

JERSEY / JUDGMENT

AG -v- Lekkerkerker [2013] JRC 217 (12 November 2013)

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JUDGMENT

THE DEPUTY BAILIFF: 1. The defendant was convicted on 5 th September, 2013, on two counts of making indecent photographs of children, contrary to Article 2(1)(a) of the Protection of Children (Jersey) Law 1994 and one count of attempting to make indecent photographs of children, contrary to the same Article. In each case the counts on the Indictment related to conduct of downloading films from the internet. In relation to the first count of making such images, the Crown's case was that there were eight films involving activity at levels 4 and 5 on the Oliver scale (R-v-Oliver [2003] 1 Cr. App. R. 28), which involved girls under the age of 16. The defendant denied that the girls in question were under that age and, there being no evidence as to their identity, the Court had to resolve the question of their age which was in dispute, simply by watching the films in question and asking itself whether it was satisfied, to the criminal standard, that the girls were under the age of 16. We recall that, having done so, the Court was not satisfied to the criminal standard that this was the case in respect of all eight films but the jurors were satisfied in respect of the girls appearing in films two, four and eight and the first girl in film five that they were under the age of 16. As we indicated this afternoon, our note at the time was that we considered that film eight showed images at Oliver level 2 and not level 5. Accordingly a conviction was entered on Count 1 on the Indictment, there being no dispute it was the defendant who had actually downloaded these particular films and that they did constitute indecent images. There was dispute in relation to Count 1 and other counts as to whether the downloading of films had taken place in Jersey. Having reviewed all the evidence the Court was satisfied, to the criminal standard, that the downloading had taken place in this Island. We add in passing that in that respect there may well be reason for the legislature to consider a possible amendment to the Law which would enable a charge to be brought in the Royal Court on an extra-territorial basis where the downloading was proved to have been effected by the defendant, whether it took place within the jurisdiction or not, and we would urge the Attorney General to bring to the attention of the relevant authorities these particular remarks. 2. In relation to the second count of making indecent images, that was Count 3, and in relation to Count 2, which was attempting to make indecent images, apart from the issue as to where the films were downloaded and where the attempts might have taken place, the defence related to the defendant's intentions in allegedly downloading them. In relation to the count of attempt, the Jurats concluded that the defendant

intentionally downloaded in Jersey the films in question from the internet and that when he did so he intended to download the films which contained, or were likely to contain, indecent images of a child. The attempts charged by Count 2 were alleged to have taken place over a period of some 15 months, but the Crown summary asserts downloading over a period of 5 months. 3. The Crown's case was that it was clear from the tables which were shown to us that there were over 100 films in this category involved. The Defence case, repeated in mitigation by Advocate Blakeley, is that the number is considerably less than that and we will return to this point in a moment. In relation to Count 3, which was the second count of making indecent photographs, the pornographic nature was not disputed, neither was the age of the girls in question. There was dispute as to the place where the downloading might have occurred, and also the defendant's intention in downloading them and the Court was in no doubt about these issues and entered a finding of guilty accordingly. 4. It is otiose to reflect on the detail of all the titles involved but, as I put to Advocate Blakeley in the course of his mitigation, a title such as "7Yo Melissa gets Fucked Both Doggy & Missionary" is sufficiently explicit that the person downloading the film cannot, in our judgment, have been in any doubt as to what he intended to download and that conclusion is reinforced by a reference to not only the timescale over which the films as a whole were downloaded, but also the explicit nature of the titles of many of those films and/or the codewords or "hooks" as one of the expert witnesses described to us, which would give the person looking for paedophile pornography a clue as to whether the film fell, or was likely to fall, into that category or not. 5. So the approach this Court takes to sentencing in this area is established by AG-v-Godson and Crowley

[2013] JRC 091 applying the decision of Guernsey Court of Appeal in Wicks and Ors-v-The Law Officers of the Crown (Guernsey judgment 14/2012) of 22 nd March, 2012. In our judgment it is clear that the making of films in this instant case falls within category 4, namely the offender has made an image, or possessed an image, for distribution or show falling within levels 4 or 5 on the Oliver scale. Accordingly, the Court takes an initial figure of 3 years' imprisonment and has to consider whether this should be increased or decreased, having regard to the aggravating and mitigating factors involved. 6. It is at this point that we have been considering the submissions on numbers which have been put to us by Advocate Blakeley. In this case it is probably not possible to determine the exact number of films that fall within the Oliver levels 4 or 5 but in our judgment it is not necessary to do so. The number is somewhere between the Crown figure and the Defence figure of 28. Either way we are satisfied that the number of images is significant and indicates a high level of personal interest in such images. We note also, we think this is a very relevant factor, that these were not single images but they were films containing, naturally, a number of images of these children. The images were collected over a significant period of time. We note the defendant had access to these images using the eMule program which enabled a sharing of these films with others who might be using the eMule program at the same time, and we also note that there was a "peer to peer" facility on the relevant computer of the defendant which enabled contact between the defendant and another user outside the collectivity of the eMule program. 7. None of the other aggravating factors

