Judgment 14/2012

James Alfred Wicks, Christopher Michael Sharp & Paul Thomas Towers, v Law Officers of the Crown - Court of Appeal
- Criminal File Nos. 431, 435, 242
- 22 March 2012

Criminal appeals against sentence – Protection of Children (Bailiwick of Guernsey) Law, 1985 – indecent photographs of children – review of guidelines – aggravating factors and mitigation.

IN THE COURT OF APPEAL OF GUERNSEY

The 22nd day of March, 2012 before Sir Geoffrey Rowland, Bailiff, President, Sir John Nutting Bt QC, The Hon Michael Jacob Beloff QC, Dame Heather Steel, DBE, Sir de Vic Carey, Michael Scott Jones QC and Michael Cameron St John Birt, Bailiff of Jersey

JAMES ALFRED WICKS

(Appellant)

-v-

THE LAW OFFICERS OF THE CROWN

(Respondent)

In the matter of the appeal, with leave, by the Appellant against the sentence of 3 years and 6 months' imprisonment, imposed by the Royal Court on the 11th day of February 2011.

WHEREAS on the 16th day of February 2012, THE COURT having heard Advocate C Fletcher for the Appellant and Advocate G Perry for the Crown thereon;

AND WHEREAS on the 17th day of February 2012 GAVE JUDGMENT and ALLOWED the appeal, RESERVED its reasons and: -

1. REDUCED the sentence to 2 years 9 months imprisonment;

2. AGREED that the extended sentence licence of 2 years remains in place;

THE COURT this day ISSUED JUDGMENT in the terms attached hereto.

J TORODE
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

The 22nd day of March, 2012 before Sir Geoffrey Rowland, Bailiff, President, Sir John Nutting Bt QC, The Hon Michael Jacob Beloff QC, Dame Heather Steel, DBE, Sir de Vic Carey, Michael Scott Jones QC and Michael Cameron St John Birt, Bailiff of Jersey

CHRISTOPHER MICHAEL SHARP

(Appellant)

-v-

THE LAW OFFICERS OF THE CROWN

(Respondent)

In the matter of the appeal, with leave, by the Appellant against the sentence of 4 years imprisonment, imposed by the Royal Court on 20th day of January 2011.

WHEREAS on the 16th day of February 2012, THE COURT having heard Advocate A M Merrien for the Appellant and Advocate G Perry for the Crown thereon;

AND WHEREAS on the 17th day of February 2012 the appeal was DISMISSED, and Judgment RESERVED;

THE COURT this day ISSUED JUDGMENT in the terms attached hereto.

J TORODE
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

The 22nd day of March, 2012 before Sir Geoffrey Rowland, Bailiff, President, Sir John Nutting Bt QC, The Hon Michael Jacob Beloff QC, Dame Heather Steel, DBE, Sir de Vic Carey, Michael Scott Jones QC and Michael Cameron St John Birt, Bailiff of Jersey

PAUL THOMAS TOWERS

(Appellant)

-v-

THE LAW OFFICERS OF THE CROWN

(Respondent)

In the matter of the appeal, with leave, by the Appellant against the sentence of 3 years and 9 months' imprisonment, imposed by the Royal Court on the 28th day of March 2011.

WHEREAS on the 16th day of February 2012, THE COURT heard Advocate C Fletcher for the Appellant and Advocate G Perry for the Crown thereon;

AND WHEREAS on the 17th February 2012 GAVE JUDGMENT and ALLOWED the appeal and RESERVED its reasons;

1. QUASHED the 3 years 9 months custodial term;
2. IMPOSED a 3 year term in substitution for Counts 6 and 7 of the Indictment and;
3. AGREED that the extended sentence was appropriate and the extended sentence licence and conditions remain unchanged.

THE COURT this day ISSUED JUDGMENT in the terms attached hereto.

J TORODE
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL APPEALS

16 and 17 February 2012

Before: **The Bailiff (President)**
Sir John Nutting Bt QC
The Hon Michael Beloff QC
Dame Heather Steel D.B.E
Sir de Vic Carey
Michael Jones QC and
Michael Birt, Bailiff of Jersey
Judges of Appeal

Between: **JAMES ALFRED WICKS** **(Appellants)**
(Appeal from the decision of the Royal Court on 11 February 2011)

CHRISTOPHER MICHAEL SHARP
(Appeal from the decision of the Royal Court on 20 January 2011)

PAUL THOMAS TOWERS
(Appeal from the decision of the Royal Court on 18 February 2011)

V

THE LAW OFFICERS OF THE CROWN **(Respondent)**

Decision handed down: 17 February 2012
Reserved Judgment handed down: 22 March 2012

Advocate C Fletcher for the Appellant James Alfred Wicks
Advocate A M Merrien for the Appellant Christopher Michael Sharp
Advocate A M Merrien for the Appellant Paul Thomas Towers
Advocate G Perry appears for the Crown

Authorities and Texts referred to: -
Mark Richard Gunter v Law Officers of the Crown, CA 423 15 July 2011
R v Oliver [2003] 1 Cr.Ap.R.28
Attorney General v U [2011] JRC 219
Law Officers of the Crown v Henriques 20 January 2012
R v Newsome, R v Brown [1970] 2QB 711
Burton v Law Officers of the Crown CA 425 6 February 2012
Ryder v Law Officers [2009-10] GLR 288 (paras 14 – 16)
Campbell v Attorney General [1995] JLR 136
H.M. Advocate v Graham [2010] HCJAC 50
R.v Bowden [2000] 1 Cr.App.R.(S.) 26
Forno v. Attorney General [2011] JCA 22
R.v Nelson (2002) 1 Cr.App.R.(S) 565
Gemmell v Lord Advocate HJC 20 December 2011
The Protection of Children (Bailiwick of Guernsey) Law, 1985

The Administration of Justice (Bailiwick of Guernsey) Law, 1991
The Criminal Justice and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2002
The Criminal Justice and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2003
Sentencing Guidelines Council's Reduction in Sentence for a Guilty Plea: Revised Guideline 2007
Sentences for Abuse Involving Child Pornography by Professor Alisdair Gillespie; Crim.L.R. (2003) p.81 at 91)
Criminal Justice (Supervision of Offenders) (Bailiwick of Guernsey) Law, 2004
Sentencing Guidelines Council Definitive Guideline on the Sexual Offences Act, 2003
Protection of Children Act, 1978
Sexual Offences Act, 2003
Criminal Justice Act, 2003 Sections 144 and 174(2) (d)

THE PRESIDENT

This is the judgment of the Court.

INTRODUCTION

1. Following the Court of Appeal judgment on 15th July 2011 in the case of Mark Richard Gunter v Law Officers of the Crown, Appeal Number 423 (Gunter), the three Appellants have been granted leave to appeal to enable this Court of seven judges to consider the sentences passed upon each for offences contrary to the provisions of the Protection of Children (Bailiwick of Guernsey) Law 1985, as amended.

