

Judgment 06/2013

**Darren John Le Gallez v
The Law Officers of the Crown
Court of Appeal
File No. 444
12th March 2013**

Appeal from the sentences imposed by the Royal Court – making indecent images of children.

**Approved Text
12.03.2013**

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION – APPEAL NO 444

12th March 2013

Before: Sir Michael Birt
Jonathan Crow QC
Nigel Fleming QC

Between: DARREN JOHN LE GALLEZ Appellant

-v-

THE LAW OFFICERS OF THE CROWN Respondent

regarding

**The Appellant seeks to appeal from the sentences
imposed on him by the
Royal Court on 16 October, 2012**

**Advocate A M Merrien appeared for the Appellant
Crown Advocate G D McKerrell appeared for the Crown**

Crow, JA

INTRODUCTION

1. This is the judgment of the Court.
2. Darren John Le Gallez is applying for permission to appeal and, if permission is granted, he is seeking to appeal against sentence. For the reasons we are about to give, the application for permission to appeal is granted but the appeal is dismissed.

3. On the 12th July 2012 the Appellant pleaded Guilty to 21 counts of making indecent images of children contrary to s. 3(1)(a) of the Protection of Children (Bailiwick of Guernsey) Law, 1985, as amended, and 2 counts of distributing indecent images of children contrary to s. 3(1)(b) of the same Law. He was sentenced by the Royal Court (the Deputy Bailiff presiding) –
 - 3.1. in respect of each of Counts 8 and 19, to 4 years and 9 months (concurrently);
 - 3.2. in respect of each of Counts 7, 9, 10, 17, 18, 20, 21 and 22, to 4 years and 9 months (concurrently);
 - 3.3. in respect of each of Counts 3, 4, 5, 6, 13, 14, 15, 16 and 23, to 2 years and 3 months (concurrently);
 - 3.4. in respect of each of Counts 1, 2, 11 and 12, to 1 year (concurrently).
4. Counts 1-21 related to the making of 14,701 indecent still images and 928 indecent videos (lasting 49 hours). In this context, ‘making’ means downloading and storing the images and videos from the internet. None of the offences involved taking original photographs or filming indecent acts. The offences occurred over a period of nearly 4½ years, from the 31st January 2007 to the 14th June 2011.
5. Counts 22 and 23 related to the distribution of 14 images over the same period. The distribution consisted of uploading images onto a social website which appears to have been accessible to over 2,800 members.
6. In summary, the grounds of appeal are that –
 - 6.1. the sentences of 4 years and 9 months in respect of each of Counts 7, 8, 9, 10, 17, 18, 19, 20, 21 and 22 were manifestly excessive and out of proportion to the gravity of the offences in each case, and in particular
 - 6.2. the uplift (which involved doubling the initial figure of 3 years and 3 months) to reflect the aggravating features of the case (namely (i) the transmission of images to others, (ii) the large number of images, and (iii) the time frame) was excessive having regard to the circumstances of the case: in particular, the Appellant contends that it was wrong to treat the transmission of images to others as an aggravating factor in relation to the offences of making indecent images when acts of distribution were themselves subject to separate charges in respect of which the Appellant was also sentenced; and it has also been suggested that the sentencing court took into account unproven acts of distribution going beyond those itemised in Counts 22 and 23.
7. The Bailiff, sitting alone, heard an application for permission to appeal on the 21st February 2013, which he referred for decision to this Court. Having outlined the facts and the grounds of appeal, he said this:
 - “15. I do not agree that treating the distribution element as an aggravating factor imposes a double penalty when distribution is also the subject of separate counts. The approach of the Royal Court was to look at the totality of the offending, to reflect the totality in the longest sentences imposed and then to make all sentences run concurrently. If the Court had imposed a consecutive sentence for the distribution counts, there might have been a risk of a double penalty but that is not how the court approached the sentencing exercise.

