3. In both England and Guernsey, the maximum sentence for these offences has progressively increased over the past forty years, with the increasing level of public concern about the abuse of children. In England, the offences created by Section 1 of the Act of 1978 originally carried a maximum sentence of three years imprisonment. This was increased in 2001 to ten years. Mere possession of an indecent photograph of a child was originally a summary offence in England,

carrying a maximum sentence of six months imprisonment. In 2001, it became an offence triable either way with a maximum sentence of five years imprisonment. In Guernsey, the offence under Section 3 of the Law of 1985 originally carried a maximum sentence of 3 years imprisonment on indictment, and at the time of its introduction in 1991 the offence of mere possession under Section 3A of the Law of 1985 was punishable only by a fine. Thereafter, increases in the maximum sentence for these offences in England have been adopted at a few years distance by corresponding legislation in Guernsey. Since 2007, the statutory maxima have been the same in Guernsey as in England, except that the maximum sentence imposable by a magistrate on summary conviction in Guernsey is twelve months as opposed to six.

4. In *R. v. Oliver* [2003] 1 Cr. App. R. 28 the Court of Appeal (Criminal Division) in England, after consulting the Sentencing Advisory Panel, gave guidance about the general level of sentences in England for offences of making or possessing indecent photographs of children. We set out the principal sections of the judgment in full, because it remains the starting point for any sentencing exercise for this kind of offence:

9 We agree with the Panel that the two primary factors determinative of the seriousness of a particular offence are the nature of the indecent material and the extent of the offender's involvement with it.

10 As to the nature of the material, it will usually be desirable for sentencers to view for themselves the images involved, unless there is an agreed description of what those images depict. Subject to one matter, we accept the Panel's analysis of increasing seriousness by reference to five different levels of activity, derived from the COPINE Project's description of images. We do not agree with the Panel that COPINE typologies 2 and 3 are properly within Level 1. As it seems to us, neither nakedness in a legitimate setting, nor the surreptitious procuring of an image, gives rise, of itself, to a pornographic image. Accordingly, with that amendment to the Panel's proposals, we categorise the relevant levels as:

- (1) images depicting erotic posing with no sexual activity;
- (2) sexual activity between children, or solo masturbation by a child;
- (3) non-penetrative sexual activity between adults and children;
- (4) penetrative sexual activity between children and adults;
- (5) sadism or bestiality.

11 As to the nature of the offender's activity, the seriousness of an individual offence increases with the offender's proximity to, and responsibility for, the original abuse. Any element of commercial gain will place an offence at a high level of seriousness. In our judgment, swapping of images can properly be regarded as a commercial activity, albeit without financial gain, because it fuels demand for such material. Wide-scale distribution, even without financial profit, is intrinsically more harmful than a transaction limited to two or three individuals, both by reference to the potential use of the images by active paedophiles, and by reference to the shame and degradation to the original victims.

12 Merely locating an image on the internet will generally be less serious than down-loading it. Down-loading will generally be less serious than taking an original film or photograph of indecent posing or activity. We agree with the Panel that the choice between a custodial and non-custodial sentence is particularly difficult. On the one hand, there is considerable pressure, demonstrated by Parliament increasing the maximum permissible sentence, to mark society's abhorrence of child sexual abuse and child pornography by the use of custody. On the other hand, there is evidence that sex offender treatment programmes can be effective in controlling offenders' behaviour and thus preventing the commission of further offences. We agree with the Panel's recommendation that, in any case which is close to the custody threshold, the offender's suitability for treatment should be assessed with a view to imposing a community rehabilitation order with a requirement to attend a sex offender treatment

programme. We also agree with the Panel that the appropriate sentence should not be determined by the availability of additional orders, or by the availability of treatment programmes for offenders in custody.