2. Section 3 of the 1985 Law, with which this judgment is concerned, and section 3A, which is closely related to section 3, are in the following terms:-

> ***Indecent photographs of children.***
>
> ***3.*** *(1) It is an offence for a person –*
>
> *(a) to take, or permit to be taken or to make, any indecent photograph or pseudo-photograph of a child, or*
>
> *(b) to distribute or show such indecent photographs or pseudo-photographs, or*
>
> *(c) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others, or*
>
> *(d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs, or intends to do so.*
>
> *(2) For the purposes of this section, a person is to be regarded as distributing an indecent photograph or pseudo-photographs if he parts with possession of it to, or exposes or offers it for acquisition by, another person.*
>
> *… …*
>
> ***Possession of indecent photographs of children.***
>
> ***3A.*** *(1) It is an offence for a person to have any indecent photograph or pseudo-photograph of a child (meaning in this section a person under or apparently under the age of 16) in his possession.*

3. For the purposes of section 3, a child is defined as a person under the age of sixteen years. (Section 9(1)) A pseudo-photograph means an image, whether made by computer graphics or otherwise, which appears to be a photograph. (Section 9(6)) If the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of the 1985 Law as showing a child. (Section 9(7)) A person guilty of an offence under section 3 is liable on conviction on indictment to imprisonment for a term not exceeding 10 years, or to a fine, or both. (Section 8A(a)) Conviction of an offence under section 3A carries a maximum penalty of 5 years' imprisonment. (Section 3A(4)) Later in this judgment, we say more about the way in which the law in this area has developed over the years.

4. On 4th November 2010 in the Royal Court, the Appellant James Alfred Wicks pleaded guilty to 14 counts on an indictment which alleged the making of 1,346 indecent images of children, downloaded and stored in his computer between September and November 2009, contrary to section 3(1)(a) of the Protection of Children (Bailiwick of Guernsey) Law 1985, as amended. On 11th February 2011 the Appellant, who was then aged 36, was sentenced by Judge Russell Finch and nine Jurats to an extended sentence of 3 years 6 months imprisonment concurrent on each count with an extended sentence licence of two years which included conditions "(i) Not to own or use any computer without the prior approval of your Supervising Officer and (ii) To comply with any requirements specified by your Supervising Officer for the purpose of ensuring that you address your sexual offending behaviour pattern."

5. On 6th October 2011, the Single Judge granted leave to appeal that sentence out of time.

6. On 17th February 2012, the appeal was allowed by this Court; the sentence of 3 years 6 months imprisonment was quashed and an extended sentence of imprisonment imposed of 2 years 9 months, with the extended sentence licence period of 2 years to remain unchanged.

7. On 29th November 2010 in the Royal Court, the Appellant Christopher Michael Sharp pleaded guilty to seven counts on an indictment which alleged the making of 537 indecent images of children between August 2007 and September 2008, contrary to section 3(1)(a) of the Protection of Children (Bailiwick of Guernsey) Law 1985, as amended. The images comprised 502 still and 35 video images, downloaded and stored in his computer. On 20th January 2011, the Appellant, who was then aged 44, was sentenced in the Royal Court by Judge Russell Finch and eight Jurats to an extended sentence of 4 years imprisonment concurrent for each of the seven counts, plus a 2 year extended sentence licence which included conditions "(i) Not to own or use any computer without prior approval of your Supervising Officer, which we consider is right in all the relevant circumstances for the Supervisor to decide. (ii) As recommended by the Supervisor to comply with any requirements specified by your Supervising Officer for the purpose of ensuring that you address your sexual offending behaviour problems."

8. On 2nd November 2011, the single Judge granted leave to appeal out of time and leave to appeal that sentence.

9. On 17th February 2012, the appeal was dismissed by this Court.

10. On 18th February 2011, the Appellant Paul Thomas Towers was convicted in the Royal Court before Judge Russell Finch and nine Jurats on an indictment containing seven counts of making indecent images of children contrary to section 3 of the Protection of Children (Bailiwick of Guernsey) Law 1985, as amended. The counts represented 147 still images and 7 video images. He was remanded in custody. On 28th March, when he was aged 51, he was sentenced in the Royal Court (Judge Finch and 8 Jurats) to an extended sentence of 3 years 9 months imprisonment concurrent for each count to run from 18th February 2011 plus an extended sentence licence of 2 years which included the condition "To comply with any requirements of your Supervising Officer for the purpose of ensuring that you address your sexual offending behaviour problems."

11. On 6th October 2011, the single judge granted leave to appeal that sentence.

12. On 17th February 2012, the appeal was allowed by this Court. The extended sentence of 3 years 9 months imprisonment was quashed and a sentence of 3 years imposed, with the extended sentence licence period to remain unchanged.

THE CONSTITUTIONAL POSITION

13. For the first time in its history, the Court is sitting as a panel of seven judges. We should explain why this is so.

14. In Gunter v Law Officers of the Crown (15th July 2011), the Court of Appeal considered the appropriate sentencing levels for offences involving indecent images of children. The Court held that, subject to two reservations which are not relevant for the purposes of this judgment, the Guernsey courts should apply the sentencing levels laid down in the leading English case of R v Oliver [2003] 1 Cr.Ap.R.28. In the course of so doing, the Court said this:-

> *"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".*

15. The Court went on at paragraph 6 of its judgment to conclude that these three conditions were met in the case of offences concerning indecent images of children and accordingly the time had 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.

16. The decision in Gunter has raised a number of concerns:-

    (i) The passage cited above coupled with the decision in the case suggests that, unless there is a significant difference between social or other conditions in Guernsey and those in England, the Guernsey courts should follow English sentencing practice. That has not hitherto been thought to be the case and it raises an issue of fundamental importance as to the constitutional position of Guernsey as a separate jurisdiction.

    (ii) In Attorney General v U [2011] JRC 219, the Royal Court of Jersey declined to follow Gunter, on the ground that the requirement that there must be some difference of social or other condition before departure from English sentencing practice is justified is incorrect and inconsistent with the constitutional position. In the course of its judgment, that Court referred to a number of dicta from the Jersey Court of Appeal which would appear to be inconsistent with the approach of the Court of Appeal in Gunter.

    (iii) Prior to the decision in Gunter, the Royal Court had been imposing sentences for offences of indecent images of children at a higher level than that provided for under the English guidelines and, since Gunter, has expressed the view that the English sentencing levels are in certain respects too low. Thus, in Law Officers of the Crown v Henriques (20th January 2012), the Court made it clear that, but for the decision in Gunter, the Jurats would have been minded to impose a higher sentence.

    (iv) The sentencing guidelines in England adopted by the English Court of Appeal in Oliver were subsequently amended in 2007. Thus the Court in Gunter has directed the Royal Court to follow English guidelines, notwithstanding that they have since been changed in England itself.

17. Although the Court of Appeal in Guernsey is not bound by its own previous decisions in the same way as the criminal division of the Court of Appeal in England and Wales, we note that, even in that court, a five judge court may depart from an earlier decision of a three judge court in matters of sentencing (see R v Newsome, R v Brown [1970] 2QB 711). Given the important concerns described above, the present Court has been constituted to review the decision in Gunter. It is of note that the panel comprises judges from Guernsey, Jersey, England and Scotland.

