Neutral Citation No: [2022] NICC 1 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **OHA11748** *ICOS No:* **20/059466** *Delivered:* **01/02/2022**

IN THE CROWN COURT IN NORTHERN IRELAND
SITTING IN LAGANSIDE COURTHOUSE

THE QUEEN

v

ALEXANDER McCARTNEY

APPLICATION FOR A NO BILL

Mr G Berry QC with Mr Kevin F O'Hare (instructed by Jarlath Fields Solicitors) for the Defendant
Mr D McDowell QC with Ms G McCullough (instructed by the Public Prosecution Service) for the Crown

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O'HARA J

Introduction

[1] The defendant has pleaded guilty to 100 charges of sexual conduct involving children. They include possessing, making and distributing indecent photographs and inciting sexual activity. Some of the children were under 16 years of age, others were under 13.

[2] This application for an entry of No Bill is in relation to four categories of offences:

(i) 58 counts of blackmail, contrary to section 20 of the Theft Act (Northern Ireland) 1969.

(ii) 25 counts of intentionally causing a child to engage in sexual activity, contrary to Articles 15 and 17 of the Sexual Offences (NI) Order 2008.

(iii) Three counts of intentionally causing a person to engage in sexual activity, contrary to Article 8 of the 2008 Order.

(iv) A single count of intimidation, contrary to section 1(d) of the Protection of the Person and Property Act (NI) 1969.

[3] So far as the first three categories are concerned the defendant's submission is that on a proper interpretation of the statutory provisions no case is made out which is sufficient to justify putting the defendant on trial. Accordingly, I am invited to order an entry of No Bill in the Crown Book as provided for by section 2(3) of the Grand Jury (Abolition) Act (NI) 1969. On the count of intimidation the defence submission is that the papers do not disclose a case against the defendant. As will appear below the Crown responded in detail to the issue about intimidation and the defence did not engage with that response. Accordingly, this judgment focuses primarily on the first three categories.

[4] The circumstances in which a No Bill can be entered have been the subject of many judgments since 1969. Most recently the Court of Appeal revisited the No Bill issue in *R v Charles Valliday* [2020] NICA 43. The various valuable authorities need not be addressed or analysed in this judgment because the defence submissions relate to the interpretation of the statutory offences rather than to an analysis of the evidence.

The Blackmail Charges

[5] Section 20(1) of the Theft Act (NI) 1969 provides that:

> "(1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and, for this purpose, a demand with menaces is unwarranted unless the person making it does so in the belief—
>
> (a) that he has reasonable grounds for making the demand; and
>
> (b) that the use of the menaces is a proper means of reinforcing the demand."

[6] In section 32(2)(b) of the 1969 Act the following definition appears:

> "(b) "gain" and "loss" are to be construed as extending only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; …"

[7] Section 4 of the 1969 Act then defines property and states:

> "(1) "Property" includes money and all other property, real or personal, including things in action and other intangible property."

[8] In this case the prosecution has framed the blackmail charges in terms that on certain dates the defendant "with a view to gain for himself or with intent to cause loss to another made an unwarranted demand of indecent images from …" an identified individual. The defence submission is that indecent images sent electronically as digital files are not "property" within the meaning of section 4. It is accepted by the defence that if a photograph had been demanded it would be property but that, however counterintuitive it might appear, a digital image is not property.

[9] For the defendant Mr Berry relied on *Oxford v Moss* [1978] 68 Cr App R 183. In that case a divisional court upheld the decision of a magistrate to dismiss a charge of theft against a university student who had dishonestly obtained the proof of an examination paper. He read the contents of the paper *i.e.* the examination questions and then returned the paper from where he had got it.

[10] Moss was prosecuted on the basis that he stole certain intangible property, namely the confidential examination questions, with intent to permanently deprive the university of that property. The Divisional Court held that the confidential information did not fall within the definition of "intangible property." In a very short judgment the court held that confidential information is not intangible property whilst taking and retaining the paper would have been theft. It therefore distinguished between the information on the paper (not property) and the paper itself (property). I would add that a simpler way to approach the case might have been to say simply that there was no theft because there had been no permanent deprivation of the information from the university by Mr Moss.

[11] Mr Berry continued by relying on the New Zealand case of *R v Dixon* [2014] 3 NZLR 504. The defendant was a bouncer employed by a security firm. He became aware of CCTV footage from a bar showing a prominent sportsman with a woman. He asked an employee of the bar to download the footage on to her work computer which she did. He then accessed that computer, found the relevant file and transferred it on to his own USB stick. After he attempted, but failed, to sell the footage, he posted it on a video sharing site.

