

JERSEY / JUDGMENT

AG v Bulpin [2020] JRC 162 (11 August 2020)

[2020] JRC 162

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 22 nd July 2020 I gave a ruling in this case before directing the Jurats prior to their retirement to consider their verdict. I now give the reasons for that ruling.

Background

2. On 19 th May, 2019, police attended the Defendant's home address and seized his i-Phone from his bedroom. The Defendant provided the pin code to unlock the phone. It was examined by William Cloete, a digital forensic examiner employed by the States of Jersey Police. He identified twenty-two images that the Crown alleged to be indecent images of children. The Jurats found that thirteen of these images were indecent images of children under the age of sixteen. As indicated by the agreed facts, all the images identified by the Crown were recovered from the web caches associated with the Safari web browser. Images from websites are automatically placed into web caches when the user visits that website. The images were cached between 1 st May 2019 and 19 th May 2019. 3. As to the web cache, the relevant agreed facts say:- "7. The Safari web browser comes pre-installed on Apple devices. When a user navigates to a web page many of the component parts of the web page (including the images) are downloaded to the user's device. This is done automatically by the Safari web browser. 8. Internet browsers use the cache to store web pages by automatically retaining a copy of the visited pages and then using that copy if the user revisits that page. If the date on the page is the same as the previously stored copy, the device uses the copy already stored rather than downloading it from the internet again. 9. The images are cached by the device in order to speed up loading if a user revisits the webpage. Files in the cache will remain there until the user deletes them, the files 'expire', or the folders reach a pre-determined maximum size. 10. Images cached in this way are not necessarily visible to the user on the screen of their device. It may be necessary for a user to scroll down to see the whole web page. 11. Image files saved in a web page cache would not be accessible to the user of the device without specialist software." 4. The twenty-two images were from the Xvideos pornographic website. They would have been obtained by internet searches carried out by the Defendant. The agreed evidence was that between 1 st and 15 th May 2020 the Defendant had carried out internet searches using the terms "little girls" (no

fewer than three times), "teens masturbating" (the latter word spelt incorrectly), and "dirty little slags". 5. It was only in relation to the searches carried out on 5 th May 2019 that Mr Cloete was able to link specific images identified in the cache to the searches carried out by the Defendant. He did this by re-creating the search as set out in his report. Mr Cloete could tell from URL data held on the Defendant's phone exactly what the Defendant had seen on that day. 6. In evidence he confirmed the content of any page that was searched for would be temporarily downloaded on to the phone memory into the cache. He said there was no hard and fast rule as to how long an image could be stored on the cache. Such data could be removed by erasing the search history or the remnants of pages might be left behind. 7. All of the images (eight in total) that Mr Cloete identified from the cache as those obtained by the Defendant from searches which took place just before 3 a.m. on th May 2019 were connected to videos. There was only evidence that the Defendant may have played one of the videos and may have only seen the images connected to the other videos for a period of seconds. One of the images that the Defendant would have seen is a category 3 image, reference 12120. Other video titles which were seen by the Defendant at this time with the image stored in the cache included two images which the Jurats found to be images of children under sixteen accompanying titles including " teen fucked and spanked " and " dasha jan nudes ". 8. The Jurats were directed as follows:- "12. The defendant faces one count of making indecent photographs of children, contrary to Article 2(1)(a) of the Protection of the Children (Jersey) Law 1994. It is agreed that the defendant downloaded the images in question on to his telephone. Images on a computer or a telephone are included within the meaning of 'photographs' for the purpose of the Law. There is no dispute that there were twenty-two images of children on the defendant's phone in this case but as a preliminary issue you need to be satisfied that they are images of children under the age of 16. In respect of the twenty-two photographs which the Crown particularise on the indictment as being indecent photographs of children under the age of sixteen you have already viewed those photographs and indicated that in relation to nine of the photographs you are not satisfied that the person shown are under the age of sixteen. You need to be satisfied that one or more of the remaining thirteen photographs which you have seen are indecent and feature a child under the age of sixteen years. This is disputed by the defence. 13. The Crown must prove three additional matters in order for the defendant to be found guilty of this offence. (1) That the photographs were 'made'. As the images were found in the cache on the defendant's telephone that element of the offence is not in dispute. (2) That the defendant made the photographs intentionally, i.e. that the defendant deliberately searched for the relevant images recovered from his phone. In this regard the Crown point to the search terms, particularly those used on 1st, 5th and 15th May 2019, such as 'little girls'; 'dirty little slags' and 'teens masturbating'. The defendant accepts that he made the photographs intentionally in that the search for images was a deliberate one, although he says that when he carried out the searches that caused the images to be downloaded to his telephone, he believed that all persons shown on the websites in question were required to be eighteen or over and he did not know that the websites contained indecent images of children. (3) The defendant must have 'made' the image (in the way described) knowing that it was, or is likely

