

Distributing indecent images of a child under, or apparently under, the age of 16 years, in contravention s.3(1)(b) of the Protection of Children (Bailiwick of Guernsey) Law, 1985, as amended; and alleging possession of indecent photographs of children under, or apparently under, the age of 16 years in contravention of s.3A(1) of the aforementioned Law.

[2022]GRC010

SENTENCING REMARKS

ROYAL COURT

FULL COURT

2nd March 2022

Before: Richard J Collas, Lieutenant Bailiff and Jurats:

**Stephen Murray Jones OBE, Claire Helen Le Pelley,
Steven John Morris, Joanne Marie Wyatt, David John Robilliard,
Marilyn Jasmine King, Tina Jane Le Poidevin, James Robert Toynton.**

THE LAW OFFICERS OF THE CROWN

- v -

RICHARD SILVA

**Advocate F M Russell appeared for the Crown
Advocate S E Steel appeared for the Defendant**

LIEUTENANT BAILIFF:

Background

Richard Silva, you have pleaded guilty to an indictment containing eleven counts under the Protection of Children (Bailiwick of Guernsey) Law, 1985, as amended. Each of the first eight counts are charged under section 3(1)(b) of that Law and involve distributing indecent images of a child under, or apparently under, the age of 16 years. The other three counts are under section 3A(1) of the Law, alleging possession of indecent photographs of children under, or apparently under, the age of 16 years. Counts 1-8 carry a maximum penalty of ten years' imprisonment and the other three counts, five years' imprisonment.

The images have all been classified in accordance with the Child Abuse Images Database. The most serious are Category A, which are defined as child images involving penetrative sexual activity, or sexual activity with animals or sadism. Category B are child images showing non-penetrative sexual activity. Category C images are all other indecent images involving children.

The first eight counts with which you have been charged, relate to four Category A images and four Category C images. The images, in the form of videos, were distributed by you on eight separate days between 2nd September 2020 and 12th April 2021. The possession offences in Counts 9 to 11 were committed on various dates between 1st September 2020 and 12th August 2021, the date when you were arrested for these offences. Count 9 concerns 15 Category A images, Count 10, 9 Category B images and Count 11 involves 15 images of category C.

The images were found on two Facebook Messenger accounts, controlled by you, with the usernames 'JL Shane' and 'Nicer Jen' in the 'Shared Media' section of each. Facebook Messenger is an instant

messaging application that can accommodate numerous participants and are easily made private and are essentially closed to uninvited people and the wider public. All images and any other media sent between users are automatically saved into the 'Shared Media' section and can be accessed at any time through a user's Facebook account, unless the user chooses to click 'Remove', in order to remove the image from the chat feed and from the user's own 'Shared Media' account. The first eight counts relate to images distributed from your accounts to group chats.

Sentencing Guidelines

This Court has regard to sentencing guidelines set by the Guernsey Court of Appeal in 2012, in the case of Wicks, Sharp and Towers. At that time, reference was made to five categories of gravity. Categories 4 and 5 correspond to what is now Category A under the CAID classification. Category B was previously Categories 2 and 3, whilst Category 1 now corresponds to Category C. Wicks set an "initial figure" for sentencing, before taking account of any aggravating or mitigating factors. The "initial figure", appropriate to each of the four Counts involving distribution of a Category A image is 3 years' imprisonment. Possession of an image for distribution or show within Category B is 18 months and in relation to a Category C image, the guidance states that "*a fine or community sentence preferably with a condition of treatment, would be appropriate*" except where an aggravating factor is present and "*the court may feel the custody threshold is passed and may consider a sentence of up to 6 months' imprisonment*".

Aggravating Factors

The Court of Appeal identified a number of aggravating factors, one of which is arguably present in your case, namely "*where the images have been widely distributed or shown to others*". The Court of Appeal quoted with approval the English case of Oliver stating: "*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.*"

Although there has been distribution in this case, it is different from much of what was envisaged in Wicks and in Oliver in that the images in this case were already accessible by every participant within the groups. But taking that into account, we have arrived at a starting point before considering the mitigating factors. We have had regard to the totality principle so have started with the most serious offences, the distribution of the four images of Category A and the starting point we have come up with is 3 years' imprisonment.