18. We start by addressing the fundamental constitutional issue. Guernsey is a separate jurisdiction and has its own legal system. It is, therefore, free to set its own sentencing levels as the Island's courts think appropriate for Guernsey. Guernsey no more has to follow sentencing practice in England than it has to follow sentencing practice in Scotland, Northern Ireland, Jersey or, for that matter France; it can, of course, in exercise of its autonomy choose, but for the same reason of autonomy cannot be compelled, to do so. In our judgment, no authority is required to justify this elementary statement of the constitutional position which has been regularly stated on previous occasions. Therefore, we would cite merely the following:-

    (i) Since Gunter, a five judge Court of Appeal in the case of Burton v Law Officers of the Crown (6th February 2012) has described the constitutional position and sentencing practice in some detail (paras 28 to 37) and, at para 35, the judgment states:-

    "... the Royal Court can rightly claim that in matters of criminal sentencing it is not bound by English sentencing decisions and that it exercises its own discretion in determining an appropriate disposal in criminal matters coming before it."

    (ii) In Ryder v Law Officers of the Crown (16th September 2009 at paras 14 – 16) this Court made it clear that it is open to the Guernsey courts to impose heavier sentences for offences of violence than are imposed in England and Wales simply because of the desire to maintain the particular and relative safety of Guernsey.

    (iii) In Campbell v Attorney General [1995] JLR 136, a five judge panel of the Jersey Court of Appeal said this at 141:-

    "The Island cannot be impervious to outside influences but there are nevertheless important differences between the sentencing process in Jersey and that which pertains in England… As we have already stated, Jersey is a separate jurisdiction and entitled to fix its own sentencing levels."

19. The difficulty with the observation in Gunter referred to in para 14 above is that it appears to suggest that, when the elements of the offence in question and the statutory maximum sentences are the same in Guernsey as in England and Wales, the Guernsey courts may only depart from English sentencing levels if there is a significant difference in social or other conditions between Guernsey on the one hand and England and Wales on the other. We must respectfully disagree. Such an approach is wholly inconsistent with Guernsey's position as a separate jurisdiction. Naturally, where the elements of the offence in question are comparable in the two jurisdictions and the statutory maximum sentence for the offence is also comparable, the Guernsey courts may well derive considerable assistance from the sentencing practice applied in England because of its larger size and the greater number of cases which will come before the courts of that jurisdiction. A recent example of this Court choosing of its own volition to apply English sentencing levels is the decision in Burton itself (which concerned an offence of rape).

20. But there is no need for there to be a significant difference in social or other conditions for the Guernsey courts to take a different approach from England and Wales and adopt a different level of sentencing. The Guernsey courts may simply consider that the sentencing levels in England

are either too high or too low and should not be followed. They are perfectly free to do so. It is wrong to start from the position that sentencing levels in England are correct and that there must be some specific reason to depart from them. Rather, the position from which it is right to start is that the Guernsey courts must determine the appropriate sentencing levels for offences committed in Guernsey and that, in doing so, they may or may not derive assistance from what is done in England and Wales or in any other jurisdiction.

21. The Court of Appeal in Gunter having wrongly decided to adopt English sentencing levels in relation to indecent images of children, because it could not identify any difference in social or other condition, we must now approach the matter afresh. While taking into account the practice in England and Wales, we must determine the right level of sentencing for this jurisdiction.

22. In relation to the present category of offences, it is clearly the view of the Royal Court that the sentencing levels established in England are too low in certain respects. As this Court pointed out in Burton, this jurisdiction has the significant advantage that sentencing is not passed by a single professional judge; sentencing in the Royal Court is determined by a panel of Jurats who are elected for their independence of character and other attributes. They are particularly well placed to reflect local concerns. Whilst sentencing levels are ultimately a matter for this Court to determine, due weight should be given to the views of the Royal Court, consisting as it does of a panel of Jurats drawn from the local community.

23. Nevertheless, in a field such as this, it is important that there should be some guidelines in order to achieve a measure of consistency and clarify the principles which the Royal Court will apply in determining the appropriate sentence. Accordingly, in what follows, we set out broad guidelines which are designed to be of assistance to the Royal Court. As will be seen, in some respects, we have decided to apply the same broad sentencing levels as in England and Wales because we believe these to be appropriate; but, in others, we have increased the level to take account of the views of the Royal Court.

THE PROPER APPROACH

24. The convictions with which this appeal are concerned all relate to "making" an indecent image of a child, but the guidance which we give to the courts of the Bailiwick for sentencing include circumstances where an offender is charged under the other limbs of Section 3(1) of the Protection of Children (Bailiwick of Guernsey) Law 1985 as amended, including cases of taking, or permitting the taking of, an indecent image of a child, as well as the offence of distributing or showing such an image or having such an image in possession with a view to distribution or show.

25. In practical terms, the offences under Section 3 are apt to include all acts associated with the creation of an indecent image and embrace the activities of all those involved in the process, from the photographer who takes the original image to the person who later downloads it onto his computer for his own perverted pleasure. The guidance which we give may also be useful where the charge involves acts of conspiring, procuring, commissioning or encouraging the commission of any of the offences, or attempting to do so.

26. It is interesting to note that the original offence under Section 3 has undergone significant change in the last twenty five years and the penalties have been substantially increased. The 1985 Law provided for a maximum sentence for any offence under Section 3 of three months imprisonment and/or a fine not exceeding £500 on summary conviction, and three years imprisonment and/or an unlimited fine on conviction on indictment.

27. Section 3 of the 1985 Law also made it an offence to possess an indecent image of a child only if the possession was with a view to distribution or show. In 1991 the Administration of Justice (Bailiwick of Guernsey) Law created the additional offence of possessing an indecent image,

simpliciter, by the insertion of Section 3A into the 1985 Law, the maximum penalty being a fine at level 5.

28. In 2002, the Criminal Justice and Miscellaneous Provisions (Bailiwick of Guernsey) Law added to Section 3(1) the offence of "making" an indecent image of a child and introduced the concept of pseudo-photographs which are defined in the Law. By this same Law the maximum penalty for the possession of an indecent photograph of a child was increased to six months imprisonment.

29. In 2003 the Criminal Justice Miscellaneous Provisions (Bailiwick of Guernsey) Law increased the maximum penalties for all the offences, except the offence of simple possession, to twelve months imprisonment and/or a level 5 fine on summary conviction, and to ten years imprisonment and/or an unlimited fine on conviction on indictment. In respect of the offence of possession the penalty was increased to twelve months in the Magistrates Court and to five years on indictment.

30. The progressive increases in this jurisdiction of the maximum sentence which could be passed on conviction on indictment for the offences of taking, making, distributing and possessing for distribution an indecent image, from three to five to ten years, over a comparatively short period, echoed similar increases in maximum sentences considered appropriate for these crimes in England and Wales by the U.K. Parliament. It is clear that the public, legislators and judges in both jurisdictions were influenced by a determination to protect children from abuse caused by the market in this type of pornography.