to have been, an indecent image of a child. This is the central issue in the case. Did the defendant search for this material knowing that it was or likely to contain an indecent image of a child under sixteen? If a person views an image which is saved onto his phone having searched for a photograph of an attractive woman then he would have no reason to believe that a photograph would be anything other than that woman aged eighteen or over, and would not be guilty of an offence even if the photograph turned out to be an indecent photograph of a child. In this case the Crown says that the defendant, from the search terms which he used, knew that the images were or were likely to be indecent images of a child under sixteen. The defendant disputes this and further disputes that in fact the prosecution has proved that the images were of children under the age of sixteen. He relies on the fact that most of the pornographic images (over 2000) found on his telephone depicted adults. The real question for you is whether you are sure that when the defendant downloaded these images he knew that the images were or were likely to be indecent images of children under sixteen. If you are sure of this and to the other elements then you must convict. If you think the defendant's account in relation to either of these issues is or may be true then you must acquit." 9. Although not mentioned at the Plea and Directions hearing, or in the defence case statement, in his closing submissions to the Jurats defence counsel said that the Crown needed to prove a further matter which was not foreshadowed in the course of the trial, namely that the Jurats needed to be sure that the Defendant knew or believed that he was causing the images to be stored in the cache when he carried out the searches which he admitted carrying out. 10. In view of this assertion I heard argument at the end of the first day of the trial, after counsel had made their closing speeches, and prior to summing up the case to the Jurats on 22 nd July 2020. 11. The defence argued that it was necessary for the Crown to prove that the Defendant knew of the existence of the cache and that the Crown had not done so. The Crown pointed to cases where defendants appear to have been convicted on the basis of indecent photographs being stored in the cache. That only took the Crown so far as none of those cases were contested and it was not clear from those authorities the extent to which the defendant knew of the cache. In AG v Rebelo

[2019] JRC 215 the court observed at paragraph 4:- "Count 4 relates to fifteen indecent images of children found in your phone, of which five were at Level 4 on the Copine Scale which involves images of penetrative sex with a minor. The searches recorded on your phone show that you have searched four sites which are suggestive of an interest in underage girls on your part. However, we accept again, because we must proceed in the defence version in the absence of any hearing to the contrary, and this in fact is agreed by the prosecution, that these images were stored in the cache of your phone and could not therefore be accessed by you without specialist equipment. This was not therefore the normal case of images which can be repeatedly viewed by the person concerned." 12. Accordingly it is clearly mitigation that a defendant is unable to access images stored in the cache but that case does not really assist on whether or not the defendant must have knowledge of the cache in order to be convicted. 13. The Crown also said that the mischief of the offence was to prevent material being viewed and disseminated, that the images

must have existed on the Defendant's screen in order to be found on the cache (which was undisputed) and the Crown did not need to prove that the images were actually viewed by the Defendant (which was not challenged), let alone prove the existence of the Defendant's knowledge of the cache. 14. The Crown accepted the need to prove mens rea (as set out at paragraph 13 of the summing up), and that was consistent with the authorities. The Crown said that they did not need to prove knowledge of storage in a specific location as that would cause difficulties as prior to examination of the device it might be difficult to determine where on a device the images were stored, which would lead to an uneasy situation where defendants with technical knowledge of the abilities of their device would be in a different position from defendants without such knowledge. The Crown said that had they had advance knowledge of the point they might have dealt with their expert evidence differently. 15. I was referred to Archbold and certain English authorities, as there did not appear to be any Jersey authority precisely on point. The relevant extract from Archbold reads:- "In Smith; Jayson