Mitigation

We have had regard to everything that has been said about you by Advocate Steel and we have taken into account the contents of the Social Enquiry Report and the three reference letters we have received.

We appreciate that you co-operated fully with the Police investigation and provided them with the login credentials for your Facebook Messenger accounts. We have given you full credit for the guilty pleas entered at the earliest available opportunity. You are previously of good character and have not appeared before these courts before. We accept that you have shown genuine remorse for your offending and that you are quite embarrassed by it. We note that the Senior Probation officer has assessed you as posing a very low likelihood of general offending although he has assessed that any re-offending scenarios would lie in the online world.

A further mitigating factor to which we have had regard is the effect of any sentence on your wife who is having health problems, as described in the materials before us, but we won't say any more about that in these sentencing remarks.

We have carefully considered the principles set out by the English Court of Appeal in the case of Petherick which were applied by this Court on appeal from the Magistrate's Court in Bourgaize v Law Officers. Article 8 of the European Convention on Human Rights is engaged. That case held that there are three questions to consider:

“A. Is there an interference with family life?”

B. Is it in accordance with law and in pursuit of a legitimate aim within article 8.2?”

C. Is the interference proportionate given the balance between the various factors?”

We have answered the first two questions in the affirmative. With regard to the third question, we have considered the judgment in *Petherick*. Although that court was principally concerned with the effect of a sentence on any dependent children, Hughes LJ, the Vice-President, said at paragraph 18, that Article 8 considerations, “*will apply in some cases to an adult for whom a male or female dependent is a carer and whether there is a marital or parental link or not*”. At paragraph 21, he said a court must consider:

“Fifth, in a criminal sentencing exercise the legitimate aims of sentencing which has to be balanced against the effect of a sentence often inevitably has on the family life of others, including the need of society to punish serious crime, the interest of victims that punishment should constitute just desserts, the needs of society for appropriate deterrence ... and the requirement that there ought not to be unjustified disparity between different defendants convicted of similar crimes. ... It also needs to be remembered that just as a sentence may affect the family life of the defendant and his/her innocent family, so the crime will very often have involved the infringement of other people’s family life.”

Applying that principle, we had to balance the effect of a custodial sentence on you and your wife against the need to punish a serious crime and the effect of the crime on the innocent victims, that is to say, the abused children whose images feature in the horrific images shared within your group.

Sentence

The Court repeats what it has said on many occasions, that these types of offences are truly abhorrent and revolting. Society demands that those who commit such offences are punished and the sentencing starting points include an element of deterrence.

Whilst the number of images is comparatively low, they do include images of the most serious Category A type. For each image that has been created, a young person has been subject to unnecessary degradation and abuse. You have shown that you are now truly remorseful but that does not alter the fact that you chose to draw attention to these images to the other participants in the groups of which you were part on Facebook Messenger.

We have carefully considered all the mitigation put before the Court, including the consequences of an immediate custodial sentence on your wife whose situation has been explained in some detail. In our judgment, the unusual circumstances of these offences are outweighed by the impact of a sentence on the family life of you and your wife, such that an immediate custodial sentence is disproportionate.

In sentencing, we have had regard to the totality principle, so the sentences we are about to announce will all be concurrent:

- In respect of Count 1, the distribution of indecent images of Category A, the sentence is 18 months.
- In respect of Count 2, the distribution of indecent images of Category C, the sentence is 3 months.
- In respect of Count 3, the distribution of indecent images of Category A, the sentence is 18 months.
- In respect of Count 4, the distribution of indecent images of Category C, the sentence is 3 months.
- In respect of Count 5, the distribution of indecent images of Category C, the sentence is 3 months.
- In respect of Count 6, the distribution of indecent images of Category C, the sentence is 3 months.
- In respect of Count 7, the distribution of indecent images of Category A, the sentence is 18 months.
- In respect of Count 8, the distribution of indecent images of Category A, the sentence is 18 months.