31. The gravamen of the offence is the exploitation of children. It follows that, in the view of this Court, the closer the offender's conduct is to the creation of the original image, the harsher, generally speaking, the punishment should be.

32. That conduct is also rendered more serious by the nature of the image concerned. We have found helpful the scale of indecent images originally defined as part of the COPINE Project developed by the University of Cork. These classifications have undergone revisions and the most recent divide indecent images into the following levels of gravity:

Level 1.	Images depicting erotic posing with no sexual activity.
Level 2.	Non-penetrative sexual activity between children, or solo masturbation by a child.
Level 3.	Non-penetrative sexual activity between adults and children.
Level 4.	Penetrative sexual activity involving a child or children, or both children and adults.
Level 5.	Sadism or penetration of, or by, an animal.

33. We adopt these levels and we propose to treat both the extent of the offender's involvement and the level of the images concerned as the most important factors in defining different categories of offending for the purpose of sentence.

34. We accept that a judgment into which level an individual image may fall is sometimes somewhat subjective and we agree that arrangements should always be made to enable the sentencing court to view representative samples of the material in the case. As the Court said in Gunter:

> "*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.*" (para.14).

35. The prosecution should be responsible for assembling the material and for obtaining the agreement of the defence. In the event of disagreement, the material should be put before the court, albeit that the defence advocate will be entitled to make to the court any observations on the unrepresentative nature of the material or on any other matter. In this context we echo what was said by the Lord Justice-Clerk in H.M. Advocate v Graham (2010) HCJAC 50 that the sentencer

> "*should be conscious of the ever present danger of passing sentence when his emotions have been raised by what he has seen*" (para. 50).

36. Neither the concept of "taking", nor the concept of "making", an image is defined in the Law. In the following categorisations we use the verb "take" to include the creation of the original image and "make" to concern conduct including downloading the image. In R.v Bowden (2000) 1 Cr.App.R.(S.) 26, the Court of Appeal decided that someone who downloads indecent images from the internet to their computer is making indecent images rather than merely possessing them because an electronic duplicate version is created.

37. We use the word "image" to include still or moving photographs. Since we prefer to treat gain and distribution to others as being aggravating factors of taking, making and possessing with a view to distribution, any indecent image, we do not include provision for these factors of offending within the categories.

38. None of the counts in any of the indictments with which these appeals are concerned relates to simple possession of indecent images and since, importantly, that offence carries a different maximum sentence, we do not include advice on sentencing for this offence within the categories listed below, although no doubt the Guidelines will provide general assistance to the Magistrates Court and the Royal Court in such cases.

39. The guidance given in Oliver was first reported and published in 2002. It was reviewed by the Sentencing Guidance Council in 2007. We have preferred to have regard, broadly, to the tabulation used by the Council in drafting Guidelines for this jurisdiction. In each of the categories which we have adopted below, we refer to an "initial figure". We envisage that, having selected what it considers to be the appropriate initial figure for the offence, the sentencing court will adjust that figure to reflect such aggravating and mitigating factors of the offence as there may be. The resulting figure may be subject to a discount to reflect personal mitigation and a guilty plea. We say more about that in paragraph 59 below.

Category 1.	Where an offender has been concerned in any way in the taking or production of an image falling within levels 4 or 5, an initial figure in the region of 6 years imprisonment would be appropriate.
Category 2.	Where the offender has similarly been involved in the taking or production of an image falling within levels 2 or 3, an initial figure in the region of 4 years imprisonment would be appropriate.
Category 3.	Where an offender has similarly been involved in the taking or production of images of level 1, an initial figure in the region of 2 years imprisonment would be appropriate.
Category 4.	Where an offender has made an image, or possessed an image for distribution or show, falling within levels 4 or 5, an initial figure in the region of 3 years imprisonment would be appropriate.
Category 5.	Where an offender has made an image, or possessed an image for distribution or show, falling within levels 2 or 3, an initial figure in the region of 18 months imprisonment would be appropriate.

Category 6. Where an offender has made an image of material falling within level 1, a fine or community penalty, preferably with a condition of treatment, would be appropriate. Where, however, one or more of the aggravating factors which we list below, or any other aggravating factor which the court considers relevant, is present, the court may feel that the custody threshold is passed and may consider whether a sentence of up to 6 months imprisonment would be appropriate.

Category 7. Where the offence is limited to the making of a pseudo-image, the sentencing court may take the view that the custody threshold has not been passed and a fine or a community penalty, with or without conditions, would be appropriate.

In relation to Category 7, we have been influenced by the consideration that pseudo-images do not have the specific ingredient of the abuse or exploitation of children. However, if the case is one involving an image which, following the description in Oliver, may be described as "particularly grotesque," (para. 15), especially if one or more aggravating factors are present, the court may conclude that the custody threshold has been passed. It must also be born in mind that the distribution of such images fuels the demand for child pornography and may therefore justifiably constitute an aggravating feature of the offence.

AGGRAVATING FACTORS

40. We now turn to matters which aggravate these crimes. As with most criminal offences, a number of factors potentially aggravate any offence. We do not regard the list as closed but it includes:

1. Breach of trust or the taking advantage of a child of special vulnerability, or where the production has involved threats to, or promises of reward for, the child, or where the child has been given alcohol or drugs to facilitate the taking of the image, or where the child has been deceived or otherwise manipulated or coerced.

2. Where the number of images is large, indicating a high level of personal interest in such images and/or a significant period of time over which the images have been collected.

   We have carefully considered the apparent preference of the Court in Gunter, following Oliver, to treat the amount of material as a reason for lifting the case from one sentencing category into another. We prefer to treat quantity as an aggravating factor within the sentencing categories which we have proposed. We also note that the Court in Oliver declined to define what is meant by a "*large*" number of images. However, the High Court of Justiciary in Graham concluded that a large number could be defined as in the "*high hundreds*" and upward (see para. 32). We accept that any figure is necessarily arbitrary and that a sentencing court might well take the view that a large number of images of levels 4 or 5 would constitute a more significant aggravating factor than a similar number of images of level 1, or levels 2 and 3. We recognise the ease with which such images can be downloaded from the Internet. Evidence from other cases demonstrates that paedophiles find the images addictive and tend to download images in substantial numbers. We accept, as the Lord Justice-Clerk reports in his judgment, that offenders can quickly amass a collection of many thousands of images (para. 32). Nonetheless, we decline, with respect, to adopt the view of the High Court of Justiciary. We regard any number of images above three figures as constituting a large number. In doing so we are less concerned to pay heed to the facility with which the images can be downloaded and more concerned to reflect the obvious fact that the possession of any significant number of such images involves the abuse either of a large number of children on a few occasions or of a small number of children on a large number of

occasions. With these observations we leave the extent to which the number of images is considered to be an aggravating factor for each level to the judgment of the Magistrates Court and the Royal Court.

