

Neutral Citation No. [2010] NICC 2

Ref:

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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BILL No. 09/112922

R -v - Adrian Golligher

His Honour Judge Grant

- 1) These offences were committed between September and November 2007, before the introduction of the new sentencing regime under the provisions of the Criminal Justice (Northern Ireland) Order 2008 and accordingly I am sentencing you under the provisions of the Criminal Justice (NI) Order 1996, to which I will refer as the 1996 Order.
- 2) You were charged on this Bill of Indictment with 8 Counts of making indecent photographs of a child. You were first arraigned on 30th November 2009 and pleaded guilty to each count and accordingly it is accepted by the Crown that you admitted your guilt at the first opportunity and that accordingly you are entitled to full credit under the provisions of Article 33 of the 1996 Order.

FACTS

- 3) The facts and circumstances surrounding these offences are not in dispute and have been outlined by Crown counsel and accordingly I do not intend to rehearse them in great detail.
- 4) Following information received from West Midlands Police, who were investigating another individual in the Birmingham area, police entered and searched your home on the 21 November 2007 and there seized a laptop computer and other items belonging to you. These items were examined and eight film or video clips which had been downloaded from the Internet under a system called Bear Share were found stored on the laptop computer. The discovery of these film or video clips led to your prosecution on the eight specific counts on the indictment to which you have pleaded guilty.
- 5) On the 21 November 2007 you were interviewed and in the course of interview admitted that you downloaded this material. You claimed that you were looking for adult male, homosexual, pornographic material and accidentally downloaded this illicit material when looking for music. You

admitted that you had viewed the films but claimed that in doing so you had no sexual interest in the images depicted and sought no sexual gratification but watched them merely out of curiosity. In the pre-sentence report it is recorded that you informed the reporting officer that you could not remember if you had masturbated whilst watching these films. That you may have masturbated at all in connection with these films leads me to the conclusion that you had a clear sexual interest in this material.

- 6) It is agreed between the prosecution and defence that the films that are the subject of Counts 3-8 inclusive fall within category two of what is commonly known as the Oliver categorisation. The film under Count 2 falls within category three and the film under Count 1 falls within category four.
- 7) This categorisation was set out and adopted in the English Court of Appeal decision in R v Oliver and Others [2002] EWCA Crim 2766 and is now widely used by police forces both in the United Kingdom and Northern Ireland as a means of assessing the serious nature of this type of material. The Court of Appeal defined the categories in the following terms:
 - "(1) images depicting erotic posing with no sexual activity;
 - (2) sexual activity between children, or solo masturbation by a child;
 - (3) non-penetrative sexual activity between adults and children;
 - (4) penetrative sexual activity between children and adults;
 - (5) sadism or bestiality."
- 8) These categories have been adopted and approved by the Court of Appeal in Northern Ireland.
- 9) In addition to establishing these categories the English Court of Appeal set out guidelines for sentencers considering these offences. These guidelines have been relied upon by sentencers in Northern Ireland and this approach rather than the revised guidelines issued by the Sentencing Guidelines Council in England and Wales has been approved by the Northern Ireland Court Of Appeal in the recent judgement of Morgan LCJ in Attorney General's Reference (No. 8) of (2009) Christopher McCartney [2009] NICA 52.

I set out below the relevant portions of the judgement of Rose LJ in Oliver:

16. We agree with the Panel that a community sentence may be appropriate in a case where the offender was in possession of a large amount of material at Level 1 and/or no more than a small number of

images at Level 2, provided the material had not been distributed or shown to others. For an offender with the necessary level of motivation and co-operation, the appropriate sentence would be a community rehabilitation order with a sex offender programme. We agree with the Panel that the custody threshold will usually be passed where any of the material has been shown or distributed to others, or, in cases of possession, where there is a large amount of material at Level 2, or a small amount at Level 3 or above. A custodial sentence of up to six months will generally be appropriate in a case where (a) the offender was in possession of a large amount of material at Level 2 or a small amount at Level 3; or (b) the offender has shown, distributed, or exchanged indecent material at Level 1 or 2 on a limited scale, without financial gain. A custodial sentence of between six and twelve months will generally be appropriate for (a) showing or distributing a large number of images at Level 2 or three; or (b) possessing a small number of images at Levels 4 or 5.

17. In relation to more serious offences, a custodial sentence between twelve months and three years will generally be appropriate for (a) possessing a large quantity of material at Levels 4 or 5, even if there was no showing or distribution of it to others; or (b) showing or distributing a large number of images at Level 3; or (c) producing or trading in material at Levels 1 to 3. Sentences longer than three years should be reserved for cases where (a) images at Levels 4 or 5 have been shown or distributed; or (b) the offender was actively involved in the production of images at Levels 4 or 5, especially where that involvement included a breach of trust, and whether or not there was an element of commercial gain; or (c) the offender had commissioned or encouraged the production of such images. An offender whose conduct merits more than three years will merit a higher sentence if his conduct is within more than one of categories (a), (b) and (c) than one where conduct is within only one such category.
18. Sentences approaching the ten-year maximum will be appropriate in very serious cases where the defendant has a previous conviction either for dealing in child pornography, or for abusing children sexually or with violence. Previous such convictions in less serious cases may result in the custody threshold being passed and will be likely to give rise to a higher sentence where the custody threshold has been passed. An extended sentence may be appropriate in some cases, even where the custodial term is quite short: see R v Nelson [2002] 1 Cr App R(S) 565.
19. The levels of sentence which we have indicated are appropriate for adult offenders after a contested trial and without (save to the extent that we have referred to them) previous convictions.