[2002] EWCA Crim 683 ; [2003] 1 Cr App R 13, it was held:- (a) that where a person opens an attachment to an email that contains an indecent photograph or pseudo-photograph of a child, he may be said to 'make' that photograph or pseudo-photograph within s1(1)(a), and he will be guilty of an offence contrary to that provision if it is established that when he opened the attachment he did so intentionally and with knowledge that what he was making was, or was likely to be an indecent image of a child; (b) that the mere act of downloading a photograph or pseudo-photograph from the internet to a computer screen could also be said to constitute the 'making' of a photograph or pseudo-photograph, and that a person who did such an act intentionally and knowing that the image was, or was likely to be an indecent image of a child, would be guilty of an offence under s.1(1)(a); and (c) that in neither case was it necessary to prove that the individual did any act with a view to saving the image on his computer." 16. The relevant English legislation is for these purposes similar to the equivalent provisions of the Protection of Children (Jersey) Law 1994 . This was an alleged offence under Article 2(1)(a) of a person making an indecent photograph of a child. It was agreed that a photograph includes a moving or still image or data that is capable of conversion into such an image pursuant to Article 1 of the law. 17. The decision of the English Court of Appeal in R v Smith and R v Jayson

[2003] 1 Cr App R 13 was referred to at some length in the case of argument. In R v Jayson , the image was downloaded by the appellant from the internet on to his computer screen and was saved in a temporary cache as a result of an automatic function of the software. It was contended that the appellant did not have the necessary mens rea for the purpose of the offence of making an indecent image since the image had been stored in a temporary cache which gave rise to the inference that there was no intention subsequently to retrieve them. 18. The facts in relation to the case of Smith are different from the instant case and the paragraphs of the judgment are not helpful when read in the context of that appeal. 19. What the Court of Appeal said in the case of Jayson was this:- "23. On 18 October 2001, in the Crown Court at Luton, before His Honour Judge Altman, the appellant Michael

Jayson pleaded guilty to seven counts of making an indecent photograph of a child. He was sentenced to concurrent sentences of 12 months' imprisonment. He now appeals against conviction and sentence by leave of the single judge. The appellant's plea of guilty followed a ruling by the judge on the definition of "make" for the purposes of section 1(1) (a) of the 1978 Act. The judge ruled that the browsing of Internet child pornography amounted to the offence of making an indecent photograph if it resulted (a) in an image being displayed on the computer screen of the browser, or (b) the automatic downloading of the image to a temporary Internet cache, provided that there was the requisite mens rea. 24. The facts may be stated quite shortly. On 23 August 2000, the appellant's home was searched and his computer seized. The hard drive on the computer was analysed by an expert who was able to recover a number of pornographic images. Some of these depicted explicit adult sexual activity and adult males carrying out various sexual acts, including sexual intercourse and oral sex with young girls. Some of the children appeared to have been forced into the activity and were visibly distressed. Others were compliant. One image showed a female child aged about 5 being raped by an adult male. 25. It was common ground that these images had not been stored on to the hard drive. They had been stored by the computer because of an automatic function of the Internet Explorer Software. This software automatically stored on to a temporary Internet cache any material viewed on the screen by the operator while browsing. The cache was temporary because it could only store a finite amount of data. All of the images had been automatically emptied before the computer was seized by the police. The images were retrieved by a special process undertaken by the prosecution computer expert. The function and purpose of the temporary cache was helpfully explained by the expert evidence recorded in Atkins at page 428G in these terms: "... the browser automatically creates a temporary information store, a 'cache', of recently viewed documents. The reason for this is that when the user revisits the documents the browser may use the locally stored cache, provided that it is not too old and does not need updating, which saves time in fetching the documents The cache is automatically emptied of documents as it becomes full, but even then it is possible to retrieve information forensically. Expert computer users can access the cache directly." 26. The prosecution put its case on two bases: (a) searching the worldwide web and selecting images to appear on the computer monitor was sufficient to amount to "making"; or (b) the fact that images were stored automatically in the temporary Internet cache amounted to "making" an indecent photograph of a child. The judge agreed to hear submissions in preliminary argument before the jury were sworn. He heard evidence from computer experts, and ruled in favour of the prosecution on both points. 27. The judge described the process by which the images were accessed and how they came to be on the computer screen in the following terms: "In this case the operator, which I for the purpose of this ruling will describe as the defendant, joined some clubs so the process he went through was to call up a web page, select a category of, for instance, something called pre-teen, select from a choice of clubs and having joined the selected club or clubs then to call up through that club a series of pages, and it appears that on the pages would come a variety of indicators