3. Where the images have been widely distributed or shown to others.

We regard wide-scale distribution of such material, even without the ingredient of gain, as a significantly aggravating factor of these offences and the larger the number of those to whom the images have been distributed, the more significant the aggravating feature. As was said by the Court in Oliver:

"*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 of the original victims.*"

The distribution or showing of indecent images to a child, or where the images have been stored in such a way as to make it more likely that they will be found accidentally by a child or by a vulnerable adult, is also a factor which aggravates the offence.

4. Where the commission of the offence includes an element of financial gain.

This includes evidence that the images have been stored or organised in such a way as to indicate an interest in trading the images.

5. Relevant previous convictions including convictions for a similar offence or offences, or convictions involving sexual offences with a child or young person of either sex, whether the child consented or not.

6. Where the image is of a child from this Bailiwick.

Any child who is abused by the taking of an indecent image not only suffers from having his/her innocence destroyed by the abuse, but the perpetuation of the image in photographic or moving picture form renders the abuse more lasting. As the child grows older, nothing can effectively mitigate the knowledge that there exist on the Internet images of the abuse which he or she suffered and which are still being used by paedophiles for their perverse gratification. It is not unusual for the police to find indecent images which are tens of years old and when the victim is traced the trauma of the abuse resurfaces. (See "Sentences for Abuse Involving Child Pornography" by Professor Alisdair Gillespie; Crim.L.R. (2003) p.81 at 91). In our view, the sentencing court would be entitled to consider that the fact that the child victim was from Guernsey constituted an additional aggravating factor of any offence. In this context we respectfully endorse and adopt what was said in Forno v. Attorney General (2011) JCA 22, a case involving sexual images of Jersey children. The Jersey Court of Appeal said:

"*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.*"

41. We also take the opportunity to remind sentencing courts that, in certain cases, it may well be appropriate to pass an extended sentence under Section 3 of the Criminal Justice (Supervision of Offenders) (Bailiwick of Guernsey) Law 2004, even where the sentence is quite short, according to the principles explored in R.v Nelson (2002) 1 Cr.App.R.(S) 565.

42. We have carefully considered whether the age of the child should be an aggravating feature. It is a lamentable fact that indecent images sometimes include infants. A case involving an infant would provide a good reason for treating infancy as an aggravating factor. However where such images are of the lower level, it is possible that the infant will have been unaware of the image being taken and the effect on the infant may well have been negligible. On the other hand, if images of these levels are taken of an older child the impact may well be serious and have a psychologically damaging long term effect. Such considerations would entitle a court to consider the fact that the child is older to be an aggravating factor. It is plain that age cannot be treated as an aggravating factor in every case whether the child is an infant or more mature. We have concluded that the proper way to treat age, as a factor of each case, is to regard all children, of whatever age, as deserving of protection and to provide for severe sentences in these Guidelines for those who contribute to abusing or exploiting them for sexual purposes.

43. The "initial figure" to which we have referred in these Guidelines is based on a number of premises:

    1. That the offender is an adult.

    2. That he has no relevant convictions i.e. no convictions for the same or a similar offence and no convictions for violence towards, or sexual assault of whatever kind on, a person of either sex under the age of 16 years.

    3. That the number of images is small.

    4. That the "making" of the image has been confined to being for the benefit of the offender himself or, if the image has been distributed or shown to another, that the number of those to whom it has been distributed or shown is limited to only two or three other adult persons.

    5. The sentencing process results from a contested trial.

44. We have acknowledged that these Guidelines differ from Gunter in treating the quantity of images at each level as an aggravating factor within the different categories of sentence which we propose, rather than treating the number of images as an aspect of the offence which lifts it from one band into a higher one. This change does not make it easy precisely to compare the approach which we have adopted and the approach adopted in that case. However, in so far as the sentences we recommend appear to be more severe, for the reasons given in the early part of this judgment, we respectfully differ from that Court in considering it necessary to follow the sentencing categorisation recommended in Oliver, which in any event, has been superseded by the advice of the Sentencing Guidance Council in 2007 to which we have referred.

45. As we have also indicated above, in justifying its decision to follow Oliver, this Court in Gunter emphasised similarities between England and Guernsey in three respects, the way in which these offences are described in the Laws and Statutes of both jurisdictions, the increasing statutory sentencing maxima for the offences during the past quarter century both here and on the mainland, and the uniform social values of both jurisdictions towards the protection of children from abuse.

46. As we have stated earlier, it is not necessary to identify differences between Guernsey and England to justify a different sentencing approach. However, there are two important differences between the mainland and the Bailiwick which are relevant. The first is the judicial climate in which sentences of imprisonment are imposed in England. This climate recognises the significant overcrowding of prisons generally which on occasions have reached saturation levels.

47. The second consideration concerns deterrence. This factor is mentioned in para 8 of the judgment in Gunter. The Court acknowledged that:

> "*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.*"
>
> The judgment continues:
>
> "*In our judgment, however, this is not a consideration which warrants a different approach to sentencing for this offence in Guernsey compared 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.*"

48. It seems to this Court, with respect, that the Gunter approach ignores a fundamental advantage which the administration of criminal justice enjoys in the Bailiwick. It is rare, indeed, in England that a case involving the offence of making indecent images of a child/children receives national publicity and, therefore, that any sentence for the offence would be likely to have "a salutary effect in modifying criminal behaviour." In this jurisdiction, however, any such case is very likely to be given prominent publicity in the local media. The sentences which we propose are designed not just to reflect the increasing abhorrence towards this type of crime manifest over the last quarter century, but also to deter those in this Bailiwick who might be tempted to contribute to the abuse of children by taking, making or possessing for distribution or distributing, images of the kind we have defined.

49. We enquired during the hearing of these appeals whether there was evidence to show that this offence is on the increase here. We were told that the essentially private way in which the offence is frequently committed makes it difficult to know how prevalent the offence is and whether its occurrence is escalating. What is certain, however, is that prosecutions for offences under both Sections 3 and 3A of the 1985 Law significantly increased between 2010 and 2011.

50. Another way in which the Guidelines which we propose differ from those adopted in Gunter relates to the bracketing of sentences within the categories. While we endorse the desirability for consistency in sentencing we do not consider it necessary to recommend ceilings and floors to the sentencing categories we have proposed. Accordingly, in most of them we have used the phrase "an initial figure in the region of ..." to identify the point from which a sentencing Court might embark. We emphasise that the categories are not rigidly divided. An offence in one category which has material aggravating factors may result in a sentence which comes within the sentencing levels for a higher category.

51. In relation to previous convictions, in the view of this Court, the particularity of this offence renders general bad character less relevant as an aggravating factor than might be the case involving violence or dishonesty. On the other hand any previous conviction for a sexual offence with or towards a child, or a previous conviction for making or possessing an indecent image of a child, should, in the view of this Court, significantly aggravate the offence and, if the offence itself has other aggravating factors, may well justify a sentence near to the statutory maximum, as the Vice President suggested in giving the judgment of the Court in Oliver (para.18).

