[2019] EWCA Crim 1961
No: 2019 00584/B3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 30 July 2019

B e f o r e:

LORD JUSTICE HADDON-CAVE

MRS JUSTICE FARBEY DBE

HER HONOUR JUDGE MOLYNEUX

R E G I N A

v

HOULEMATOU TOURE

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Ms Martine Snowdon appeared on behalf of the **Appellant**
Ms Claire Jones appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. **LORD JUSTICE HADDON-CAVE**: On 15th January 2019 in the Crown Court at Liverpool before His Honour Judge Wright (sitting as a deputy circuit judge) the appellant, Houlematou Toure (now aged 39) was convicted of five counts: counts 1, possession of an indecent assault image of a child, contrary to section 160 of the Criminal Justice Act 1988; count 2, attempting to distribute an indecent image of a child, contrary to section 1 of the Criminal Attempts Act 1981; and counts 3, 4 and 5, distributing an indecent image of a child, contrary to section 1(1)(b) of the Protection of Children Act 1978.

2. On 18th January 2019 the appellant was sentenced by His Honour Judge Wright to a conditional discharge for 12 months on each of those counts to run concurrently, together with the statutory surcharge. Having been convicted of an offence under Schedule 3 of the Sexual Offences Act 2003, the appellant was required to comply with the provisions of Part 2 of the Act (notification to police) for 12 months.

3. She appeals against conviction by leave of the single judge, who granted a representation order. We have been assisted today by the helpful and succinct submissions of Ms Snowden on behalf of the appellant and Ms Jones on behalf of the respondent Crown.

4. As the learned associate has said, the provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence and the usual reporting restrictions apply.

5. <u>The facts</u>
   The facts were essentially not in dispute. On 4th November 2016, at 10.40 am, an indecent image of a child was sent to the appellant's phone via the Whatsapp messaging service. The image was a video lasting 3 minutes 16 seconds and depicted a Caucasian child, aged between 1 to 3 years, being sexually abused by an adult Caucasian male. The appellant told a friend on that day that she had deleted the image.

6. On 16th December 2017 (just over 12 months later) the appellant found the image on her phone and attempted to send the video to a person called Dio via Facebook Messenger. Her attempt was however blocked by Facebook, who eventually notified the police.

7. On 17th December 2017 the appellant successfully sent the video to someone with the name La Souer Fanta at 14:34 hours and to somebody called Queenta at 19.30 hours.

8. On 26th January 2018, at 13:20 hours, the appellant sent the video to somebody called Doss.

9. The appellant was arrested on 14th February 2018 and interviewed under caution in the presence of a solicitor. She handed in a prepared statement and made no comment thereafter.

10. The prosecution case was as follows. The prosecution did not accept the account given in the prepared statement by the appellant or in her defence case statement. In the prepared statement she admitted sending the video only to her friend Dio and not to anyone else. In fact, she sent the video to three separate people and did not include any message explaining that it was being sent as a warning by a concerned parent. She failed to provide contact details of the person who sent her the video. She failed to report receipt of the video to the police.

11. The defence case was that the appellant did not solicit or request the video and she mistakenly believed she had deleted it on the day that she received it, namely 4th November 2016, and when she later found it on her phone and distributed it to her friends, she had a legitimate reason for doing so.

12. The issues for the jury were as follows. On count 1, the questions were: (1) were they satisfied that it was more likely than not that the video was sent to the appellant without any request being made by her or on her behalf? If so, (2) was it more likely than not that she did not keep the video for an unreasonable period of time? If so, the verdict was not guilty. If on (1) they were not satisfied, then (3) were they satisfied that it was more likely than not that she had a legitimate reason for having possession of the video, ie (a) was her reason a genuine one and (b) if so, was that a legitimate reason? If so, she was not guilty.

13. On count 2 there was no dispute that she attempted to distribute the video on 16th December. The issue was whether it was more likely than not that she had a legitimate reason for doing so.

