APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 8
HCA/21-383/XC

Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD DOHERTY

in

APPEAL AGAINST SENTENCE

by

KEIRAN WEBSTER

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg, Solicitor Advocate; Paterson Bell Solicitors (for Keith Tuck Solicitors, Glasgow)
Respondent: Way AD; Crown Agent

1 February 2022

Introduction

[1] The appellant was born in November 1997. On 9 June 2021 at Dumbarton Sheriff Court he pled guilty to 3 charges. Charge (1) was a contravention of the Civic Government (Scotland) Act 1982, section 52(1)(a) by taking or permitting to be taken or making indecent photographs or pseudo-photographs of children on various occasions between 1 February 2019 and 22 February 2021. Charge (2) was a contravention of the Civic Government

(Scotland) Act 1982, section 52A(1) by having in his possession indecent photographs or pseudo-photographs of children on various occasions between 1 February 2019 and 23 February 2021. Both of those offences were aggravated by having been committed while on bail. Charge (5) was a charge of breaching a condition of bail by failing to provide devices capable of browsing the internet to the police when requested to do so on 23 February 2021.

[2] On 1 October 2021 the sheriff sentenced the appellant to 6 months imprisonment in respect of charge (5) to commence from 24 February 2021. That sentence had been reduced from a headline sentence of 8 months to reflect the timing of the appellant's plea of guilty. In respect of charges (1) and (2) he imposed a *cumulo* extended sentence of 66 months, being a custodial term of 30 months and an extension period of 36 months. The sheriff's starting point was a headline custodial term of 40 months which was reduced to 30 months because of the timing of the plea of guilty. The sentence for charges (1) and (2) was consecutive to the sentence imposed on charge (5). The sheriff also imposed a Sexual Offences Prevention Order for a period of 5 years in respect of charges (1) and (2).

The circumstances of the offences

[3] The circumstances of the offences are as follows.

Charges (1) and (2)

[4] On 3 April 2020 police officers attended at the appellant's address and seized his laptop and mobile phone. On 29 October 2020 they again attended there and seized another mobile phone from him. The police recovered from the laptop 113 Category A still images and 749 Category A moving images. From the first mobile phone they recovered 10

Category A moving images and 1 Category A still image. From the second mobile phone they recovered 987 Category A still images and 1,852 Category A moving images. Many thousands of Category B and Category C images, both moving and still, were also recovered from the devices. There were a number of bookmarks to websites containing indecent images of children. The images on the devices were indecent and were of both male and female children aged between 1 and 15 years. The search histories of the devices disclosed searches for indecent material involving children. The second mobile phone was found to have programs installed which can be used to conceal or remove the internet history of a user, permanently delete files, and ensure that internet activity is not logged by the internet provider.

Charge (5)

[5] When the police attended at the appellant's home on 23 February 2021 he stated that he did not own any devices. He was reminded that one of his bail conditions required him to produce all devices capable of accessing the internet. He then produced a mobile phone which had been hidden in his bed sheets and stated that that was the only device he had. However, after a search the police also recovered a USB stick and a hard drive from underneath the bed sheet.

Previous conviction

[6] The appellant's only previous conviction was on 3 October 2019 for a contravention of the Firearms Act 1968, section 5(1)(b). The weapons concerned were pepper spray canisters. On 21 November 2019 he was sentenced to a Community Payback Order with a supervision requirement for 12 months.

The criminal justice social work reports and Professor Macpherson's report

[7] The material before the sheriff included a criminal justice social work report ("CJSWR") dated 9 July 2021. The author recorded that the appellant had had a difficult upbringing. He had suffered mental health difficulties in September 2017. He was admitted to hospital for a month because of suicidal ideation. Since then he had had periods when he struggled to cope with anxiety, stress and low mood, and he had frequent contact with emergency services due to self-harm and suicidal ideation. He did not effectively utilise the services available to him when in crisis, and his attendance at appointments was sporadic. He had a diagnosis of Emotionally Unstable/Borderline Personality Disorder which probably stemmed from childhood experiences. The author assessed the appellant as having a moderate risk of reconviction for a sexual offence. She observed:

> "The viewing of indecent images may not indicate a propensity to cause serious harm by the individual viewing them however the children who were abused in the creation of these images and videos are likely to have suffered physical and emotional trauma which is likely to be long lasting and/or impossible to recover from…."