52. We emphasise that these Guidelines are indeed only guidelines. They are not designed to inhibit the Royal Court from passing an individualised sentence in any case where such a sentence would be justified, or to provide any sort of straight jacket for the courts of this island. Sentencing should always involve the judgment and discretion of the court at first instance.

53. This Court will exercise its supervisory jurisdiction by reviewing any sentence appealed from the Royal Court and interfering with such sentence only if the sentence was wrong in principle or manifestly excessive.

MITIGATING FACTORS AND SENTENCING DISCOUNTS

54. It is appropriate at this stage to say something about mitigating factors and sentence discounts.

Mitigating Factors

55. In the Sentencing Guidelines Council Definitive Guideline on the Sexual Offences Act 2003, published in April 2007, certain general observations are offered on mitigation, which are relevant in this jurisdiction. It is suggested, for example, that the youth and immaturity of an offender are potential mitigating factors to be taken into account by the sentencing court. That general approach was most recently adopted in Guernsey in Burton (Para 107).

56. In the particular context of offences involving indecent photographs of children, as to which provision is made in England and Wales by the terms of the Protection of Children Act 1978, the Definitive Guideline identifies three specific mitigating factors which call for comment in the context of these appeals. These are:-

> "1. A few images held [elsewhere "retained"] solely for personal use.
>
> 2. Images viewed but not stored.
>
> 3. A few images held solely for personal use and it is established both that the subject is aged 16 or 17 and that he or she was consenting."

57. We deal with each of these in turn.

1. Whilst we do not demur to the proposition that the involvement of a relatively "few" images may be regarded as a mitigating factor in Guernsey, regard should be had to the guidance which we have given in this judgment as to the quantity of images which should be regarded as an aggravating factor. The number of images which may be considered to amount to a "few" will have to be judged against what we have suggested constitutes a "large" number. Further, since we have suggested that distribution and showing are aggravating factors, we do not consider it appropriate to treat holding for "personal use" as a mitigating factor.

2. As we have explained, a person who downloads an image commits the offence of making that image, within the meaning of section 3(1)(a) of the 1985 Law. A person who views, but does not download an indecent image commits a section 3A offence which, as we have seen, carries a maximum penalty of 5 years' imprisonment. Viewing but not storing an indecent image does not, therefore, mitigate sentence in the context of a section 3(1) offence.

3. By the time of the publication of the Definitive Guideline, the definition of the term "*child*", where it is used in the Protection of Children Act 1978, had been amended by the provisions of the Sexual Offences Act 2003, to mean a person under the age of 18 years. The Guideline's third factor has, therefore, no application in Guernsey.

Sentence Discounts

58. The Royal Court has, we understand, from time immemorial invariably adopted the practice, whenever an accused elects to plead guilty to the charge laid against him, of allowing a discount

to the sentence that would have been handed down had the matter proceeded to a full trial. The amount of the discount varies depending on the circumstances of the case. The practice has not been the subject of statutory refinement as it has in England and Wales (Sections 144 and 174(2)(d) of the Criminal Justice Act 2003) followed by Sentencing Council Revised Guidelines in 2007. Neither has the practice in either Bailiwick enjoyed the detailed analysis and refinement that it has recently enjoyed in Scotland (see Gemmell v. Lord Advocate HCJ 20th December 2011*)*

59. There is an argument which has emerged both in Scotland and in England and Wales that the discount for a guilty plea should not be treated as mitigation in its strict sense but should be applied to a figure, calculated by reference to the aggravating and mitigating factors in the case, representing what would have been the sentence after a trial. There are a number of reasons for separating the discounting exercise in this way in a large jurisdiction where public perceptions are perhaps different. We are conscious, however, of the point made in Burton that in Guernsey sentencing is a collegiate exercise performed by a judge and seven or more Jurats, who will all have their views on matters of detail. We see no need to direct the Royal Court to engage in a more structured exercise of the kind that appears to have gained support in the mainland jurisdictions. So that this Court can understand the workings of the court below if there is an appeal, the important points for the Royal Court to bear in mind are that it should begin by selecting an initial figure and then adjust that to reflect any aggravating and mitigating factors of the offence, as suggested in paragraph 39 above. The adjusted figure should then be discounted to reflect any personal mitigation and to give such credit as is appropriate for a guilty plea, to arrive at the sentence which will be passed. The Royal Court should give such explanations of its calculations as it deems appropriate. Discounts should be meaningful and the Royal Court should guard against getting too involved in considerations as to the strength of the Crown case (see paragraph 48 of Gemmell)

CONCLUSIONS ON INDIVIDUAL APPEALS

60. We applied the above principles and conclusions to the three appeals.

James Anthony Wicks

61. The Appellant James Anthony Wicks was, when these offences came to light aged 35 and living with his parents. Intelligence from the Surrey police investigating the use by subscribers of Peer to Peer software applications to share and download indecent material relating to children led local police officers on 10th November 2009 to attend the Appellant's home address to execute a search warrant. The Appellant voluntarily produced his computer, (a Dell Inspiron 531 tower model) to the police which was subsequently submitted for examination.

62. In the first of two interviews on 10th November 2009, the Appellant described a drink problem which led him to download indecent images of children. He said that he hated what he was seeing, but got a thrill out of finding them and so started to look for those websites to get that thrill. His actual words as recorded were '*It's true. It's a problem that I've got. I'm not interested in the pictures, but when I drink I just have an urge to download anything and the worse it is the more of a thrill I get from downloading it, but I don't look at the pictures, I download them, I put them in a file and I mean I hate what I do.'* He told the police that he had last downloaded files, which included indecent images, the night before, but that when the images were filed he never looked at them. He told the police that he had sole use of the computer which contained the 'Limewire' application, a file sharing programme to download images, that there would be significant numbers of indecent images stored, probably thousands, and that he had already deleted many images. He explained how the images were stored and how he could find images of child pornography.

63. During the second interview the Appellant provided information about the other computers at his home, and said that the Dell tower was the only one he used to access the images. He claimed

not to have distributed or shared any indecent images with any other person.

64. On 2nd March 2010 the Guernsey Police Computer Crime Unit commenced examination of the Dell computer and the forensic images of the computer's hard drive were submitted for analysis. Nothing was found to indicate that the Appellant shared any files of an indecent nature. It was established that the' Limewire' application had been used to download indecent images of children. The internet search engine Google had also been used to access sites whose names were indicative of content associated with child pornography.

65. The 1,346 illegal images recovered from the Appellant's computer were broken into 'live' and 'deleted' headings. 'Deleted' refers either to deleted images or images held in locations inaccessible to the user without specialist tools. The number comprises 1086 'live' images and 260 'deleted'.

