

Committing an act intending to pervert the course of justice. Failed to disclose certain information within 7 days as required by a Notice served under section 46 of the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law 2003 and making indecent photographs of children contrary to section 3(1)(a) of the Protection of Children (Bailiwick of Guernsey) Law, 1985.

**[2022]GRC042**

**ROYAL COURT  
FULL COURT**

**Thursday 9<sup>th</sup> June 2022**

**Before: Catherine Maureen Fooks, Judge of the Royal Court and Jurats:**

**Terry John Ferbrache, Steven John Morris, David John Robilliard, Stuart Michael Crisp,  
Marilyn Jasmine King, Heather Reed, James Robert Toyton.**

**THE LAW OFFICERS OF THE CROWN**

**- v -**

**KYLE BRIAN COWENS**

**Advocate J McVeigh appeared for the Crown  
Advocate S J Maindonald appeared for the Defendant**

**JUDGE OF THE ROYAL COURT:**

**Background**

Mr Cowens you have pleaded guilty to 5 Counts on one Indictment. The first Count is that on or about the 6<sup>th</sup> November 2021 you did an act tending to pervert the course of justice which is a common law offence, the maximum penalty for which is life imprisonment.

Counts 2 and 3 are that between the 28<sup>th</sup> November 2021 and the 7<sup>th</sup> December 2021, you failed to disclose certain information within 7 days as required by a Notice served under section 46 of the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law 2003, (a “RIPL offence”), in respect of two separate devices. The maximum sentence for this offence is two years’ imprisonment.

Counts 4 and 5 are of making indecent photographs of children between the 8<sup>th</sup> July and the 10<sup>th</sup> August 2021 contrary to section 3(1)(a) of the Protection of Children (Bailiwick of Guernsey) Law, 1985, as amended. The reference to ‘making’ is used here in a technical sense, meaning downloading the images and storing them on your devices and does not refer to taking or producing them. Each of these offences in these Counts is punishable by a maximum sentence of 10 years’ imprisonment.

Images are now grouped into three categories by reference to the Child Abuse Images Database (“CAID”). Category A, which includes penetrative sexual activity, sadism or sexual activity between children and animals, Category B covers non-penetrative sexual activity and Category C covers all other indecent images, not in the first two categories. You had images in Category A and Category C; all involved pre-pubescent females and two depicted interaction with adult males.

The facts are that intelligence was received that indecent images of children were being uploaded to a specific e-mail address linked to you at your home address. During a search on 4<sup>th</sup> November 2021 an Apple iPhone (BB197/041121/1) “iPhone 1” and an Apple iPod was seized and you were subsequently

arrested and interviewed. You declined to provide any passcodes for the seized devices. You were warned not to access any online accounts linked to the investigation or to alter those accounts.

While officers were trying to access the e-mail address, it became apparent that someone had changed the password for the e-mail address via a second e-mail address by using a different iPhone which, in the end, turned out to be your mother's iPhone. At interview you admitted using that phone to access the second e-mail account and you claimed to have forgotten the warning. Officers were still able to access the specific e-mail address.

Because you did not provide the passcodes to your devices, they could not be accessed. This means that the Court has been unable to verify your claim that the images were unsought and unseen.

Officers were able to access your Google account which contained the indecent images which were graded. The Category A images comprised one GIF, one still image, two videos and the Category C images were all still images.

You are a local man of 21 years of age. You were working in retail and had been the Manager of a local store at one time. You have previous convictions, notably from September 2021, when you received total sentences of 6 months suspended for 2 years for assaults on police and disorderly behaviour. You have breached those suspended sentences by being convicted on the 31<sup>st</sup> March 2022 of all the offences on the current indictment, but we note that the offences in Counts 4 and 5 were committed before the imposition of the suspended sentence.

The Court has to consider how to deal with the breach of the suspended sentences, of which we have heard the facts. The Court's options under section 2 of the Criminal Justice (Power to Suspend Sentence) (Bailiwick of Guernsey) Law, 1972 are to activate the suspended sentences without altering the term, to activate but reduce the term, to vary the order by substituting a different period of suspension or to make No Order. The Court should activate suspended sentences, without altering the term, unless it is unjust to do so, in view of all the circumstances which have arisen since the suspended sentences were passed including the facts of subsequent offences.

The investigations into this matter have taken time and you have been in custody since the 6<sup>th</sup> November 2021.

### **Sentencing Considerations**

The offences fall to be considered separately in terms of starting points and then we will apply the totality principle at the end.

There are no guideline cases for doing acts tending to Pervert the Course of Justice, this is always considered to be a serious offence as it undermines the very system of criminal justice. The Court is satisfied that the custody threshold in respect of that offence has been passed. The starting point will be 6 months before consideration of any aggravating or mitigating factors.