- 13 That said, we turn to the particular factors relevant to the level of sentence. We stress that the proposals we make are guidelines intended to help sentencers. They are not to be construed as providing sentencers with a straightjacket from which they cannot escape. We bear in mind the current state of overcrowding in our prisons, and that a custodial sentence should only be imposed when necessary. We also bear in mind the public concern in this area to which we have already referred.
- 14 In our judgment, a fine will normally be appropriate in a case where the offender was merely in possession of material solely for his own use, including cases where material was downloaded from the internet but was not further distributed, and either the material consisted entirely of pseudo-photographs, the making of which had involved no abuse or exploitation of children, or there was no more than a small quantity of material at Level 1. A conditional discharge may be appropriate in such a case if the defendant pleads guilty and has no previous convictions. But a discharge should not be granted, as we have earlier indicated, for the purpose of avoiding the requirement of registration under the Sex Offenders Act 1997 .
- 15 Possession, including down-loading, of artificially created pseudo-photographs and the making of such images, should generally be treated as being at a lower level of seriousness than possessing or making photographic images of real children. But there may be exceptional cases in which the possession of a pseudo-photograph is as serious as the possession of a photograph of a real child: for example, where the pseudo-photograph provides a particularly grotesque image generally beyond the scope of a photograph. It is also to be borne in mind that, although pseudo-photographs lack the historical element of likely corruption of real children depicted in photographs, pseudo-photographs may be as likely as real photographs to fall into the hands of, or to be shown to, the vulnerable, and there to have equally corrupting effect. It will usually be desirable that a charge or count in an indictment specifies whether photographs or pseudo- photographs are involved.
- 16 We agree with the Panel that a community sentence may be appropriate in a case where the offender was in possession of a large amount of material at Level 1 and/or no more than a small number of images at Level 2, provided the material had not been distributed or shown to others. For an offender with the necessary level of motivation and co-operation, the appropriate sentence would be a community rehabilitation order with a sex offender programme. We agree with the Panel that the custody threshold will usually be passed where any of the material has been shown or distributed to others, or, in cases of possession, where there is a large amount of material at Level 2, or a small amount at Level 3 or above. A custodial sentence of up to six months will generally be appropriate in a case where (a) the offender was in possession of a large amount of material at Level 2 or a small amount at Level 3; or (b) the offender has shown, distributed, or exchanged indecent material at Level 1 or 2 on a limited scale, without financial gain. A custodial sentence of between six and twelve months will generally be appropriate for (a) showing or distributing a large number of images at Level 2 or 3; or (b) possessing a small number of images at Levels 4 or 5.
- 17 In relation to more serious offences, a custodial sentence between 12 months and three years will generally be appropriate for (a) possessing a large quantity of material at Levels 4 or 5, even if there was no showing or distribution of it to others; or (b) showing or distributing a large number of images at Level 3; or (c) producing or trading in material at Levels 1 to 3. Sentences longer than three years should be reserved for cases where (a) images at Levels 4 or 5 have been shown or distributed; or (b) the offender was actively involved in the production of images at Levels 4 or 5, especially where that involvement included a breach of trust, and whether or not there was an element of commercial gain; or (c) the offender had

commissioned or encouraged the production of such images. An offender whose conduct merits more than three years will merit a higher sentence if his conduct is within more than one of categories (a), (b) and (c) than one where conduct is within only one such category.

18 Sentences approaching the ten-year maximum will be appropriate in very serious cases where the defendant has a previous conviction either for dealing in child pornography, or for abusing children sexually or with violence. Previous such convictions in less serious cases may result in the custody threshold being passed and will be likely to give rise to a higher sentence where the custody threshold has been passed. An extended sentence may be appropriate in some cases, even where the custodial term is quite short: see *R. v Nelson* [2002] 1 Cr App R(S) 565 .

19 The levels of sentence which we have indicated are appropriate for adult offenders after a contested trial and without (save to the extent that we have referred to them) previous convictions.

20 There are specific factors which are capable of aggravating the seriousness of a particular offence. We identify these as follows:

- (i) If the images have been shown or distributed to a child.
- (ii) If there are a large number of images. It is impossible to specify precision as to numbers. Sentencers must make their own assessment of whether the numbers are small or large. Regard must be had to the principles presently applying by virtue of *R. v Canavan, Kidd and Shaw* [1998] 1 Cr App R 79 .
- (iii) The way in which a collection of images is organised on a computer may indicate a more or less sophisticated approach on the part of the offender to trading, or a higher level of personal interest in the material. An offence will be less serious if images have been viewed but not stored.
- (iv) Images posted on a public area of the internet, or distributed in a way making it more likely they will be found accidentally by computer users not looking for pornographic material, will aggravate the seriousness of the offence.
- (v) The offence will be aggravated if the offender was responsible for the original production of the images, particularly if the child or children involved were members of the offender's own family, or were drawn from particularly vulnerable groups, such as those who have left or have been taken from their home or normal environment, whether for the purposes of exploitation or otherwise, or if the offender has abused a position of trust, as in the case of a teacher, friend of the family, social worker, or youth group leader.
- (vi) The age of the children involved may be an aggravating feature. In many cases it will be difficult to quantify the effect of age by reference to the impact on the child. But in some cases that impact may be apparent. For example, assaults on babies or very young children attract particular repugnance and may, by the conduct depicted in the image, indicate the likelihood of physical injury to the private parts of the victim. Some conduct may manifestly (that is to say, apparently from the image) have induced fear or distress in the victim, and some conduct which might not cause fear or distress to an adolescent child, might cause fear or distress to a child of, say, 6 or 7.