In the event of the imposition of a custodial sentence she recommended consideration be given to a period of post-release supervision in order that offence focused interventions could be undertaken in the community upon release. She requested that the appellant be assessed by a psychologist to provide a more accurate assessment of his risk and manageability in the community. A matter of further interest is that she noted that during the supervision for his Community Payback Order the appellant indicated that he had thoughts about killing people and of shooting himself and others; and that he would like to kill someone as he would "find it funny to watch them suffer".

[8] Professor Gary Macpherson, a consultant forensic clinical psychologist, prepared a report dated 28 July 2021. In that report Professor Macpherson advised that internet-only

offenders such as the appellant have consistently been found to have the lowest rates of going on to carry out contact sex offences. On the other hand, the appellant had a very high risk of analogous non-contact re-offending in the absence of any intervention or supervision. He indicated that after his release the appellant would continue to require monitoring and supervision in the community, and that his registration on the Sex Offenders Register would be an additional safeguard to remind him of his obligations.

[9] In a Supplementary CJSWR dated 29 September 2021 the author confirmed that Professor Macpherson's assessment of the appellant's risk of re-offending is likely to be a more accurate assessment than the author's assessment. In the event of a custodial sentence being imposed she recommended consideration being given to a substantial period of post-release supervision.

The sheriff's report

[10] In paragraph 16 of his report the sheriff expressed the view that the imposition of an extended sentence was necessary to prevent further offending. He saw the appellant's accessing of indecent images as being harmful - "causing horrendous damage to the children involved".

The appeal

[11] The appellant appeals against sentence.

[12] Following a further remit to him by this court, Professor Macpherson prepared a supplementary report dated 20 January 2022. In that report he clarified that only a very small minority of non-contact sexual offenders go on to commit contact offences. Internet offenders who are lower in self-control are more likely to commit non-contact offences than

internet offenders who have greater self-control. In his view the appellant lacks self-control. Professor Macpherson noted that the appellant had frequented chat rooms where there had been discussion and sharing of images. He regarded the appellant's reported comments about wanting to kill someone and see them suffer as being a highly unusual and sadistic set of beliefs and evidence of an anti-social orientation. The appellant's previous purchase of pepper spray canisters was further evidence of an anti-social orientation.
Professor Macpherson considers that the appellant requires post-release supervision, whether via an extended sentence or other means. However, on the basis of the material available to him he does not believe that the appellant poses a risk of serious harm to the public.

Submissions for the appellant

[13] The solicitor advocate for the appellant, Ms Ogg, did not challenge the sentence imposed for charge (5). She submitted that the sentence imposed on charges (1) and (2), and the totality of the sentences imposed, were excessive.

[14] First, the imposition of an extended sentence on charges (1) and (2) had been incompetent. On the facts the sheriff had not been entitled to find that an extended sentence was necessary to protect the public from serious harm from the appellant. He had fallen into the same error as the sheriffs in *Wood* v *H M Advocate* 2017 JC 185. Here, as there, the only material risk was of further non-contact offending by the appellant. That was not sufficient to be serious harm within the meaning of section 210A(1)(b) of the Criminal Procedure (Scotland) Act 1995. In any case, even if it had been competent to pass an extended sentence, the sheriff ought not to have done so because the making of the Sexual Offences Prevention Order provided adequate protection for the public.

[15] Second, the sheriff's headline custodial term of 40 months was excessive having regard to the appellant's age at the time of the offences (21 to 23), his history of mental health problems, and the nature and circumstances of the offences. It was submitted that reference to the criteria discussed in *HM Advocate* v *Graham* 2011 JC 1 and in the Sentencing Council for England and Wales' Definitive Guideline suggested that 40 months was excessive. Under the Definitive Guideline the top of the range for a Category A possession offence was 3 years imprisonment. The headline sentence for charges (1) and (2) ought to have been less than that given the appellant's youth, immaturity, and mental health issues.