The Guernsey Court of Appeal in Barras, Watt and Orchard [2021] GCA045 considered the sentencing in respect of RIPL offences and made four observations:-

- (1) Failing to make the disclosure required by a Notice will almost invariably call for an immediate custodial sentence.
- (2) The sentencing court is entitled to proceed on the basis that the failure to provide access is motivated by a desire to hide something, either to protect others, or to conceal the accused's own more extensive criminality.
- (3) Deterrence is an important aspect of sentencing in this context; and

- (4) The appropriate sentence will, of course, depend on the particular circumstances of the case.

We are taking a starting point for the RIPL offences of 12 months before consideration of aggravating and mitigating factors. We will start at 15 months for both offences to reflect the fact that there are two of them and the sentences will be concurrent with each other.

In 2012, the Court of Appeal approved guidelines in relation to sentencing in indecent images cases in Guernsey in Wicks, Sharp and Towers (14/2012) which is the case to which this Court has regard.

At that time, reference was made to five levels of seriousness. Levels 4 and 5 were the most serious and are now reflected by reference to Category A in CAID, levels 2 and 3 have become Category B and level 1 corresponds to Category C.

The Court of Appeal in Wicks sets out five categories of seriousness, to each of which an 'initial figure' for sentence is assigned and we have adopted those criteria. The first three categories do not apply to you.

The first of the bands of sentences set out in paragraph 39 in Wicks, to which we have regard, is Category 4, which now covers the making of an image within CAID of Category A and so relates to Count 1, where an initial figure in the region of 3 years' imprisonment is indicated.

The third band is Category 6, covering images within Category C and so relates to Count 3, where the guideline suggests "*a fine or community sentence, preferably with a condition of treatment. If any relevant aggravating factor is present, the court may feel that the custody threshold is passed and may consider a sentence of up to 6 months' imprisonment*". However, this is of less relevance in your case where there are images in the more serious category and we are satisfied that the custody threshold is passed here in relation to all of your offending.

We will start with a starting point of 3 years for the Category A images, which will be increased to 3 years 3 months to take account of the Category C images and these sentences will be concurrent with each other.

Turning to aggravating and mitigating factors, you have been convicted for all of these offences whilst subject to a suspended sentence and we will deal with the breach of the suspended sentence separately.

Whilst there are some aggravating factors in that the images were moving and there is a mitigating factor insofar as there were a very small number of images in total, the changing of the password to the e-mail account did not prevent it being accessed and therefore, in all the circumstances, there will be no revision to those starting points.

The Court must first consider the impact of your guilty pleas on sentence. Early guilty pleas were indicated to Counts 1 to 3 and we are told would have been indicated to Counts 4 and 5 but for administrative difficulties. We afford you full credit for the guilty pleas to all offences.

### **Mitigation**

The Court has considered carefully the very helpful Probation Report prepared in respect of you and especially note the difficulties you have experienced. We have also listened to the well-structured submissions of your experienced advocate. We have read the letters from your mother and grandmother who are supportive of you and your letter to the Court, received today, which explains the impact on you of the offending and being remanded in custody and how you have used your time on remand wisely.

Most importantly you are still a young man of 21 years and this must be taken into account as must the fact that you have been in custody since November 2021. Your record cannot be ignored. You are gathering convictions at an increasing rate.

You are described as loyal and caring, intelligent, with a strong work ethic and you have clearly taken the opportunities in prison to gain further qualifications. You are not assessed as needing any interventions except to ensure that you do not commit further sexual offences.

You have expressed understanding of the nature of the offences regarding the images. The wish to keep your personal intimate pictures private is not a good reason to withhold the passcodes. As the probation officer notes, only you know what was really on your devices.

You are assessed as having a medium risk of re-offending generally but a low risk of sexual re-offending.

It goes without saying that the Court is satisfied that the custody threshold has been passed. The offences relating to indecent images committed by you are abhorrent and inexcusable. The number of images is low but each image represents the abuse of a child. Society demands that those who commit such offences are punished and the sentencing starting points include an element of deterrence. Protection of the public and rehabilitation must also be factored in.

Perverting the Course of Justice is an offence striking at the heart of the justice system and is always viewed as serious. Similarly the RIPLs must be viewed as impeding the investigation of crime, here a very serious crime, impacting on the lives of children.

In view of the seriousness of the offences and taking into account other matters, alternatives to immediate custody cannot be considered, but we have kept the sentences to a minimum by affording you generous discounts and in sentencing you we have taken into account the totality principle, that is that the total sentence is just and proportionate to the offending behaviour.

## **Sentence**

For an intelligent young man you have got yourself into serious trouble. The legacy of the commission of the sexual offences will be with you for many years to come. You need to address your hostility to police which forms part of your overall offending and, you say, played a part in how you behaved after your arrest for the offences for which you appear today.

You have to return to prison today, but you know how to make the most of what is one offer and to take the help offered which will enable you to build a new life on your release.