21 So far as mitigation is concerned, we agree with the Panel that some, but not much, weight should be attached to good character. A plea of guilty, by virtue of s. 152 of the Powers of Criminal Courts (Sentencing) Act 2000 , is a statutory mitigating factor. The extent of the

sentencing discount to be allowed for a plea of guilty will vary according to the timing and circumstances of the plea. The sooner it is tendered, the greater is likely to be the discount: see, for example, *R. v Barber* [2002] 1 Cr App R(S) 548 .

5. Decisions of the Court of Appeal in England on sentencing practice are not as such binding in Guernsey. But the Guernsey courts will normally look to them as persuasive authority in a case where the (i) elements of the offence are comparable in the two jurisdictions, (ii) the statutory maximum sentence for the offence is comparable, and (iii) there are no significant differences between social or other conditions in Guernsey and those in England which justify a different approach.

6. In practice, the five-level classification in the *Oliver* guidelines has commonly been used in sentencing by the Royal Court in Guernsey. The guidelines themselves have also been used, but less consistently. In our judgment the time has come formally to adopt the sentencing practice in England for offences corresponding to those created by Sections 3 and 3A of the Protection of Children (Bailiwick of Guernsey) Law 1985. There is a number of reasons for this. In the first place, justice requires that those convicted of these offences in Guernsey should be sentenced on a reasonably consistent basis. This is difficult to achieve with the relatively small volume of case-law generated within the bailiwick. The volume and variety of case-law in England covers a far wider range of situations. Second, the social values of this community and those of England in the sensitive area of child protection and abuse are very similar and, subject to two reservations (to which we shall come), the relevant social conditions are broadly comparable. Third, the law is substantially the same. The Guernsey Law has directly adopted the elements of the offences from English statute law. In both England and Guernsey, the exploitation of children by making, possessing or accessing child pornography has been perceived as a problem of growing significance, and the maximum sentence available in Guernsey has been increased in line with English law. Fourth, the *Oliver* guidelines were based on the considerable experience of the English courts of sentencing in this kind of case, and on expert advice on the different categories of child pornography. Fifth and last, but certainly not least, the *Oliver* guidelines, as the judgment of the English Court of Appeal shows, are not a straightjacket. They are guidelines, which are intended to be sufficiently flexible to accommodate exceptional cases in which it will be right to depart from the proposed sentencing ranges, in either direction.

7. The two reservations which we have mentioned both reflect the fact that Guernsey is a much smaller and in some respects a closer-knit and more homogeneous community than England.

8. The first is that for some offences deterrence may be a more or less important factor in Guernsey than it would be in England. If a particular kind of offence is on the increase locally, or if it is becoming a serious social problem, a severe deterrent sentence may have a salutary effect in modifying criminal behaviour. It may also satisfy legitimate feelings of abhorrence which are likely to resonate more strongly in a small community such as Guernsey. In our judgment, however, this is not a consideration which warrants a different approach to sentencing for these particular offences in Guernsey by comparison to England. This is because a significant element of deterrence is already incorporated in the sentencing principles applied in both jurisdictions, which is reflected in the progressive increases in the statutory maximum sentences for these offences. Offences involving child pornography, even of the most serious kind, which two decades ago would have tried summarily or punished by a fine or a modest sentence of imprisonment, are now regularly visited by substantial custodial sentences. There is no reason to believe that a further element of deterrence, on top of that adopted relatively recently by the legislature, is necessary in order to deal with such behaviour. While this kind of offending undoubtedly generates strong feelings, it is important that the Royal Court should not for that reason alone feel under pressure to over-sentence.