which are set out in Wicks apply in this case but we have had to consider the question of the erasing software which is treated by the Crown in this case as an aggravating feature. The local authority on this point seems to be limited to two cases, the first being the case of AG-v-Langlands

- [2013] JRC 106 where, as Advocate Blakeley correctly pointed out at paragraph 4, the Court, having reviewed the nature of the offending in that case, said this:- "We note that no suspicion fell on your wife and also that the wiping software was used apparently for both adult and child pornography so we do not take account of the aggravating features which the Crown has identified." Advocate Blakeley relies on that passage to assert that one needs to look at the purpose for which the wiping software was used in order to decide whether it is an aggravating feature. 8. The second case where the issue of erasing software as an aggravating feature was raised was that of AG-v-Young
- [2013] JRC 212 where, at paragraph 4 of the sentencing remarks, the Bailiff said this:- "You also have used equipment to try and remove evidence of what you have done and to cover your tracks." That was then used as an aggravating feature which, in that case, took the initial point of 3 years' imprisonment up to 5 years. 9. Advocate Blakeley refers us to the Guidelines of the Sentencing Guidelines Counsel in the United Kingdom where, at page 114 - and these are the guidelines which, we are told, are the most recent guidelines and were issued in April 2007 - it is said to be a mitigating factor that images are viewed but not stored and he points out that there is no consistency between treating the viewing but not storing of images as a mitigating factor and the use of erasing software which would be necessary for them not to be stored, or might be necessary for them not to be stored, as an aggravating factor. We accept that that would be a potential inconsistency and, in our judgment, therefore it is right to take the use of erasing software as an aggravating feature where the purpose of use is to avoid detection. That is consistent with both the cases of Langlands and Young to which I have referred. 10. So in this case, as Advocate Blakeley has pointed out, the erasing software was used for both the paedophile pornographic material and the adult pornographic material, which was legal material, and it therefore is not possible to conclude to the criminal standard that the erasing software was used for the purposes of avoiding detection. And indeed there is some support for the defendant's position in that respect also from the fact that some of these downloads would have taken a very considerable amount of time and so we assume would have taken up a considerable amount of space on the relevant hard drives. At all events we do not therefore take the use of erasing software as an aggravating feature in this case. 11. Having regard to all these features we think that the starting point of 3 years should be increased to a point of 4 years' imprisonment, having regard to the number of films that were made and therefore the significant number of images that are made and also having regard to the period of time over which they were made. We also have regard to the use of the eMule program as being an aggravating feature in this context. 12. We now come to look at the mitigating circumstances. There has been no guilty plea and the defendant has no mitigating factor of youth, but he is of largely good character in this country and there is an amount of