Taking into account all the above, the sentences will be as follows:-

- Count 1 - Perverting the Course of Justice – 3 months' immediate custody
- Count 2 - The RIPL offence No.1 – 9 months' immediate custody consecutive
- Count 3 - The second RIPL offence – 9 months' immediate custody, concurrent to Count 2
- Count 4 - Category A Images – 18 months' immediate custody, consecutive to Count 1
- Count 5 - Category C Images – 1 month concurrent with Count 4

All those sentences are to run from the 6<sup>th</sup> November 2021. This means in total that the sentences for the offences on the Indictment will be 2 years 6 months.

The suspended sentences must be activated in all the circumstances, but taking into account totality, will be reduced to 3 months. So the total time to be served is: 2 years 9 months with effect from 6<sup>th</sup> November 2021.

### **Forfeiture**

The Crown's application pursuant to Section 3 of the Police Property and Forfeiture (Bailiwick of Guernsey Law) 2006 for forfeiture of iPhone 1 and your iPad are granted. These applications were not opposed. The items were lawfully seized and we are satisfied were used in the commission of offences. The Court has had regard to the value of the property, £100 for iPhone 1 and approximately £100-£200 for the iPad and we have taken into account the likely financial and other effects on you of making that Order.

### **Extended Sentence**

The issue of an extended sentence is raised in the probation report and the Court has concluded that the usual period of supervision after sentence, would not be adequate for the purpose of preventing the commission of further offences and securing your rehabilitation. Consequently the Court is imposing an extended period of imprisonment in relation to each of the fourth and fifth Counts which relate to the images.

This extended sentence has two elements, the custodial term, which I have already told you, followed by an extension period after your release, throughout which you will be subject to an Extended Sentence Licence. The extension period shall be the period recommended of 3 years thereby enabling completion of the work begun whilst you are in prison as well as monitoring and addressing your progress after release. That 3 year period comprises the custodial term I have already mentioned, so the sentence of imprisonment of 18 months for the images, together with an extension period of 18 months, so it doesn't increase the time that you are to serve, do you understand?

If upon release you fail to comply with the conditions of the Extended Sentence Licence or are convicted of further imprisonable offences, the Court sentencing you, or the Parole Review Committee, can revoke the licence, in which case you could be returned to custody for the remainder of the sentence.

The Extended Sentence standard conditions are as follows:-

1. To be well behaved and not commit any offence and not do anything which could undermine the purposes of your supervision which are to protect the public, prevent you from re-offending and help you to re-settle successfully into the community.
2. To keep in touch with your supervising officer in accordance with any instructions you may be given.
3. If required, to receive visits from your supervising officer at your home.
4. Permanently to reside at an address approved by 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 the address.
5. To undertake only such work as approved by your supervising officer and to notify him or her in advance of any change, not to travel outside Guernsey without prior permission of your supervising officer, which will be given in exceptional circumstances only.

Those conditions will be given to you on paper because clearly they are, not all of them relevant, at this precise moment.

Additional conditions are added to mirror those suggested for the Probation Order which the Court adopting guidance from the English case of Smith 2011 EWCA 1772, considers necessary, not oppressive and proportionate. Those conditions are clear and are as follows and I take these from the Probation Report, paragraph 15:-

1. To comply with any requirements specified by your supervising officer for the purpose of ensuring that you address your sexual offending behaviour problems.
2. Not to possess or use any device capable of accessing the internet without the prior approval of your supervising officer.
3. Not to access social media or any application capable of instant messaging without the approval of your supervising officer.
4. 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 the supervising officer.
5. Not to have any contact directly or indirectly, by any means, with any child under the age of 16 years without prior permission of your supervising officer other than such contact as is inadvertent and not reasonably avoidable in the course of lawful daily life.
6. To allow your supervising officer or any persons or persons nominated by that 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 at your home address.

Again, that will all be given to you on paper.

### **Notification**

Having been convicted of a relevant offence under the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013, you became subject to Notification requirements under Part 2 of that Law. We must now set the notification period. 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 those relevant offences, that is to say the images on the 31<sup>st</sup> March 2021. 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 and these were read out when the pleas were entered, but in summary:

- You are required by law to notify the police within 24 hours of your name, address, date of birth, social insurance number, passport details, bank account details, employment details and you will need to let them know if there are any changes in that regard.
- If asked to do so you must also allow your fingerprints, photograph and DNA sample to be taken.
- You must notify them of any change of name or home address at least 24 hours in advance or within 24 hours if you had no prior knowledge.
- 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 in total, in any 12 month period and you must notify them 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.

Again, you will have all of that written down and your advocate will explain to you. Clearly some of it does not apply right now but some of it does.

By way of summary:

- the total sentence of imprisonment is 2 years 9 months with effect from the 6<sup>th</sup> November 2021.
- there is an extended sentence totalling 36 months, being 18 months' custody, which is part of that 2 years 9 months and 18 months' extension period and;
- forfeiture of the iPhone and iPad are ordered.

**Catherine Maureen Fooks**  
**Judge of the Royal Court**  
**9<sup>th</sup> June 2022**