16. The Court took as its initial point for the SAP Category 4 and 5 offences – three years and three months which is within the guidelines laid down in *Wicks* namely “*in the region of three years imprisonment*”. The Royal Court was correct to increase that initial point significantly to reflect the aggravating factors. In its discretion, the Royal Court decided to double the initial point. I consider that is high and I have some difficulty in deciding whether it is within the band of decisions that it was reasonable for the Court to make. I take account of the fact that this is the first occasion on which the Royal Court has been required to apply the guidelines laid down in *Wicks*. I have difficulty in deciding whether the doubling of the initial point was “*manifestly excessive*”. For that reason, and because this is the first occasion on which the guidelines have been applied, I consider it is appropriate to refer the application for leave to appeal against sentence to the Plenary Court.
17. Regarding mitigation, the Court indicated that it was granting a discount to reflect the Applicant’s co-operation with the Police. A discount “*in the region of*” 25% is appropriate in the circumstances. There is little or no other mitigation available to the Applicant. These are his first convictions for offences of this nature but as the Court of Appeal indicated in *Wicks*, the guidelines they laid down are based on the premise that the offender has no relevant convictions (paragraph 43.2. of the judgment).

Decision

18. For the reasons I have given, I refer the application for leave to appeal against sentence by the Applicant to the Plenary Court. I have not viewed the images. I assume that the Plenary Court may wish to do so, having regard to observations made by the Court in its sentencing remarks.”
8. Before turning to deal with the specific grounds of appeal, we should explain our response to the Bailiff’s observation in §18 that this Court may wish to view the images in light of the sentencing remarks. Having considered those sentencing remarks and also the Bailiff’s observation in this regard, we have concluded that it is not necessary for us to view the images because their precise content is not material to the issue we have to decide. As will become apparent, the initial figure of 3 years and 3 months is not, and cannot be, challenged: and the aggravating factors on the basis of which the Royal Court doubled that initial figure did not include the content of the images. In any event, the sentencing remarks include a table listing the number of still images and videos falling within each of the 5 Levels of gravity identified in *Wicks, Sharp & Turner v. Law Officers* (CA, 22nd March 2012, unreported), so this Court has a fairly clear understanding of the overall nature of the material without having to view it first-hand.

DISTRIBUTION AS AN AGGRAVATING FACTOR

9. As is apparent from §15 of his ruling, the Bailiff did not agree that the Royal Court had erred in taking distribution into account as an aggravating factor when considering the length of sentence for the making of indecent images, because (i) the Royal Court assessed the totality of the offending as a whole, (ii) it reflected the totality of the offences in the longest sentences imposed and (iii) it made the sentences run concurrently. Since the separate sentences for the offences of distribution were no longer than the sentences for making indecent images, and they ran concurrently with those sentences, there was no double penalty.
10. We entirely agree with the Bailiff on this point. The judgment in *Wicks* makes clear at §40.3 that widespread distribution is capable of being treated as an aggravating factor in sentencing for an offence of making indecent images. We do not consider that the position is altered where distribution also forms a separate charge.

11. In general, when a sentencing court is faced with related offences of varying degrees of gravity, it is entitled either to treat the lesser offence as an aggravating factor when sentencing for the more serious offence, or (in an appropriate case) to impose a short, separate consecutive sentence for the lesser offence. To do neither would leave that lesser offence unpunished. In the context of drug trafficking, the decisions in *Richards v. Law Officers* (CA, 18th April 2002, unreported), at §12, and *O'Dette v. Law Officers* [2007-08] GLR 16, at §40-43, provide illustrations of the former approach. In both cases this Court observed that the better course is to treat the lesser offence as aggravating the gravity of the more serious offence, and to impose a greater term of imprisonment than would otherwise have been imposed for the more serious offence, to run concurrently with the lesser sentence imposed for the lesser offence. The Court said that consecutive sentences should not normally be imposed in such cases, because that might create the misleading impression that each offence is being sentenced more leniently than it is.
12. We would respectfully agree with that approach, and we consider it to be equally applicable to the circumstances of this case.
13. That leaves the secondary point made by Advocate Merrien for the Appellant, namely that the Royal Court took into account as an aggravating factor a level of distribution which had not been proved or admitted. What the Court said was this (our emphasis):

“As counts 22 and 23 in particular demonstrate, your involvement with this unwholesome industry was not only as a viewer of images but also as a distributor of them. Whilst this has not involved you directly in taking or producing images, your transmission to a significant number of other members of the group of images to which they might well not have had access, is a more serious category of offending behaviour. For reasons we will shortly explain, we treat this as a significant aggravating factor.