[12] Mr Dixon was charged with accessing a computer system for a dishonest purpose. An element of the statutory offence was that he must have obtained some "property … pecuniary advantage [or] benefit …". The question for the court was whether the CCTV footage which he had copied and transferred was property. The trial judge had rejected a submission that it was not and the jury had then convicted Mr Dixon.

[13] On appeal the New Zealand Court of Appeal disagreed with the trial judge on the "property" issue but upheld the conviction on a different basis. At paragraph 21 of its judgment it acknowledged that the trial judge's view was understandable and likely to be shared by many because "it reflects an intuitive response that in the modern computer age digital data must be property." Despite that, the Court of Appeal found that the ruling was wrong. At paragraph 25 it referred to *Oxford v Moss* as "not a closely reasoned decision" but one which remains good law. Having considered case law in New Zealand and Australia it held to what it described as the "orthodox position" that confidential information is not property and that digital footage is not distinguishable from information. At paragraph 31 of the judgment it is stated:

> "It is problematic to treat computer data as being analogous to information recorded in physical form. A computer file is essentially just a stored sequence of bytes that is available to a computer program or operating system. Those bytes cannot meaningfully be distinguished from pure information."

[14] The New Zealand Supreme Court then considered a further appeal on a number of issues including whether the Court of Appeal had been correct in holding that the digital files were not property. It is expressly stated in the Supreme Court judgment that the Crown did not contend that "pure information was property but rather that digital files were not simply information but should properly be regarded as things which could be owned and dealt with in the same as other items of personal property." The Supreme Court accepted that contention. It said at paragraph 25:

> "We have no doubt that the digital files at issue are property and not simply information. In summary, we consider that the digital files can be identified, have a value and are capable of being transferred to others. They also have a physical presence, albeit one that cannot be detected by means of the unaided senses. Whether they are classified as tangible or intangible, the digital files are nevertheless property ..."

[15] Expanding on that finding the court stated that material held in electronic form on a computer falls within the definition of document. Moreover, it held that the CCTV footage which was downloaded to the USB stick had an economic value and also had a material presence which altered the physical state of whatever medium it was stored on *i.e.* the USB stick *with* a download is different to the USB stick *without* the download.

[16] The Supreme Court's judgment was subjected to severely critical analysis in an article entitled "Digital files as property in the New Zealand Supreme Court:

innovation or confusion?" in LQR 2016, 132 (Jul) 394-399. Mr Berry adopted this criticism and submitted that the Court of Appeal approach was to be preferred. However, in a compelling submission Mr McDowell challenged the LQR critique and contended that the approach of the authors and of the New Zealand Court of Appeal would lead in the present case to an absurd result based on an unduly technical approach which ignores practical realities.

[17] In my judgment the application for No Bill on the blackmail charges must fail because in each case the images which the defendant is alleged to have obtained from his victims with menaces were property within the meaning of section 4 of the Theft Act. I agree entirely that the intuitive response is not necessarily the legally correct one but in this case I believe that it is.

[18] The authors of the LQR article were concerned about the effect of the Supreme Court decision on copyright law. With respect, that is irrelevant. Their approach is to my mind unduly and unattractively narrow and legalistic and sits uneasily with their concession that "some may plausibly argue that social and economic charges demand that digital files be recognised as the object of some new form of intangible property …"

[19] Finally, on this issue I agree with the prosecution submission that it is appropriate to acknowledge that at least two cases of blackmail have been considered by the Court of Appeal in England and Wales in respect of sentence – *R v Falder* [2019] 1 Cr App R(S) 46 at page 309 and *R v Leighton* [2017] EWCA Crim 2057. In each case the defendant pleaded guilty to offences of blackmail involving indecent images. In neither case was any issue taken that the charges should fail because no property was involved. It does not follow automatically from these cases that the property issue raised in the present application for a No Bill should fail but in my judgment those cases support the contention that on any proper analysis digital images are property as defined by the Theft Act.

Articles 15 and 17 of the Sexual Offences (NI) Order 2008

[20] These offences fall into four categories:

- Article 15(1) which is causing or inciting a child under 13 years of age to engage in sexual activity.

- Article 15(2) which is causing or inciting a child under 13 years of age to engage in sexual activity involving penetration.

- Article 17(1) which is an adult causing or inciting a child between 13 and 16 to engage in sexual activity.

- Article 17(2) which is an adult causing or inciting a child between 13 and 16 to engage in sexual activity involving penetration.