[16] Third, when the totality of the sentences was considered it was clear that the total of the headline sentences – 48 months - is excessive. A shorter total would have fulfilled all of the sentencing purposes.

Decision and reasons

Was an extended sentence competent and appropriate?

[17] Section 210A of the Criminal Procedure (Scotland) Act 1995 provides:

> "**210A Extended sentences for sex, violent and terrorist offenders.**
>
> (1) Where a person is convicted on indictment of a sexual, violent or terrorism offence, the court may, if it—
>
> (a) intends, in relation to—
>
> (i) a sexual offence, to pass a determinate sentence of imprisonment…
>
> (b) considers that the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender…
>
> pass an extended sentence on the offender.
>
> …
>
> (4) A court shall, before passing an extended sentence, consider a report by a relevant officer of a local authority about the offender and his circumstances and, if the court thinks it necessary, hear that officer.
>
> …
>
> (10) For the purposes of this section—

…

'imprisonment' includes—

(i) detention under section 207 of this Act;

…"

[18] In *Wood* v *HM Advocate* 2017 JC 185 each of the appellants pled guilty to offences involving the making and possession of indecent images of children, including Category A images. Each received an extended sentence. The court held that the sheriffs had not been entitled to impose extended sentences. It observed:

> "[27] … such a sentence is only to be imposed where the court is satisfied that the period for which the offender would otherwise be subject to a licence would 'not be adequate for the purpose of protecting the public from serious harm'. Although the sheriffs have attempted to justify the sentences in terms of the section, it is simply not possible to classify these appellants as posing a risk of 'serious harm' to the public were they to be released during the course of, or at the end of, the period of custody imposed. In order to reach a contrary conclusion, a somewhat convoluted course of reasoning would require to be adopted, whereby a connection would be established between accessing the pornographic images and the risk to those who might appear in similar images in the future. Such a connection does exist in general terms, but to classify it as involving a risk of 'serious harm' to the public in the sense intended in the legislation is an error (see, eg *Taylor* v *HM Advocate*; *Barron* v *HM Advocate*; Morrison, *Sentencing Practice*, para N17.0007; see for England and Wales *R* v *Dixon*). It follows that, in each appeal, the extended element of the sentences must be quashed."

[19] In the present case the high risk of re-offending which Professor Macpherson pointed to was a risk of analogous non-contact offending. The harm to children which the sheriff identified and relied upon appears to us to be of precisely the sort which the Court in *Wood* ruled did not amount to serious harm within the meaning of section 210A. It follows that the sheriff's reasons for imposing an extended sentence do not withstand scrutiny. However, the question remains whether, looking at the matter *de novo*, the court ought to conclude that there are good reasons which make its imposition an available and appropriate disposal.

[20] In that regard we have given particular attention to the following factors. First, it is significant that, while most non-contact sex offenders do not go on to commit contact sex offences, the very small minority who do are likely to exhibit low self-control. The appellant has low self-control. Second, he frequented chat groups where there was discussion and sharing of indecent images of children (cf. *Doherty* v *HM Advocate* 2019 JC 40, paragraphs [12]-[14]). Third, his statements about wanting to kill someone and watch them suffer are evidence of a highly unusual and sadistic set of beliefs, and of an anti-social orientation. His previous purchase of pepper spray canisters is further evidence of an anti-social orientation. Fourth, both the author of the criminal justice social work reports and Professor Macpherson are very clear indeed about the need in this case for post-release supervision, whether by way of an extended sentence or otherwise.

[21] So far as the first factor is concerned, even allowing for the fact that the appellant's low self-control makes him more likely to form part of the very small minority of internet offenders who go on to commit contact offences, all of the evidence suggests that the risk appears to be a very small one.