14. On counts 3, 4 and 5 it was not in dispute that she distributed the video twice on 17th December 2017 and once on 26th January 2018. The issue was whether it was more likely than not that she had a legitimate reason for doing so.

15. Detective Constable Tosney was the investigating officer. The appellant was arrested and interviewed only in relation to the attempted blocked sending via Facebook. Afterwards her phone was analysed, and the other distributions were found but it was not considered necessary to reinterview the appellant before charge. The officer, DC Tosney, was unable to trace the three addressees, La Souer Fanta or Queenta or Doss, but was able to trace Dio.

16. In cross-examination, it was put to DC Tosney that the full download from the appellant's phone revealed that there was in fact a context to her distribution of the video which supported the defence case. When she sent the video to Queenta she was socialising with her; the sending to La Souer Fanta appeared to be "bookended" by telephone conversations between them; it was accepted that Doss was a campaigner against child porn and he sent a message to the appellant a couple of hours after the video was sent to him saying "No, he is sick". Dio was somebody called Amdadou Diallo, whom the appellant had attempted to send the video to via Facebook. He had met her in Liverpool, and they had got talking because they were both from Guinea. They would chat whenever they would happen to bump into each other. He described her as a kind and caring person with whom he discussed what was going on back home, including politics and people being mistreated. He did not remember ever having a conversation with her about child abuse.

17. The appellant gave evidence that she had come to the United Kingdom from Guinea as a asylum seeker, having suffered physical and sexual abuse there and was now a British Citizen. She was a single mother and was active in campaigning against human rights abuses in Guinea. She was of good character. She was friendly with a West African lady called Rokia and it was Rokia who sent her this video in November 2016 after they had been discussing the sexual abuse of children and how horrible it was. The appellant opened the video, sent it to her friend Natine (who was not the subject of any count) and then deleted it, or so she thought. Over a year later, she said in December 2017, she was talking to her friend La Souer Fanta about child abuse being prevalent in this country and not just in Africa, but her friend did not believe her. So she decided to go through her phone to see if she could find the video. She did find it and sent it to her friend and telephoned her afterwards and they continued their discussion about the issue. Later that day she sent it to her friend Queenta (a single mother) to make her aware that children were being abused in this country. She was with Queenta at the Albert Dock at the time she sent it. She did not know that what she was doing was against the law. She just wanted to make people aware of what was going on. She also sent it to her friend Doss because he was active in the community working to protect children and raise awareness about human rights abuses. They had a conversation after she had sent it.

18. In cross-examination, she was asked whether, when Facebook blocked her attempt to send the video to Dio thirteen months after she received it, that set off alarm bells? She said no; Facebook did not say why it was blocked so she just used Whatsapp instead. She was asked why she sent it to Dio instead of straight to Doss, who was the most obvious person to show it to. She said that Dio was her friend and had children and so she wanted to warn him and other Guinea friends of the dangers of abuse in the West.

19. The appellant's friend, Mamadou Bah, gave evidence. He was active in the Guinea community in this country and campaigned against civil rights abuses. He confirmed that

the appellant was also involved, and he knew her to be a kind, caring mother and a good person. He agreed that knowledge of this video was helpful in raising awareness of this sort of thing and this sort of thing goes on in this country.

20. The appellant's friend La Souer Fanta gave evidence. She was a single mother. She confirmed that she and the appellant had discussed their concerns about children being sexually abused and about the need to be careful about who you left your children with. She could not believe that it would happen in this country, so the appellant said that she was going to check her phone to see if she still had this video. The witness La Souer Fanta then received the video on her phone. It was disgusting, she said. The appellant phoned her and said it was proof this goes on everywhere. Ms La Souer Fanta confirmed that she was happy to leave her children alone with the appellant.