66. The Indictment concerns offences committed between 16th September and 11th November 2009.

Counts 1-4	represent specific single images in level 1
Count 5	is a comprehensive count of 1006 level 1 images to a total of 1010
Count 6	represents a specific single image in level 2
Count 7	is a comprehensive count of 50 level 2 images to a total of 51
Count 8	represents a specific single image in level 3
Count 9	is a comprehensive count of 78 level 3 offences to a total of 79
Counts 10 & 11	represent two specific single images in level 4
Count 12	is a comprehensive count of 160 level 4images to a total of 162
Count 13	represents a specific single image in level 5
Count 14	is a comprehensive count of 43 images to a total of 44

67. The Royal Court considered a report from Dr. Philip Baron, Consultant Psychiatrist, dated 7th January 2011, a report from Lisa Saint, Child Protection Consultant with RWA Child Protection Services dated 8th June 2010 and a Social Enquiry Report from Cathy Murphy, Probation Officer dated 9th December 2010.

68. In mitigation Advocate Fletcher invited the Royal Court to give the Appellant full credit for his pleas, frankness and co-operation with the police; to take into account that the offences were committed over a short period during which time the Appellant's behaviour was obsessive and to the fact that the Appellant did not speak to anyone about or distribute the images. Advocate Fletcher referred to the reports, the Appellant's domestic circumstances, employment and deep rooted problems with alcohol. She submitted that the previous convictions recorded against the Appellant were not relevant to theses offences.

69. The Court, in sentencing the Appellant to the extended sentence referred to the mitigation and indicated a discount of 'around 25%'. The Judge stated:

> "*We note the English Sentencing Council Guidelines on this type of offence. They are particularly useful in listing aggravating and mitigating factors, but do not bind us. Indeed, we are bound to note that in general this court sentences for offences of this type more severely than is indicated in the English Guidelines. We pay respectful attention to the English sentencing practices, but are not bound by them.-----Similar cases in England have a sentencing range of 6 months to 2 years which we consider inadequate in Guernsey in relation to local considerations,--------We wish to suppress this type of activity, and in this small jurisdiction, think it only right to sentence above the English Sentencing Guidelines".*

70. The principles set out in our judgment endorse this approach and we accordingly took those principles into account when we considered this appeal. In the particular circumstances of this case we adopted the sentencing discount of 'around 25%' as appropriate to reflect the Appellant's immediate admissions and co-operation with the police, the limited period over which the offences were committed and all the other mitigation before the Court. All cases are fact specific and the discount allowed will inevitably vary, sometimes widely, from case to case. We allowed the appeal against the custodial sentence of 3 years 6 months having concluded that, before the discount was made, the Court must have determined that a sentence in excess of 4 years 6 months was appropriate for these offences. That would have been manifestly excessive and therefore rendered the sentence passed manifestly excessive. Our initial figure for custody was the sentence passed in the Royal Court of 3 years 6 months and, applying a discount of 'around'25% to that, we sentenced the Appellant to 2 years 9 months custody. We stress that sentencing is not a mathematical exercise and that in the interests of justice calculations may need to be flexible.

71. The indictment in this case was properly and helpfully drafted so that the counts set out the numbers of images concerned in each level. As a result the total sentence passed is not appropriate for the offences in counts 1-5 which refer to the level 1 images, nor counts 6-9 which refer to the level 2-3 images, but only for counts 10-14 which concern levels 4-5.

72. Applying the principles set out in this judgment we pass sentences of 9 months imprisonment on each of counts 1-5, and 18 months imprisonment on each of counts 6-9 those sentences to be served concurrently with the sentence of 2 years 9 months on counts 10-14.

    The extended sentence licence of 2 years with the stated additional conditions remains in place.

Christopher Michael Sharp

73. The Appellant Christopher Michael Sharp was aged 42 when the offences disclosed in the seven count indictment came to light. He came to Guernsey from England through his employment in the local hotel industry as director of a hotel where he lived with his partner.

74. Following receipt of information from the German police concerning the arrest of a German national on suspicion of possession and distribution of indecent images of children through the exchange of child pornography files to several hundred people via the internet, on 19th September 2008 police officers executed a search warrant at the Appellant's home address. He was arrested and cautioned and in interview denied that he was in possession of indecent images of children. He confirmed that one of the computers belonged to his partner and had not been used for several years. Four computers and related equipment including a Samsung Laptop Computer and an Apple iMac, which the Appellant confirmed were his and only used by himself and his partner were recovered.

75. All the computers were submitted to the Police Computer Crime Unit for assessment and examination. 502 still photographic images and 35 video movies of indecency involving children were discovered and recovered from the Samsung Laptop Computer. Further investigation of this computer confirmed the use of the Google 'Hello' application (now discontinued) which was a file sharing application that allowed users to share files, movies and other applications with members of the same network. It was established that a user of a 'Hello' account, using the name 'Lardyboy' had exchanged a number of indecent images of children using this medium. There was also evidence that the username 'Lardyboy' was connected with the Appellant's email address, and that he regularly used that as a nickname.

76. A hidden sector or 'volume' was found on the Samsung computer. Access to this volume was by way of an encrypted password, using software obtainable through the Internet and designed to

protect data on computers from unauthorised use. Various computer artefacts related to the encrypted volume indicated that it contained a considerable quantity of further indecent images of children. The titles of the files were indicative of their content. Although the hidden volume appeared to be present only on the Samsung computer, the encryption software which protected the data was present on two of the computers. On the Samsung laptop the software had been installed on 1st June 2008 and the encrypted volume had been accessed on at least six occasions between 1st June and 3rd September 2008. On the Apple iMac the encryption software had been installed on 12th February 2008 and accessed on 17th September 2008, two days before the Appellant's arrest.

77. No further indecent images were found on the Apple iMac and there was no indication that there was an encrypted or hidden volume present. However, the Apple iMac was found to have accessed files which contained file names indicative of indecent images of children. It would have been possible for an encrypted volume, physically on another piece of computer equipment to be accessed remotely through another computer using the correct application and software present on this iMac computer.

78. On 31st March 2009 the Appellant was twice interviewed. He denied any knowledge of how the indecent images were on the Samsung computer. He claimed that it was purchased by the hotel and used mainly for business presentations. He accepted that it was found in his private accommodation and denied having seen sample images which were shown to him. He confirmed his email address and that he had a nickname or username 'Lardyboy.' He expressed surprise when told that Google 'Hello' was installed and could not account for correspondence between Germany and someone using his email address and the nickname 'Lardyboy.'

79. Further forensic examination of the computers was undertaken on the Samsung computer which disclosed several chat sessions on 'Hello' involving the username 'Lardyboy' at the same time that indecent images were being exchanged by that user. The chat sessions disclosed domestic information known only to the Appellant. A number of these exchanges were contemporaneously timed with the exchange of pornographic images of children.

80. On 24th October 2009 the Appellant was interviewed again. He continued to deny being responsible for the indecent images of children found on his computer or the exchange of such images and was unable to provide any coherent explanation as to how the images got there.