20. There are specific factors which are capable of aggravating the seriousness of a particular offence. We identify these as follows:
- (i) If the images have been shown or distributed to a child.
 - (ii) If there are a large number of images. It is impossible to specify precision as to numbers. Sentencers must make their own assessment of whether the numbers are small or large. Regard must be had to the principles presently applying by virtue of R v Canavan, Kidd and Shaw [1998] 1 Cr App R 79, [1997] EWCA Crim 1773.
 - (iii) The way in which a collection of images is organised on a computer may indicate a more or less sophisticated approach on the part of the offender to trading, or a higher level of personal interest in the material. An offence will be less serious if images have been viewed but not stored.
 - (iv) Images posted on a public area of the internet, or distributed in a way making it more likely they will be found accidentally by computer users not looking for pornographic material, will aggravate the seriousness of the offence.
 - (v) The offence will be aggravated if the offender was responsible for the original production of the images, particularly if the child or children involved were members of the offender's own family, or were drawn from particularly vulnerable groups, such as those who have left or have been taken from their home or normal environment, whether for the purposes of exploitation or otherwise, or if the offender has abused a position of trust, as in the case of a teacher, friend of the family, social worker, or youth group leader.
 - (vi) The age of the children involved may be an aggravating feature. In many cases it will be difficult to quantify the effect of age by reference to the impact on the child. But in some cases that impact may be apparent. For example, assaults on babies or very young children attract particular repugnance and may, by the conduct depicted in the image, indicate the likelihood of physical injury to the private parts of the victim. Some conduct may manifestly (that is to say, apparently from the image) have induced fear or distress in the victim, and some conduct which might not cause fear or distress to an adolescent child, might cause fear or distress to a child of, say, 6 or 7.
21. So far as mitigation is concerned, we agree with the Panel that some, but not much, weight should be attached to good character. A plea of guilty, by virtue of section 152 of the Powers of Criminal Courts (Sentencing) Act 2000, is a statutory mitigating factor. The extent of the

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

- 10) As is clear from the above guidelines the quantity of material and the category into which the material falls are important factors in determining the culpability of the defendant and the appropriate sentence to be imposed. Each count must be taken separately and an assessment made of the quantity of material that falls to be considered within each relevant category.
- 11) The images which are the foundation of each of the specific charges in the indictment were identified as movie files, or video clips and classified in categories 2, 3 and 4. It is agreed that there were, six films depicting Category 2 images, each lasting about 30 - 40 seconds, one film depicting Category 3 images, lasting about ten minutes and one film depicting category 4 images, lasting about ten minutes. It is therefore clear that you downloaded and had in your possession a substantial quantity of material showing sexual activity involving children. Of much greater concern you had substantial material displaying non-penetrative and penetrative sexual activity between children and adults. The children involved and abused in the making of these films were young pre-pubescent boys. It goes without saying that such children are both vulnerable and defenceless against those who make and distribute this sort of material.
- 12) In determining the appropriate sentence to impose I must have regard to the quantity of images downloaded. As I have said this material consists of video clips made up of a number of moving images. In my view these must be considered quite differently from individual or collections of images or photographs which are frequently encountered in this type of case. The images here are not single images but video films of 30-40 seconds each and in each of the most serious categories 10 minutes of continuous film. I take the view that it is both illogical and wrong to treat a video clip as equivalent to a single image. It can reasonably and in my view appropriately be considered that each film or video frame is an image. A still image captures a fraction of a second.
- 13) I am further of the view that video footage of this type graphically and explicitly portrays the serious sexual abuse of children in a way that a still image or number of still images do not. They portray these activities in a lifelike, realistic and identifiably human form and as such have a significantly greater potential to corrupt than a single image or collection of images.