personal mitigation set out in the social enquiry report and in the psychological report, and it is not necessary to refer to it, which we have taken into account. We have also taken into account the references which have been produced and, in particular, the personal references produced this afternoon. Normally a reference which is unsigned will not receive much attention from the Court but Advocate Blakeley has explained the special circumstances which arise here and we accept, of course, what he says in that respect and therefore we have accepted and read those references. We have also taken into account all the other material which Advocate Blakeley has referred us to and, but for one feature, we think that the mitigation would lead us to a conclusion of 3½ years' imprisonment. The additional feature, however, is that of the delay in proceeding with this charge. The circumstances are that the defendant was arrested in March 2012, the first expert report was produced in May 2012, and the second expert report produced at the end of August 2012, at which point, as Advocate Pedley accepts, the Crown was ready to go in relation to Counts 1 and 2. However, the charges were not actually brought until February 2013, some 6 months later, and of course the Crown did not proceed with the application for the additional charge until the summer of 2013, not very long before trial. 13. Taking those features into account we think that there ought to be a further reduction and we therefore end up with a term of imprisonment of 3 years on each count, concurrent. 14. We order the forfeiture of the relevant computer equipment. 15. I turn next to the issue of deportation. We are satisfied in principle that offences of this kind are sufficient for us to reach the conclusion that the first part of the Camacho test is satisfied and that it is not in the best interests of the community that the person committing offences of this kind should be permitted to remain here. In this case however we think that it would not be appropriate to make a recommendation for deportation. We have taken into account the length of time which the defendant has spent in this Island and we are satisfied that his life has been predominantly here for some 20 years, even though he may not have been here full time, but during that period, and applying the approach which is set out by the Court of Appeal in Camacho we need to consider in this second part of the test the family rights of the offender as well as any other family or friendship rights which might be relevant. In this case, having regard to the offender's rights under Article 8 to respect for his private and family life, we think that while it is true, as the Court of Appeal indicated in Camacho that less weight is given in this balancing exercise to the rights of the offender, the personal references which have been put forward and the length of time spent here are such that the defendant ought to have the benefit of the doubt on this occasion. We have to say that he has come extremely close to a recommendation for deportation but on this occasion we do not think it is appropriate for reasons which we have given to make that order. In particular we do not reach that view because of the conclusion that we have reached on the matters under the Sexual Offenders Law to which I now turn. 16. First of all the defendant is subject to the notification requirements under the Sex Offenders (Jersey) Law 2010. That period runs from the date of conviction and we order that no application can be made to have those provisions disapplied for a period of 5 years from the date of conviction, 5 th September, 2013. 17. We now turn to the question of the

Restricting Orders which the Crown seeks. The Crown seeks that these should be imposed for a period of 5 years from today's date and there are four orders which the Crown has sought. The first two are not contested by the defendant. We make them in the terms the Crown seeks. That is to say:- (i) The defendant must produce to a police officer forthwith on request, for examination, at any time, any computer or device which may access the internet or any device which can store images electronically, which belongs to him or is in his possession, it being noted that such request may be made anywhere, including by the police attending at the defendant's place of residence. (ii) The defendant is prohibited from owning or having in his possession or having access to, any device capable of accessing the internet unless:- (a) It has the capacity to retain and display the history of internet use; (b) The defendant ensures that such history is not deleted. Those orders are made. 18. The Crown has also sought two other orders which prohibit the defendant from being alone with any child under the age of 16, aside from such contact which is inadvertent or unavoidable, and which would require him, should he find himself alone with such a child, to remove himself from that situation as soon as reasonably practicable. 19. In this context we have looked carefully at the reports obtained, both the social enquiry report and the psychological report, and we note, in particular, that the defendant has been assessed as presenting a medium static risk and a high stable dynamic risk of committing further sexual offences. In the psychological report Dr Emsley adds this qualification:- "6.4 It is important to stress that RM2000 has not been validated with a population engaging solely in internet offending. As [the defendant's] sexual offences are restricted to internet offences, these risk levels should be treated with caution. However, there is currently no other actuarial, static risk assessment tool validated with offenders committing Mr Lekkerkerker's type of offence." That of course related to the Risk Matrix 2000 assessment. 20. When Advocate Pedley was putting the Crown's conclusions before us we asked if there was anything which suggested any risk of serious sexual offending amounting to a contact offence and there is nothing in any of these reports which suggests that there is such a risk. There is nothing in the defendant's record which suggests such a risk and nothing in his conduct, apparently, over the years he has been in the Island which suggests such a risk and in those circumstances we are not satisfied that there is a risk of serious sexual harm, such as would justify the imposition of these restrictive orders which are aimed at the prevention of contact offences as opposed to internet offending and so we do not make those orders. That conclusion is relevant to the reasons why we have not thought it appropriate to make a recommendation for deportation because, had we been satisfied that there was a risk to the young people of this Island in terms of contact offences, then we might well have taken a different view about deportation. 21. For the reasons which I have given you are sentenced to 3 years' imprisonment, concurrent on each count. Authorities Protection of Children (Jersey) Law 1994. R-v-Oliver [2003] 1 Cr. App. R. 28. AG-v-Godson and Crowley

[2013] JRC 091 . Wicks and Ors-v-The Law Officers of the Crown (Guernsey judgment 14/2012). AG-v-Langlands

[2013] JRC 106 . AG-v-Young

[2013] JRC 212 . Camacho-v-AG

[2007] JCA 145 . AG-v-Bowey

[2013] JRC 117 . R-v-Smith and Ors

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