81. The images recovered from the Appellant's computers are classified in accordance with the Oliver categories, and, as set out in the indictment

Count 1 is a comprehensive count of 295 level 1 still images;

Count 2 is a comprehensive count of 21 level 2 still images

Count 3 is a comprehensive count of 99 level 3 still images

Count 4 is a comprehensive count of 79 level 4 still images

Count 5 is a comprehensive count of 8 level 5 still images

Count 6 represents 23 movie files of level 4

Count 7 represents 12 movie files of levels 1 2 3 & 5

The still images totalled

295 in level 1

21 in level 2
99 in level 3
79 in level 4
8 in level 5

The movie files totalled

1 in level 1
8 in level 2
1 in level 3
25 in level 4
2 in level 5

82. The Appellant appeared before The Royal Court for sentence on 20th January 2011. The Royal Court considered a Social Enquiry Report from Gemma Greening dated 14th January 2011.

83. In mitigation, Advocate Tee invited the Royal Court to consider the Appellant's personal circumstances as set out in the Social Enquiry Report, to give the Appellant some credit for his pleas and to take into account the length of time between arrest and disposal.

84. In passing sentence the Royal Court gave 'limited' credit for the guilty pleas and took into account the Appellant's good character and accepted the recommendation for an extended sentence set out in the Social Enquiry Report. The Court stated

> *'Our sentencing includes elements of deterrence and abhorrence------We have a duty to do what we can to suppress this sort of thing in Guernsey and express our detestation of it. Sentences include a deterrent element'.*

85. We dismissed this appeal for the following reasons. Following arrest in September 2008 the Appellant was interviewed, he was then twice interviewed on 31st March 2009 when he denied responsibility. He was interviewed on 24th October 2009 about chat sessions using the Google Hello account and continued to deny responsibility. He entered and maintained Not Guilty pleas in the Royal Court in May and June 2010 and finally pleaded guilty to 7 counts on 29th November 2010. The lateness of those pleas was such that the credit we gave him was minimal.

86. We determined that Counts 4-7 of the indictment warranted an extended sentence with an initial figure of 3years imprisonment followed by an extended sentence licence. The circumstances and relative sophistication of the offences and the fact that indecent images were shown to have been exchanged were aggravating factors which merited the increase to the term of 4 years imposed by the Royal Court. This sentence, although severe, is not wrong in principle or manifestly excessive.

Paul Thomas Towers

87. On 18th February 2011 the Appellant Paul Thomas Towers, who was aged 51,was convicted in the Royal Court on an indictment containing seven counts of making an indecent photograph of a child contrary to section 3 (1) (a) of the Protection of Children (Bailiwick of Guernsey) Law 1985 as amended.

88. In November 2008 the Appellant's wife complained to the police that in August that year she had discovered child pornography on her husband's Toshiba laptop computer. On 3rd December the Appellant was arrested and his Toshiba laptop and an Apple laptop were seized and sent for analysis. No indecent material was found on the Apple laptop. The Toshiba was found to contain two file sharing applications, Limewire and Ares Ultra. The Ares Ultra application used a folder

'My Shared Folder' which contained a hidden thumbs.db file. The expert recovered 114 indecent images of children in thumbnail form. A further 33 indecent images were recovered from unallocated space. 7 deleted video files containing indecent images of children were recovered. All the images recovered were no longer in live space and specialist software was required to retrieve them.

89. The 114 thumbnail images had been completely overwritten by other data. Each image had a 'last written date' associated with it which post dated the creation of the thumbs.db file on 5th February 2008. One explanation of the 'last written date could be the finishing of a download'.

90. The 7 videos had been deleted by the user. The videos disclosed the created date, the last written date and the last accessed date which indicated that on that date the video was still on the computer.

91. In interview the Appellant denied knowledge of the indecent images on the computer. He admitted that he used the computer but said that he believed his wife had set him up. Mrs Towers was interviewed and gave the police details, times and dates, of art courses in which she was involved and of medical appointments, when she would have been away from home and unable to access the computer. These details were analysed by the expert who concluded that all 114 thumbnail images had last written dates when Mrs Towers was not in the house. That exercise could not be undertaken for the 33 images in unallocated space.

92. A similar exercise was undertaken in respect of the videos, four of which had relevant created or last written dates when Mrs Towers was away from home. Internet history records were recovered which indicated that files accessed from the computer bore file names indicative of indecent photographs of children and one of the locations for those photographs was the 'My Shared Folder' which contained the thumbs db files.

93. The Appellant was again interviewed on 16th July 2009. He produced a written statement denying responsibility for the images and indicated that the expert's findings might not be a true history and that he believed that his wife had altered the records by altering the computer's clock.

94. The expert further examined the event logs in the computer and found no indication that the system clock had been altered.

95. The 147 images recovered were classified into the Oliver categories and were later set out in the indictment as follows;

    Count 1 is a single specific image in level 1

    Count 2 is a single specific mage in level 2

    Count 3 is a single specific image in level 3

    Count 4 is a single specific image in level 4

    Count 5 is a single specific image in level 5

    Count 6 refers to 7 video files 1 in level 3; 6 in level 4

    Count 7 is a comprehensive count of 142 images 54 in level 4; 1 in level 5

    The still images totalled

    52 in level 1

10 in level 2
28 in level 3
55 in level 4
2 in level 5

The video images totalled

1 in level 3
6 in level 4

96. Witnesses for the prosecution included Mrs Towers and Mr Rudenko, the expert. The Appellant gave evidence, to support the allegations which he made against his wife. That evidence was rejected by the Jurats.

97. On 28th March 2011 the Royal Court sat to consider sentence and had before it a Social Enquiry report by Gemma Greening Probation Officer dated 22nd March 2011 and ten character references for the Appellant.

98. In mitigation Advocate Merrien stressed that there was no evidence that the Appellant was responsible for distributing any images. The Appellant's personal circumstances were set out in the Social Enquiry Report. He was effectively a man of good character and the Court was referred to the Oliver guidelines indicating a sentence of 12 months to 3 years.

99. The Royal Court noted the mitigation, and passed the extended sentence the subject of this appeal. The Royal Court stated

> *"As in previous cases, the Royal Court sentences on the basis of local considerations. The English guidelines are noted but are not binding upon us. As we have previously stated, our sentencing includes elements of deterrence and abhorrence. Each case very much depends on its own individual factors. No two cases of this nature are the same,----we stress that sentences in Guernsey, based on local considerations appropriate to a small jurisdiction are generally higher than those set out in the English Sentencing Council Guidelines."*

100. In this judgment we have given careful consideration to the views in that statement and have sought to provide a guide, appropriate to Guernsey, to the principles of sentencing in cases such as these.

101. We applied those principles and guidelines in allowing this appeal. This is a case where the conviction of a man of good character, (here supported by ten references) falls squarely within the sentencing range of an initial figure of 3 years. We can find no aggravating factors to increase that term. The numbers of images in levels 4 and 5 were not substantial and we concluded that the additional 9 months in custody was not justified by the circumstances. To that extent the sentence was manifestly excessive. We quashed the 3 years 9 months custodial term of the extended sentence and imposed a 3 year term in substitution. This sentence was for Counts 6 and 7 of the indictment, representing 55 still and 6 video images in level 4; and 2 still images in level 5. No separate penalties were imposed for Counts 1-5 representing single images. The extended sentence was appropriate and the extended sentence licence and conditions remain unchanged.