21. The appellant also called a character witness, Deborah Mulvaney.

22. Grounds of appeal
Ms Snowden on behalf of the appellant submits that the learned judge erred when directing the jury as to the defence when he said that the genuineness of the appellant's belief that she had a legitimate reason was irrelevant to whether the statutory defence of legitimate reason was established. Ms Snowden drew the judge's attention, as she did to ours, to the case of DPP v Atkins [2000] 2 Cr App R 248 at paragraph 10. She invited the judge to replace the words "the genuineness of her belief is irrelevant" (which appear in the judge's route to verdict) with the words, "The genuineness of her belief is not determinative [of whether she had a legitimate reason]". The judge refused to do so. The jury subsequently sent a question on this issue during their deliberations, which the judge dealt with by repeating his earlier direction. Ms Snowden submitted that both the judge's summing-up in relation to this issue and the way he dealt with the jury question was wrong in law.

23. Ms Jones on behalf of the Crown submitted that neither statutory defence was made out. Regarding the defence of legitimate reason, she submitted the judge correctly ruled, prior to summing up, that the test was not subjective but an objective test for the jury, and even if a person holds a belief that is genuinely held, that does not make it an objectively legitimate reason in law. She submitted that the jury were correctly directed by the judge in his summing-up and that the judge dealt with the jury question correctly.

24. The issue before us is whether the judge's direction and his subsequent repetition of it to the jury were correct in law.

25. The appellant was convicted, as we have said, of offences under section 160 of the Criminal Justice Act 1988 and offences of distribution under section 1(1)(b) of the Protection of Children Act 1978. Both Acts contain the same or similar defences.

26. Section 1(4) of the Protection of Children Act 1978 provides as follows:

> i. "Where a person is charged with an offence under subsection (1)(b) or (c), it shall be a defence for him to prove--
>
> (b) that he had a legitimate reason for distributing or showing the photographs or pseudo-photographs or (as the case may be) having them in his possession ..."

27. Section 160 of the Criminal Justice Act 1998 provides as follows:

> i. "(1) It is an offence for a person to have an indecent photograph or pseudo-photograph of a child in his possession.
>
> ii. (2) Where a person is charged with an offence under subsection (1) above, it shall be a defence for him to prove --
>
> (a) that he had a legitimate reason for having the photograph or pseudo-photograph in his possession; or
>
> (b) that he had not himself seen the photograph or pseudo-photograph and did not know, nor had any cause to suspect, it to be indecent; or
>
> (c) that the photograph or pseudo-photograph was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time."

28. The appellant raised two defences at the trial. The first was the defence in relation to possession under section 160(2)(c), namely that the photograph was sent to her without any prior request and that she did not keep it for an unreasonable time. The second defence raised by the appellant at the trial in relation to both the counts of possession (count 1) and the counts of distribution (counts 3, 4 and 5) was the defence set out in section 1(4)(a) of the Protection of Children Act 1978, which is replicated in section 160(2)(a) of the Criminal Justice Act 1988, namely that she had a "legitimate reason" for possessing and/or distributing the video.

29. Ms Snowden takes no issue with the judge's summing-up as regards the defence under section 160(2)(c) but criticises the judge in respect of his direction to the jury in relation to "the legitimate reason" defence under section 1(4)(a) of the 1978 Act and section 160(2)(a) of the 1988 Act. In admirably succinct and clear submissions, Ms Snowden submitted that the judge was wrong, as she put it, to direct the jury that "the genuineness of the defendant's belief that she had a legitimate reason was irrelevant to whether the statutory defence was established".

30. The problem, in our judgment, with Ms Snowden's submission is that she has mischaracterised or misunderstood what the judge in fact said to the jury. In the course of the summing-up, having dealt with the first defence under subsection (c) of the 1988 Act, the judge then turned to the second defence, namely "the legitimate reason" defence and said this:

    i. "And so how do you approach this second defence that you only need to come to if you are not satisfied that she has established the first defence, and you need to ask yourselves two questions. First of all, was the reason she gave to you, to the police and to you about keeping this, was that genuine? Because of course sometimes people come up with stories or a reason that they put forward, so you have to ask yourself was it genuine? If you reject her account, you do not think this was the genuine reason, it was not genuinely so that she could prove to other people. It may be a pure interest, a sort of, 'Oh, look at this sort of thing going on. It's horrible, isn't it?' If you reject her account, then of course she has not put forward a genuine reason, has she, for her possession of this video and you convict her, but if you are satisfied on the evidence that you have heard from her and the other witnesses that she was genuine when I said, 'I kept it for this reason', then you will need to ask yourselves a second question, and that is this: 'Was that legitimate?', and you answer that question. It is not a matter for the defendant whether she thinks that was a legitimate reason within the Act. You set the standards for society. You twelve determine whether it was legitimate, and you can imagine many different cases where you might say yes. For instance, someone doing a PhD in child abuse may have images because it is part of their thesis on which they are doing. If they say that, you accept that is the reason, genuine research into this area, 'Well, we think that is legitimate', that may be a conclusion you come to. You may find someone else says, 'Oh, well, I was researching child abuse and so I kept it', and the evidence in say that sort of scenario is, 'Well, I just had an interest. No, I was not a university, I was not doing any course, I was just sort of interested in that', well, you might think, hearing that, 'We do not accept that you were doing this genuinely to your own research.' So you can see how the reason, genuineness in one aspect, but if someone is genuine, you need to consider whether you consider it is legitimate, because some people may feel what they are doing is legitimate, but you take the view looking on behalf of society, setting the appropriate standard, 'We take the view that reason, genuine though it is, is not legitimate'. So two questions: did she genuinely have that reason? If she did not, then you will convict her, having got to this stage. If you accept, 'Yes, we think she has established it is more likely than not that she did genuinely have that reason, was that legitimate?',

and you set the standards in deciding whether the reason that she held this material and would have continued to hold it, that is the reason to be able to show people, whether you regard that as being legitimate."

31. Thus, it is clear that the judge directed the jury that there were two separate questions. The first, was the reason put forward by the appellant for holding and then distributing this image of a small child being sexually abused by an adult male, namely that she was showing friends what sort of child abuse went on, a genuine truthful reason? Secondly, if so, was that reason "legitimate"?

32. The judge gave to the jury, as is standard practice when summing up, a route to verdict, which set out the steps and questions that the jury had to consider in sequence when arriving at their verdict.

33. In the course of the jury's deliberations the jury sent a note to the judge raising a question about this issue. After a discussion with counsel, the judge referred to his route to verdict which read as follows (in relation to the second defence):

    i. "Therefore ask yourselves, was this the genuine reason she kept the video?

    ii. If you reject her account, then she has not established any reason for keeping the video and you should convict her.

    iii. If she does establish that she genuinely kept the video for this reason, we need to go on to determine whether you consider that that is a legitimate reason.

    iv. The genuineness of her belief is irrelevant to that consideration."

34. When the jury were recalled for the judge to direct them in relation to the note which they had sent, the judge effectively repeated what was in the route to verdict and the direction that he had already given. He said this to them:

    i. "First of all, and I am really echoing what I said on pages 3 and 4 of my legal directions, the reason that she has given to you, the first question that you have got to ask ourselves is, 'Is that genuine?' because some people may have other reasons and then think 'I am on trial, oh I am going to say something else'. So the first question is, 'Is the reason she gives genuine?' And if you reject that, you say 'Oh, we think she is talking a load of nonsense, we do not accept that', then there is no reason put forward and you convict her. But if you say, 'Well, we are satisfied that it is more likely than not that she had that reason', what is the effect of that?

> Now her case is, 'That is my reason'. It is not, 'I believed I had a reason', because you will remember she did not know what the law is; no-one does. The law does not say you have to have that belief. What she is saying is 'This is why I had it' [ie why I possessed the video image]. Right, and in determining whether that amounts to a legitimate reason, you have to say, 'Well, the reason given, was that genuine? Was she genuinely giving that reason?' And if you determine - it is a matter for you - yes it was, the second step is, looking at the reason, is that a legitimate reason? And now her belief is irrelevant to that aspect."