[21] The defendant has pleaded guilty to almost all of the charges in which the evidence is that he *incited* a child to engage in sexual activity but in this application for a No Bill he has raised an issue about the counts on which the evidence is to the effect that he *caused* a child to engage in sexual activity. In short, Mr Berry submits that even if the defendant incited children to engage in sexual activity by his criminal actions while he was in Northern Ireland he cannot be charged with having caused children to engage in sexual activity outside Northern Ireland by reason of things which he did while he was in Northern Ireland. The difference, he says, is that the act which he is said to have caused (the child's sexual activity) was not performed within this jurisdiction. Since the prosecution case is that many of the children who were caused to engage in sexual activity were outside Northern Ireland, this court has no jurisdiction.

[22] For the prosecution Mr McDowell submits that the modern approach to the question of jurisdiction draws no distinction which the defendant can rely on between what he described as "conduct crimes" and "result crimes." By this he meant that the counts involved two actors – the defendant who acts in a certain way and the child, who as a result of the defendant's actions, engages in sexual activity. It is the defendant's actions which must lead to the sexual activity for the charge to be proved. And it is enough, he submits, if the defendant's conduct takes place in Northern Ireland no matter whether the child is inside or outside this jurisdiction.

[23] There is powerful authority to support the prosecution submission. As long ago as 1971 in *Treacy v DPP* [1971] AC 537 Lord Diplock said at page 561H:

> "There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom. Indeed, where the prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than comity to treat them as excusable merely on the ground that the victim was not in the United Kingdom itself but in some other state."

This was written in the context of a blackmail case involving the defendant sending a letter from within the United Kingdom to a lady in West Germany demanding money with menaces. Lord Diplock continued at page 564E:

> "…the rules of international comity, in my view, do not call for more than that each sovereign state should refrain from punishing persons for their conduct within

> the territory of another sovereign state where that conduct has had no harmful consequences within the territory of the state which imposes the punishment. I see no reason for presuming that Parliament in enacting the Theft Act 1968 intended to make the offences which it thereby created subject to any wider exclusion than this. In my view, where the described conduct of the accused should be followed by described consequences the implied exclusion is limited to cases where *neither* the conduct *nor* its harmful consequences took place in England or Wales."

[24] More recently in *R v Smith (Wallace Duncan) (No.4)* [2004] 1 QB 148 it was held that where a substantial measure of the activities constituting a crime takes place within the jurisdiction, the courts in that jurisdiction have the legal jurisdiction to try the crime. This is so even if the final act (in this case the sexual activity) occurred outside the jurisdiction. The only exception would be where it might be argued that for some reason of international comity the activity should be dealt with by another country.

[25] On this approach, which I approve and follow, the fundamental question is whether a substantial measure of the activities constituting the crime took place in Northern Ireland. In this case the only possible answer is yes. On the prosecution case, which for these purposes I take at its height, the instigator of the sexual activity, the person who caused it and brought it about, was the defendant in Northern Ireland. That being so the application for a No Bill on these counts under Articles 15 and 17 must fail.

Article 8 of the Sexual Offences (NI) Order 2008

[26] The defendant faces three counts under Article 8 of causing a person to engage in sexual activity without consent. This aspect of the No Bill Application was advanced on exactly the same basis as with Articles 15 and 17. Neither counsel has advanced any separate or additional point. For the reasons set out above, in relation to the counts under Articles 15 and 17, the application in respect of the Article 8 counts must also fail.

Intimidation

[27] On count 10 the defendant is charged with intimidation, contrary to section 1(d) of the Protection of the Person and Property Act (NI) 1969. It is alleged that between specified dates in December 2015 he unlawfully caused a person identified by a user name, by force, threats or menaces or in some other way to send to him compromising images of herself.

[28] The No Bill Application was advanced on the basis that the depositions did not establish that images were in fact sent or that there was evidence of "force, threats or menaces." In response the prosecution has set out in its skeleton argument the exchanges between the defendant and the person using the user name. Included in these exchanges are references by that person to "please just leave me alone", "you said you deleted those pics", "I hate doing this", "why are you doing this to me?", "you are hurting me" and "why, so you can torment me."

[29] On the full exchange and on the defendant's modus operandi, remembering that he has already pleaded guilty to 100 offences, the prosecution submits that there is sufficient evidence that the female had sent pictures and that the defendant was intimidating her. The defence did not respond to this submission. I accept the prosecution submission with the result that this part of the application for No Bill is refused.

Conclusion

[20] In light of my findings as set out above the defendant's application for a No Bill fails in its entirety.