9. The second reservation is that the small size of the Guernsey community may significantly aggravate the impact of the offence on the victim where the victim is here. This was the major consideration in *Forno v. Attorney General* [2011] JCA 22, where the Jersey Court of Appeal had to deal with a particularly extreme case of making and inciting the making of indecent photographs of children, involving a high degree of planning, deception and manipulation, the targeting of a number

of young girls in Jersey and the infliction of considerable distress upon them and their families. The Court dismissed an appeal against sentences which were substantially more severe than those which would have been warranted by the *Oliver* guidelines in the generality of child pornography cases. The Court added an observation which in a comparable case would have been equally applicable to Guernsey:

38 We would only add a brief observation about the relationship between sentencing guidelines in Jersey and those applied in England. Where the relevant social conditions and the policy considerations appear to be the same in both jurisdictions, it will usually be right for the sentencing court in Jersey to have regard to English sentencing practice even though not bound by it. The volume of case law generated by English criminal appeals is large and varied, and in practice it has been found of value by sentencers in this jurisdiction. There are, however, some offences where the conditions in this bailiwick call for a different approach. A well-established example is drug importation, which has for many years been visited with much heavier sentences in this jurisdiction than in England. Sexual offences of this kind, involving the perversion of children, are another case in point. The corrosive feelings of shame, self-reproach and alienation suffered by the child are significantly greater and more persistent in a small and relatively close-knit community than they are in the more anonymous environment of a highly urbanised country of more than 60 million inhabitants such as the United Kingdom. It follows that while the English categorisation of the different kinds of offence involving the sexualisation of children is undoubtedly helpful, in a particularly serious case such as this one, a sentencing court is entitled to take the view that a different and greater order of severity is called for.

10. Against that background, we turn to the facts of the present appeal.

11. All of the counts on which the Defendant was convicted were counts of possession of the images by viewing them on a pornographic website with a computer. There is no question in this case of the Defendant having been privy to the making of the original photographs, nor of his having had any dealings with the children themselves. Nor is there any question of his having distributed or intended to distribute the images to others. There is no question of exploitation of children in Guernsey. So far as the material before the Royal Court showed, none of the common aggravating factors considered by the English Court of Appeal at paragraph 20 of *Oliver* applies and there are no other aggravating factors. The Defendant was simply a passive viewer of material available on the internet. Indeed, so far as can be ascertained, the Defendant did not even download it, for it was recovered by forensic IT specialists from the internet cache and not from files created by him. The offences of which this Defendant was convicted therefore involved the lowest possible degree of personal involvement with the indecent material. Possession is not a victimless crime even on that footing. It fuels demand for a particularly exploitative and emotionally damaging form abuse of children by others. But it is a much less grave offence than direct involvement in the making of the images.

12. Turning to the images themselves, of the seven counts on which this Defendants was indicted, the first three related to images accessed on or about 13 January 2009 on a laptop computer which was in current use at the time of his arrest. It is common ground that count 1 related to a single indecent image at level 1 in the five-level classification in *Oliver*, and that count 2 related to 90 further images, also at level 1. Count 3 related to two images at level 5. The Defendant was sentenced to twelve months imprisonment on each of counts 1-3, to run concurrently.

13. Counts 1 and 2 related to level 1 images. They show children, naked, without sexual activity. The *Oliver* guidelines suggest that the mere possession, without any distribution or sharing, of even a large number of indecent images at level 1 would normally call for a community and not a custodial sentence. There was in our judgment no justification for the sentence of twelve months' imprisonment imposed by the Royal Court on these counts.

14. Count 3 raises more difficult questions, because it relates to two level five images. In *Oliver*, it was said that a custodial sentence of between six and twelve months will generally be appropriate for the possession of even a small number of images at level 5. We have, however, consistently with the suggestion in *Oliver*, viewed both images ourselves, together with a sample of the level 1 images involved in counts 1 and 2. The reason why the Court should normally view the images is that the five categories of indecent material are inevitably somewhat arbitrary at the margins. There will always be rare cases in which the description in each category does not fairly represent the gravity of the material. This is such a case. Technically, the two level five images were correctly classified at level 5, because they show bondage (a young girl, provocatively dressed, handcuffed by one wrist to a metal frame). This can be described as a mild form of sadism. But no sexual activity is shown and in every other respect than the handcuffs they belong to the category of erotic posing (level 1). They are, ironically, the least objectionable of the images which we have had to examine for this appeal. Even if the two level 5 images had been as vile as the generality of indecent images at that level, the appropriate sentence on count 3 would have been no more than six months, bearing in mind that the Defendant's involvement with them was of the most limited kind. As it is, these particular images are less obnoxious than the level 1 images of naked children involved in counts 1 and 2. We think that the right course would have been to treat them in the same way as level 1 images, which for all practical purposes is what they were. In our judgment, the viewing of the two level 5 images did not warrant a custodial sentence.