35. We have quoted extensively from the judge's summing-up and his remarks to the jury following the jury's note in order to set out the full reach of what the judge told the jury about this defence. In our view, the judge's analysis and summing up of the section 1(4)(a) defence of 1978 Act and the equivalent section 160(2)(a) defence under the 1998 Act was entirely orthodox and correct.

36. There are two questions to be asked and answered, as the judge pointed out to the jury and included in his route to verdict, namely: (a) is the defendant telling the truth about the reason that he or she put forward for possessing or distributing the material? If the answer to that question is no, then, as the judge told the jury, they must convict. If the answer is yes, then the jury are to go on to consider the second separate question, namely (b) whether or not that reason was a legitimate reason.

37. The judge, in our view, was entirely right to make it clear that the genuineness of the appellant's belief was irrelevant to the second question. Whilst the first question (namely, whether the appellant was telling the truth and genuinely believed the reason that she put forward) was a necessarily subjective question, the second question was, as the judge rightly emphasised, an objective question for the jury. As the judge elegantly pointed out to the jury, it was for the jury to set the standards for society as to whether a reason put forward (on this hypothesis, a reason genuinely held) was legitimate. As Ms Jones succinctly put it in her submissions: this was a "safeguarding" provision.

38. Ms Snowden relied on the case of Atkins, to which we have referred. Atkins was a case involving an academic who was found to have indecent images of children cached on his hard drive. The reason that he put forward for having such images was that he was engaged in legitimate academic research. He therefore raised the defence under section 160(2)(a) of the 1988 Act. Lord Justice Simon Brown, giving the judgment of the court, said this:

    i. "**Legitimate reason**

    ii. As already indicated, however this question falls to be answered,

> the answer cannot avail Dr Atkins because the Magistrate found that in any event he was not conducting 'honest and straightforward research into child pornography'. We are nevertheless invited to consider the question so that courts may have some guidance on the point. The answer seems to me plain. The question of what constitutes 'a legitimate reason (for the purposes of both section 160(2)(d) of the CJA and section 1(4)(a) of the PCA [1978]) is a pure question of fact (for the Magistrate or jury) in each case. The central question where the defence is legitimate research will be whether the defendant is essentially a person of unhealthy interests in possession of indecent photographs in the pretence of undertaking research, or by contrast a genuine researcher with no alternative but to have this sort of unpleasant material in his possession. In other cases there will be other categories of 'legitimate reason' advanced. They will each have to be considered on their own facts. Courts are plainly entitled to bring a measure of scepticism to bear upon such an enquiry: they should not too readily conclude that the defence has been made out."

39. Ms Snowden relied on that passage in Simon Brown LJ's judgment to submit that the judge had failed properly to direct the jury. She submitted that the genuineness of her belief was a relevant factor to be considered as to whether the reason put forward was "a legitimate reason".

40. In our view, Ms Snowden is wrong about that and her reliance on the case of Atkins is misplaced. As Simon Brown LJ was at pains to point out, the central question "where the defence is legitimate search" will be whether the defendant is essentially a person of unhealthy interests in possession of indecent photographs in the pretence of undertaking research, or by contrast is a genuine researcher. The facts of Atkins were entirely different and the context in which Simon Brown LJ was giving guidance were directed to the facts of that case, which are no doubt much more common. The essential issue in Atkins was regarding the first question, namely the genuineness of the defendant in that case's reason put forward, namely that he was engaging in academic research. Simon Brown LJ pointed out that courts are plainly entitled to bring a measure of scepticism to bear on such defences.

41. The facts in this case are markedly different to Atkins. In particular, both questions arose here distinctly, namely whether the appellant was telling the truth about the reason that she put forward for possessing and distributing this video, and secondly, whether the jury regarded the reason that she put forward, namely that she was a campaigner about child abuse or wanted to warn others, was a legitimate reason for possessing and distributing the video. In summary, the judge's directions were entirely correct, and the case of Atkins is distinguishable.

42. For all those reasons, whilst we understand why the appeal has been brought, this appeal is dismissed.

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