- 14) In my view the evidence indicates that you made and possessed the equivalent of a great many images in each of the categories particularly in the more serious categories in this case; categories three and four.
- 15) In paragraph 20(ii) of the judgement in Oliver the Court of Appeal stated that it was impossible to specify with precision numbers of images appropriate to applying the guidelines and that sentencers should make their own assessment of whether the numbers are small or large.
- 16) In considering a video clip I do not consider that this court should try to analyse and calculate the precise number of images which make up the film. I am satisfied that by applying common sense it is evident that even a short clip will comprise many images and that longer clips of 10 minutes are to be regarded as made up of a great many such images. I am therefore satisfied that for the purposes of applying the guidelines in this case I should approach this task on the basis that you were in possession of and made a large number of indecent images in each of the three categories.
- 17) I invited both prosecuting and defence counsel to make submissions on this issue and to bring to my attention any relevant authorities. Both counsel have advised me that they cannot find any authority that addresses this issue. I have carried out my own research but have been unable to discover any relevant authority which might offer helpful guidance.
- 18) You contend that you downloaded this material accidentally, that you watched it out of curiosity and did not seek any sexual gratification from it. I do not accept this contention. Anyone, with the most limited experience of downloading material from the Internet will be aware that to download the shortest piece of film takes a considerable time and many times longer than the duration of the film clip when played. It may be that the time required to download it would be less with special equipment or particularly fast broadband but it was not contended on your behalf that you used such a facility when carrying out this process. I am satisfied that you actively sought this type of material and held it on your computer for your own interest and gratification.
- 19) To the extent, that you have admitted your guilt and saved court time you are entitled to full credit in the sentence that I will impose in accordance with the provisions of Article 33 of the 1996 Order as your plea was entered at the earliest opportunity.
- 20) I have considered Articles 19-21 of the Criminal Justice (NI) Order 1996. I have obtained pre-sentence reports pursuant to Article 21. I have taken into account all of the information before me about the circumstances of the offences, the information contained in the pre-sentence report, the medical

report prepared by Dr Sharkey and what has been said on your behalf by counsel.

- 21) The serious categories into which these images fall and the number of images in each category makes it abundantly clear that these offences are very serious and must be treated as such by this court. I consider that these offences are so serious that the imposition of a custodial sentence is required to mark the seriousness of the offences, reflect public repugnance at this type of offence and to deter others, thereby seeking to offer some protection to children against abuse of this nature.
- 22) The children portrayed in these images particularly the most serious images are very young. In order to make these images someone has abused them terribly or at minimum corrupted them to such an extent that they participated in the making of these films. In doing so it is inevitable that they have robbed these children of the innocence and wonder of childhood. It is obvious that these vulnerable children had no control over their lives or what they have been made to do or participate in. They have no defence against the makers and distributors of this material.
- 23) It goes without saying that these images would not be made and these children would not be exposed to this sort of depravity if you and others like you did not demand this type of material and take perverted pleasure from it thereby creating a market. Although it is clear that you did not create any of these images, your perversion and instinct for self gratification and that of others, like you must carry some responsibility for the creation of these images and the depraved abuse of these children. This is fundamental to the creation of these images and their circulation on the internet. Simply because you were not present, when it was created, does not relieve you or anyone else who downloads or distributes this material, of a degree of moral responsibility for its creation and distribution.
- 24) I consider that there are two aggravating factors that I must take into account:
 1. The number of images particularly in Category 3 and 4 is substantial,
 2. The additional seriousness of the images given the age of the children involved
- 25) I have taken into account your clear record for this or any type of offence and general background and circumstances but as has been said on so many occasions and repeated in McCartney this can offer little by way of mitigation in this type of offence.

PROBATION

26) I have considered whether it would be appropriate to make a probation order either on its own or as part of the disposal in this case. The pre-sentence report does indicate that you have been assessed as suitable to engage in a period of supervision and has identified areas of concern which need to be addressed in order to further protect the public. In particular in her report the probation officer recommends your participation in and supervision under the Community Sex Offender Group Work Programme. It has been made clear that in order to carry out such a programme, effectively, a period of supervision of three years is required. Your counsel has indicated that you are fully aware of the commitment that you would have to make to effectively participate in such a programme and that you consent to a supervision order that would require participation in this programme for the full period required. I consider that you and society would benefit from the imposition of a Custody/Probation order.

27) Taking all of these matters into account I impose a sentence of;

Custody /Probation 6 months custody on each of Counts 3-8 inclusive and 12 months custody on each of Counts 1 and 2, each sentence to run concurrently to each other and a 3 year Probation Order on each Count.

Do you consent to such probation order?

You will be required to attend the Community Sex Offenders Work Programme and the order will include a term:

“That you shall present yourself as directed by the officer supervising this probation order at appropriate premises and there actively participate in the Community Sex Offenders Work Programme and comply with the directions given by or under the authority of the supervising officers”

If you had not consented to probation I would have imposed a total custodial sentence of 2 years custody

Warning

28) If you fail to comply with the terms of this probation order or commit other offences you will be returned to this court and sentenced afresh, not only for any new offence but also for these offences. This means that you would be likely to receive a further period of custody.

Do you understand?

SOPO

29) I consider it appropriate to impose a Sexual Offences Protection Order in the following terms:

- 1) That the defendant informs the designated risk manager of any change of address or proposed change of address, either permanent or temporary address.
- 2) That the defendant is prohibited from having access to computers with Internet capacity within the domestic or private setting;
- 3) That the defendant is prohibited from engaging in computer related employment without verifiable disclosure being confirmed through his designated risk manager;
- 4) That the defendant is prohibited from engaging in any work or activity which could afford him access to children;
- 5) That the defendant is prohibited from having access to or association with children less than 18 years of age unless approved by Social Services;
- 6) That the defendant is prohibited from denying, to the police, access to any computers or media storage devices in his possession.

This order shall remain in force for a period of 5 years from today.

The defendant must sign the Sex Offenders Register for a period of five years