...

In Counts 22 and 23, you have admitted distribution of 14 images. Although the impression given is that you actually uploaded more than this number of images, which has an impact on the seriousness with which we view this element as an aggravating factor, the 14 images referred to in these Counts are what you are being sentenced for in relation to distribution and so we focus only on them for the purpose of imposing sentences in respect of those two Counts. We note that this was apparently the ‘entry fee’ you had to provide in order to be allowed unlimited free access to the indecent material available on the website. The numbers of people for whom access could then be gained to the images you uploaded was clearly more than a few individuals and was, potentially, very large. The Court therefore regards these distributions as a very significant aggravating factor.”

14. On behalf of the Appellant, Advocate Merrien relies on the words underlined to suggest that, although the Royal Court (rightly) imposed the sentences for Counts 22 and 23 only by reference to the 14 images which were admittedly distributed, by contrast it (wrongly) relied on the ‘impression’ it had gained that there were considerably more instances of distribution when it took this element into account as an aggravating factor in relation to the appropriate level of sentence for the other Counts.
15. Whilst we recognise that the words on which Advocate Merrien relies are capable of bearing the meaning he suggests, we do not consider that that is what the Royal Court meant or what it was doing. Rather, it is apparent both from the first paragraph we have quoted above and also from the reference to “these distributions” at the very end of the second paragraph, that the Royal Court was (rightly) taking into account only the distributions covered by Counts 22 and 23 as aggravating factors when fixing the sentences for the other Counts. For the avoidance of

doubt, we would add that if the Royal Court had taken into account some other, unproved but assumed acts of distribution, that would have been quite wrong.

16. Finally, it was pointed out for the Appellant that the logic of the sentencing remarks breaks down in relation to the sentence imposed in respect of Count 22. Whilst the Court said that the element of distribution was an aggravating factor which justified a final sentence of 4 years and 9 months for the offences of making indecent images, the same logic could not lead to exactly the same sentence for the discrete offence of distribution itself. We see the force of that point, and for our part we would have imposed a lesser sentence in respect of Count 22, but it would not make any difference to the ultimate outcome of this appeal because it does not provide a basis for attacking the integrity of the sentence imposed for making indecent images, and that is what this appeal is all about.

WAS THE SENTENCE MANIFESTLY EXCESSIVE?

17. At §16 of his reasons for remitting this appeal to the Plenary Court, the Bailiff observed that the initial figure of 3 years and 3 months was consistent with the guidelines in *Wicks*, being a sentence “in the region of three years”. We agree, and this point was not in dispute.
18. The Bailiff also said that the Royal Court was right to hold that there were aggravating factors which justified an increase from that initial figure. We agree, and again this point was not in dispute. Furthermore, for the reasons we have already given, we consider that the Royal Court was fully entitled to take into account all three of the aggravating factors it mentioned.
19. The point which the Bailiff found difficult to decide was whether it was manifestly excessive for the Royal Court to double the initial figure to 6 years and 6 months. Since this was the first occasion for the guidelines in *Wicks* to be applied in Guernsey, he referred the matter to this Court for that reason.
20. As to mitigation, the Royal Court said that a discount of 25% was appropriate to reflect the Appellant’s guilty plea, his acceptance of responsibility and his cooperation with the police, and that there was no other mitigation available to him. We agree, because although the Appellant has a number of previous convictions and so is not of previous good character, it is apparent from §43.2 of *Wicks* that the initial figures it suggests are predicated on the assumption that the offender has no other relevant convictions, which is the position in this case as the Bailiff rightly noted in §17 of his ruling. Again, this was not in dispute.
21. So the only remaining question we have to decide is whether it resulted in a manifestly excessive sentence for the Royal Court to double the initial figure of 3 years and 3 months to reflect the three aggravating factors mentioned above.
22. In answering that question, we do not consider it to be either necessary or helpful to provide any general observations with regard to the application in any given case of the guidelines set out in *Wicks*. As the Court made clear in that case, it was laying down guidelines, not rules, and in particular it was not attempting to fetter a sentencing court’s discretion to impose an individualised sentence in any case where such a sentence would be justified. We will accordingly deal with this case on its own facts, and no more.
23. Before doing so, we would first wish to record and emphasise the reasons given by the Royal Court for imposing lengthy sentences in any case of making indecent images of children. Having explained that the Court had viewed a sample of the images in this case, and having expressed its revulsion at what it had seen, the Court said this:

“No child, wherever they are, should be subjected to this kind of abuse – it is thoroughly abhorrent and those, like you, who actively participate in websites of this nature are responsible for ramping up the demand for more and more vile

images to be created, thereby entailing more and more abuse of poor children. Incessant perverted demand for child pornography fuels supply and sadly results in the entirely unwelcome, unnecessary and avoidable exploitation of the children that everyone worldwide should be striving to protect.”

24. These are salutary words, and we would endorse them without qualification.
25. Turning to the particular circumstances of the present case, it is not in dispute that, on any reasonable application of the *Wicks* guidelines, an initial figure in the region of 3 years' imprisonment was appropriate. It is also clear from §40 of *Wicks* that the vast number of images, the lengthy period of time over which they were made, and the fact that some images were distributed to a very substantial audience are all capable of operating as aggravating factors.
26. For these reasons, the only question is whether it produced a manifestly excessive sentence for the Royal Court to rely on those three legitimate aggravating factors in deciding that 4 years and 9 months was the right final sentence. So far as that is concerned, we would make the following observations:
 - 26.1. It is stating the obvious to say that sentencing is not a science.
 - 26.2. Due respect must always be given to the judgment and experience of the Royal Court.
 - 26.3. The guiding principle is to assess the totality of the sentence by reference to the totality of the offending, rather than to focus too minutely on each stage in the reasoning that has led to fixing the ultimate term of imprisonment. In other words, the correct question in this case is “was 4 years and 9 months manifestly excessive for these offences?” not “was doubling the initial figure of 3 years and 3 months manifestly excessive?”
 - 26.4. Having said all that, in an extreme case it might in principle be possible to say that a specific step in the sentencing court's reasoning is so flawed that the final outcome is manifestly excessive. For example, we could not imagine circumstances in which aggravating factors would be capable of tripling an initial figure: any such uplift would involve such a significant departure from the initial figures in the *Wicks* guidelines as to alter fundamentally the approach indicated in that case. Indeed, we would regard doubling an initial figure as being at the very outer limits of any reasonable element of uplift, and we would not expect to encounter many instances where it would be appropriate.
 - 26.5. It is always important to bear in mind (i) the maximum available sentence for any given offence and (ii) the likelihood of any significantly more serious offences which might in future demand even more severe punishment when seeking to gauge whether the sentence imposed in any given case is manifestly excessive.
 - 26.6. As the jurisprudence of the Royal Court and of this Court evolves in the light of *Wicks* it will over time become possible to build up a body of comparables from which some (though not necessarily much) assistance may be derived. Since this is the first case, no such comparables are currently available other than the case of *Wicks* itself. In that case, a sentence of 4 years was upheld in relation the defendant Sharp who had made 502 still images and 35 video movies. That compares with more than 14,701 still images and 928 videos in this case, of which 327 still images and 274 videos were at Level 4, and 5 still images and 28 videos were at Level 5. Even allowing for the different treatment of the guilty plea in these two cases,

viewed side by side it does not suggest that a sentence of 4 years and 9 months in this case is manifestly excessive.

27. As noted above, we would regard the doubling of an initial figure as being at the outer reaches of the available range of uplifts in any given case. However, we would also emphasise that the only relevant question for this Court is whether the totality of the sentence of 4 years and 9 months in this case is manifestly excessive for the totality of the offending. In answering that question we bear in mind the experience and the judgment of the Royal Court, and also the fact that the maximum sentence for an offence under s. 3 is 10 years, so the sentence ultimately imposed in this case although substantial is still slightly less than half of the maximum available penalty. We also bear in mind the staggering number of images and videos, the fact that they included significant numbers in the two most serious Levels, the length of time over which the offences were committed, and the fact that a number of images were distributed to a significant number of others – a factor which is not only relevant in itself but relevant also because the purpose of that distribution was to enable the Appellant to gain access to yet further indecent images. In light of all these various factors, although we consider that the final sentence is at the upper end of the permissible range, it was not manifestly excessive.