15. We turn, therefore, to Counts 4-7, which are described as the 'historic' counts. They relate to images viewed by the Defendant in 2004 and retrieved from an older tower computer which the Defendant ceased to use at the end of that year. The historic counts are different from counts 1-3 in that the offences were committed at a time when the maximum sentence for possession of indecent images of children under Section 3A(1) of the Law of 1985 was six months imprisonment. It follows that the *Oliver* guidelines, which were based on a maximum sentence of ten years imprisonment for the offence corresponding to Section 3 of the Guernsey Law of 1985, and five years for the offence corresponding to Section 3A, can be applied only by rather loose analogy.

16. Applying the *Oliver* categories, Count 4 relates to a single indecent image at level 1, count 5 to 409 further images at level 1, count 6 to one image at level 3, and count 7 to one image at level 4. The Defendant was sentenced to three months on each of these counts, to run concurrently with each other but consecutively to the custodial sentences on counts 1-3.

17. Counts 4 and 5 relate entirely to level 1 images, and would not have warranted a custodial sentence even under the current law, which provides for a maximum of five years. We cannot conceive that they should warrant a custodial sentence under the law in force in 2004 which provided for a maximum sentence of only six months.

18. Counts 6 and 7 are much the most serious of the historic counts, because they relate to images at levels 3 and 4 respectively, albeit only one image in each case. On the footing of a five-year maximum sentence, the *Oliver* guidelines suggest a sentence of up to six months for possession of even a small quantity of level 3 images, and between six and twelve months for possession of a small quantity of level 4 images. Some adjustment is necessary to reflect the fact that these offences were committed at a time when the maximum sentence of imprisonment available for mere possession in Guernsey was six months imprisonment. Even so, these offences crossed the threshold for an immediate custodial sentences. The level 3 and 4 images (which we have viewed) are as unpleasant as any images at levels 3 or 4 could be. Previous good character is very limited mitigation in this field, and this Defendant, although he pleaded guilty at an early stage, had in reality very little choice once the material had been found on his computer. We are satisfied that the sentence of three months on counts 6 and 7 was entirely justified. Under the current legislation, he would undoubtedly have received a longer sentence.

19. In the result, we grant leave to appeal and allow the appeal against the sentences on counts 1-5, and we set aside the sentences of imprisonment passed by the Royal Court on those counts. We

dismiss the appeal on counts 6 and 7, so that the sentences of three months concurrent on those counts will stand. If counts 1-5 had stood alone, we would have made a community service order or imposed a fine. But as it is we make no order on counts 1-5, because that would not be appropriate in conjunction with a custodial sentence on counts 6 and 7.

20. The Royal Court imposed an extended sentence of imprisonment under Section 3 of the Criminal Justice (Supervision of Offenders) (Bailiwick of Guernsey) Law, 2004. The extended sentence licence period was three years, with a condition of compliance with any requirements of the supervising officer. The purpose of the condition was to provide for the Defendant to embark on an accredited sex offender treatment programme. This part of the sentence was based at least in part on the views expressed in the social enquiry report that such a programme would minimise the risk to the public of his release. Although the result of our order is that the Defendant's effective sentence of immediate custody will be reduced from fifteen months to three, which he has already served, we agree that in this case an extended sentence was appropriate. The extended sentence licence will be subject to the conditions imposed by the Royal Court, including the condition in the final paragraph of its order that the Defendant should comply with any requirements of his supervising officer for the purpose of ensuring that he addresses his sexual behaviour problems including attending the 'only pictures' programme. However, we propose to reduce the extended sentence licence period from three years to two, because the social inquiry report expresses the view that this would be sufficient to address the risks.