with various titles which can be explored, becoming more specific and narrowing down eventually until instead of titles the whole page or whole series of pages are illustrated or shown in miniature on a single page called thumb nails, and the final selection is made by clicking on a thumb nail and selecting a specific -- in this case allegedly pornographic picture, the content of which is known absolutely to the operator from his having looked at the thumb nail, being a facsimile miniature that has been selected. Each of those processes of narrowing down from one page to the next is a separate process to clicking the mouse so as to call up a screen from the Internet and creating an image on the screen. At one end of this process is what may well be so far as the intention of the operator is concerned, just a rather general exploration and it seems to me that what then follows is that there must be a gradual refining in the selection process and a clarification of the intention of the operator till at the other end there is the knowledge of the exact picture that is going to be called up to fill the screen. Although for ease it has been called a process of enlargement, strictly speaking the move from the thumb nail to the full screen picture is not an enlargement. Every process of calling up a fresh screen is the same process: It is by connection to the Internet manipulating the screens, selecting a particular screen and thereby the operator is in effect converting digital and other electronic information which does not exist so far as he is concerned in any form of a picture and it is converted into an image on his screen that can be viewed." 28. In his interview, the appellant told the police that he was computer literate, having had thirty years' experience with computers. It was the prosecution's case that he must have been aware of the fact that images called up on to his screen would be automatically downloaded into the temporary cache. Indeed, Mr Kirk concedes on behalf of the appellant that he was aware of how the temporary Internet cache operated. 29. On behalf of the prosecution, Miss Delamere submits quite simply that the positive action of causing the photograph to be downloaded from the web page on to the screen involves the making of a photograph. It is analogous to copying in that it is replicating the image from the web. She relies on the observation made in *Bowden* at page 445C: "... we find it impossible to conclude that the reproduction of indecent material to be found on the Internet was not within the mischief aimed at by the legislation when the words 'to make' were included in the amending statute." 30. As for the act of saving to the temporary cache, she submits that it would be iniquitous for a knowledgeable operator to evade liability by using the temporary cache in a similar fashion to a designated file in order to store revisitable and viewable material. The destination of the images is not relevant. The fact that they are held in a temporary location for a finite period is also not relevant. 31. Central to Mr Kirk's argument is section 7(4)(b) of the 1978 Act, which as earlier stated provides that references to a photograph "include data stored on a computer disc or by other electronic means which is capable of conversion to a photograph". He submits that the use of the word "stored" connotes a requirement that the electronic data be retained for future use and in order to enable subsequent retrieval. He relies on the dictionary definition of the word "store" viz "Computing; retain (data or instructions) in some physical form that enables subsequent retrieval"; and "a quantity of something kept available for future use".

He submits that in order to be guilty of the offence of making a photograph or pseudo-photograph by causing data to be stored on a computer disc, the necessary mens rea is that an offender must intend to store and intend to retrieve the material subsequently. It could not be said in relation to either of the two methods relied on by the prosecution that the appellant intended subsequent retrieval. The images that appeared on the screen would only remain in the computer's random access memory while they were being viewed. As for the images stored in the temporary cache, it was an obvious inference from the fact that these were not saved in a specific directory that there was no intention subsequently to retrieve them. 32. In further support of his submissions, Mr Kirk relies on the decision in *Atkins*. He makes the point that in that case all the photographs had been voluntarily called up on to the screen when the appellant was browsing the Internet. The allegation was that he had made the photographs by downloading them into a directory and into the cache, not by downloading them on to the screen. But we would observe that it was not alleged that the mere act of downloading them on to the screen was an act of making the photographs. The court did not, therefore, have to consider whether the appellant made photographs when he downloaded images on to his screen. Simon Brown LJ said nothing on this subject in his judgment. It follows in our view that *Atkins* sheds no light on this issue. 33. In our view, the act of voluntarily downloading an indecent image from a web page on to a computer screen is an act of making a photograph or pseudo-photograph. We reach that conclusion as a matter of the ordinary use of language, and giving to the word "make" its ordinary and natural meaning, as did this court in *Bowden*. By downloading the image, the operator is creating or causing the image to exist on the computer screen. The image may remain on the screen for a second or for a much longer period. Whether its creation amounts to an act of making cannot be determined by the length of time that the image remains on the screen. 34. The question of retrieval is irrelevant to the issue of whether the downloading of the image on to the screen amounts to an act of making. Mr Kirk seeks to place a weight on the word "stored" in section 7(4)(b) which the word simply cannot bear. The definition in section 7(4) of the 1978 Act is part of the definition of a photograph. It has nothing to do with the quite separate question of what constitutes the act of making a photograph, still less does it identify the elements of the mens rea necessary to constitute the offence. In our judgment, that mens rea is that the act of making should be a deliberate and intentional act with knowledge that the image made is, or is likely to be an indecent photograph or pseudo-photograph of a child. 35. We note in any event that the requirement in section 7(4)(b) is that data stored on a computer disc or by other electronic means "should be capable of conversion into a photograph". It is not a requirement that the data should be retrievable. It is not suggested that an image downloaded on to a computer screen is not capable of conversion into a photograph. It plainly is. Mr Kirk submits that we should give a narrow interpretation to the offence under section 1(1)(a) of the 1978 Act. Whilst we recognise that this is a penal statute, it is also necessary to give effect to the plain meaning of ordinary words and to have in mind, as was stated in *Bowden*, that the plain mischief aimed at by this legislation when the 1978 Act was amended was the reproduction of indecent material to be found on