- In respect of Count 9, the possession of indecent photographs of Category A, the sentence is 6 months.
- In respect of Count 10, the possession of indecent photographs of Category B, the sentence is 4 months.
- In respect of Count 11, the possession of indecent photographs of Category C, the sentence is 2 months.

This means a total sentence of 18 months from today. The sentence will be suspended for a period of 2 years. You must understand that if you commit an imprisonable offence during that period, you will be brought back before the Court and are liable to be re-sentenced for these offences.

Probation Order

Alongside that, we accept the Probation Officer's recommendation that you be made subject to a Probation Order for a period of 2 years which will run alongside the Notification Requirements that I will mention in a moment and there are conditions attached to the Probation Order:

- To keep in contact with your supervising officer in accordance with such instructions as you may from time to time be given by your supervising officer.
- Notify your supervising officer and notify him or her in advance of any proposed change of address or any proposed stay (even for one night) away from that approved address or working arrangement.
- Comply with any requirements or probations contained in the Probation.
- Not to do anything which would be likely to undermine the purposes of the Order, namely, to protect the public, prevent reoffending and aid rehabilitation.

And there are additional conditions which were set out in the Social Enquiry Report which are also to be attached to this Order:

- To comply with any requirements specified by your supervising officer for the purpose of ensuring that you address your sexual offending behaviour problems.*
- Not to possess or use any device capable of accessing the internet without the prior approval of your Supervising Officer.*
- Not access social media or any application capable of instant messaging without the approval of your Supervising Officer.*
- Not to delete the usage history on any internet enabled device or computer and to allow such items to be inspected and removed as required by the police or your Supervising Officer.*
- To allow the installation of monitoring software on any internet enabled device or computer if deemed necessary by your Supervising Officer.*
- Not to have any contact directly or indirectly by any means with any child under the age of sixteen years without the prior permission of your Supervising Officer, other than such contact which is inadvertent and not reasonably avoidable in the course of lawful daily life.*

(vii) *To allow your Supervising Officer (or any other person or persons nominated by your Supervising Officer) to examine any such computer or electronic device and to identify when asked if any such devices are in your possession, under your control or present in your home address.*”

That completes the conditions that will be attached to the Probation Order, but as I mentioned a moment ago, there is also a Notification Requirement which runs alongside the Probation Order.

Notification Requirement

Having been convicted of a relevant offence, you become subject to the notification requirements under Part II of the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013.

We follow the recommendation of the probation officer that the notification period should be 5 years, which runs from the date of your guilty pleas to these offences on 6th January, 2022. This period is a precaution against any risk you may pose and can be further extended. You will be given a written notice setting out all the requirements of being a notifier, but in summary they are:

- You are now required by Law to notify the Police within 24 hours; or within 24 hours of release if you are in Prison or otherwise detained, of your name, any other names that you use, your address, your date of birth, your social security number, your passport details, your bank account details and your employment details. If asked to do so, for verification purposes, you must allow your fingerprints, photograph and/or a DNA sample to be taken.
- You must notify the Police of any change of name or home address at least 24 hours in advance of the change occurring, or within 24 hours if you had no prior knowledge of the change occurring.
- You must notify the Police of any address where you reside or stay for 7 days or longer. This means either 7 days at a time or a total of 7 days in any 12 month period.
- You must notify the Police of your details every 12 months on the anniversary of your initial notification, even if there is no change in those details.
- You must notify the Police at least 7 days in advance of any plans to travel abroad.

That is a summary, but as I have said, you will be given a written notice of those, but that is a summary of the Notification Requirements.

In addition, we order Forfeiture, as requested by the Prosecution, of your iPhone and Toshiba laptop.

Deportation

In these unusual circumstances, we are not making a recommendation for deportation.

Summary

So in summary, the total sentence is:

- Imprisonment of 18 months suspended for a period of 2 years.
- Probation Order for 2 years, subject to the conditions I have read out.
- Notification Requirement for 5 years.
- Forfeiture of your iPhone and Toshiba laptop.

Sir Richard J Collas
Lieutenant Bailiff
2nd March 2022