[22] There is very little information about the content of any discussions which the appellant may have had in chat rooms about indecent images. By contrast, in *Doherty* the appellant participated in extreme discussions about the images with others in which he commented on his wish to have sex with children and infants, and he demonstrated a propensity to engage in future indecent conduct with children. Not only did he access the images, he also distributed them, magnifying the demand for such material. The court concluded that his engagement in online discussions, not only about the images but about abusing children generally, might induce others to engage in such behaviour.

[23] The statements which the appellant made about killing someone and wanting to watch someone suffer are concerning. The appellant denies that they were made in earnest. Ms Ogg submitted that they perhaps demonstrated his immaturity. That may be so. In the whole circumstances we have not attached any great weight to these statements. We are mindful that the appellant has never committed any violent offence, and that we are considering a sentence which is in respect of non-contact sexual offences.

[24] Ultimately, we conclude that in the present case the appellant's circumstances are insufficient to meet the requirements of section 210A(1)(b).

[25] We draw some comfort from the fact that in his supplementary report Professor Macpherson concludes that the appellant does not pose a risk of serious harm to the public. While we recognise that that question is in the end one for the court to decide, we have reached the same conclusion as Professor Macpherson has, and we are grateful to him for the considerable assistance which he has given us.

[26] We regret, given the clear support for it from the author of the criminal justice social work reports and from Professor Macpherson, that the option of a period of post-licence supervision is not available to us. It is not competent for us to impose either an extended sentence or a supervised release order. In *Wood* the court concluded its opinion by observing:

> "[27] …[T]he utility of using a deterrent custodial sentence combined with a period of extended supervision thereafter would, in cases such as those under consideration, seem clear, even if the current statutory tests for doing so are not met. This is a matter which the Scottish Government and/or the Scottish Sentencing Council may wish to consider in due course."

In *Doherty*, at paragraph [15], the court agreed with those observations. This case further demonstrates the desirability of consideration being given to reform of the law in this area.

Was the custodial term excessive?

[27] The custodial term was not excessive in the circumstances. We consider that reference to the part of the Sentencing Council for England and Wales Definitive Guideline which deals with indecent photographs of children supports the headline sentence of 40 months. We are dealing with a *cumulo* sentence passed for two offences, possession of indecent images and the taking or permitting to be taken or making of indecent images. Each offence was a Category A offence. There are a large number of aggravating factors. There were a very large number of Category A moving images and Category A still images, as well as an even greater number of Category B images and Category C images. In some cases the children depicted were very young and vulnerable indeed. The images involved a large number of different children. The pain and distress of many of the children will have been discernible. The offences were committed over a lengthy period. There was active involvement in chat rooms. There was deliberate and systematic searching for indecent images portraying very young children. Several devices were used. One of the devices had programs installed which can be used to conceal or remove the internet history of a user, permanently delete files, and ensure that internet activity is not logged by the internet provider. The only significant mitigating circumstances are the appellant's relative youth and immaturity at the time of the commission of the offences - he was aged 21 to 23 - and his mental health history. In our view, even without the bail contraventions, a *cumulo* sentence at or very near 3 years was appropriate. Account also has to be taken of the bail contraventions. When that is done it is clear that the headline custodial term of 40 months cannot be said to be excessive.

Was the totality of the sentences imposed excessive?

[28] Ms Ogg accepted that the headline sentence on charge (5) was not excessive. Nor, as we have already indicated, was the headline custodial term for charges (1) and (2) excessive. Ms Ogg also accepted that it was entirely appropriate for the sheriff to make the sentence on charges (1) and (2) consecutive to the sentence on charge (5), but she submitted that their combined length is excessive. We disagree. We are not persuaded that the totality of the two sentences is excessive.

Disposal

[29] We shall allow the appeal but only to the extent of quashing the sentence which the sheriff passed for charges (1) and (2) and substituting a sentence of 30 months' imprisonment. That sentence has been discounted from a headline sentence of 40 months because of the timing of the plea of guilty. As before, the sentence is consecutive to the sentence on charge (5).