the Internet. 36. We conclude, therefore, that the trial judge was right to rule that the act of downloading the images from the Internet to the screen of the appellant's computer was an act of making an indecent photograph provided that the requisite mens rea was present. That mens rea was as we have described; it did not require an intention on the part of the maker to store the images with a view to future retrieval. 37. We can deal more briefly with the second way that the prosecution put its case, since Mr Kirk's argument here is the same as that which we have already rejected. His submission is that the automatic transfer of an image to the cache is not an act of making an image because it is not accompanied by an intention to store and subsequently retrieve. He does not contend that, mens rea apart, the automatic transfer is not an act of making an image. But for the reasons that we have already given, the definition in section 7(4)(b) of the 1978 Act does not provide the clue to the mens rea in these cases. 38. It follows that the appeal of Jayson must also be dismissed." 20. The English Court of Appeal appears to have rejected the contention (at paragraph 31) that the mens rea requires that an offender must intend to store and intend to retrieve material subsequently. The required mens rea is that referred to in the last sentence of paragraph 34 "the mens rea is that the act of making should be a deliberate and intentional act with knowledge that the image made is, or is likely to be an indecent photograph or pseudo-photograph of a child". The authority is not on all fours with the facts in this case, as the Court of Appeal was dealing with a slightly different point where knowledge of the cache was not disputed. Nevertheless it appears from what is said at paragraphs 36 and 37 of the judgment that as a matter of English law, so long as the mens rea referred to above is proved the Crown does not need to prove any additional knowledge on the part of the defendant in respect of the mode of storage of the images. 21. I was also referred to the English Court of Appeal case of *Harrison v Regina*

[2007] EWCA Crim 2 976 . This was a rather different case as it involved (on appeal) a charge of possession, not making images, and did not involve the use of search terms. The key finding in that case (see paragraphs 11 to 13 of the judgment) is that there needs to be a mental element to the offences. In the event of automatic copying to the hard drive that is satisfied "if the defendant knows that the images viewed are automatically saved there. With opening an email attachment, at its lowest, the mental element is satisfied if the defendant knows that it contains, or is likely to contain illegal images" (paragraph 12). 22. With a making offence (paragraph 11) "what is necessary is 'a deliberate and intentional act, with knowledge that the image made is, or is likely to be, an indecent photograph of a child'. 23. The overall tenor of the authorities appears to be that notwithstanding the absence of an indication in the statute to this effect, in order to secure a conviction in these cases there needs to be proof of a mens rea . That has been identified in the case of making offences where, on facts such as these, the mens rea is as identified at paragraph 13 of the summing up to the Jurats on the law. To require the mens rea to extend to additional proof of knowledge of the storage facility within the mobile phone, is unwarranted in principle and not consistent with authority. *Authorities AG v Rebelo*

[2019] JRC 215 . Archbold Criminal Pleading, Evidence and Practice. Protection of Children (Jersey) Law 1994. R v Smith and R v Jayson [2003] 1 Cr App R 13. Harrison v Regina

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