



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 38
HCA/2018/424/XC

Lord Justice General
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

ROBERT REDPATH

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: O'Rourke QC; Faculty Appeals Service (for Bridge Litigation, Glasgow)

Respondent: K Harper AD; the Crown Agent

14 June 2019

Introduction

[1] The Civic Government (Scotland) Act 1982, as amended by the Criminal Justice Act 1988 (s 161), provides:

“52A(1) It is an offence for a person to have any indecent photograph ... of a child in his possession.

(2) Where a person is charged with an offence under sub-section (1), it shall be a defence for him to prove –

...

(b) that he had not himself seen the photograph ... and did not know, nor had cause to suspect, it to be indecent ...”.

Section 52(8)(c) defines “photograph” as including “data stored on a computer disc or other electronic means which is capable of conversion into a photograph”. Section 52A is identical to section 160 of the 1988 Act, which is applicable to the rest of the United Kingdom.

[2] Although this appeal is directly concerned with the sufficiency of evidence to prove “possession”, which was defined by the sheriff as requiring knowledge and control, it raises an important point about the item of which an accused requires to have knowledge when the photographs are contained on discs admittedly owned by, and in the possession of, an accused.

General

[3] On 11 June 2018, at the Sheriff Court in Glasgow, the appellant was convicted of a charge which libelled that:

“(2) between 5 December 2012 and 29 March 2017 ... at ... Glasgow you ... did have in your possession indecent photographs ... of children; CONTRARY to the Civic Government (Scotland) Act 1982 Section 52A(1)”.

The appellant was acquitted of two other charges. The first, which had the same dates and *locus*, was taking or permitting to be taken indecent photographs of children, contrary to section 52(1)(a). The photographs involved were those of his partner’s young niece. The jury specifically absolved the appellant of any criminality relative to images of the niece. The third was having extreme pornographic images in his possession, contrary to section 51A(1) of the 1982 Act, on 29 March 2017, again at the same *locus*. The sheriff sustained a “no case to answer” submission on this charge.

[4] On 21 July 2018, the sheriff imposed a 12 month restriction of liberty order on the appellant.

Evidence

[5] The appellant was a 63 year old retired electrician. Although he had a partner of some 40 years standing, they lived at separate addresses. On 29 March 2017, a search was carried out at the appellant's address, where he lived alone. The appellant had an interest in repairing computers. He had considerable quantities of computer hardware in his house. Much of this was seized and three items contained the material which ultimately resulted in his conviction.

[6] Label 2 was a quantity of CDs and DVDs which were found in various places in two bedrooms. The first of the incriminating items was disc 1 (Kodak DVD and RW disc containing 11 files with creation dates in 2011), which was part of label 2. This disc contained 7 accessible moving Category A images of children and 4 accessible moving Category B images.

[7] The second item was disc 3 (a "Mirror" DVD-R), which was also part of label 2. This included 1 accessible moving Category A feature length film (dated 1977) and 1 accessible moving Category B image.

[8] Label 4 consisted of USB sticks and cards, which were contained in a plastic box found on the floor of a bedroom (unspecified). In this there was a blue SD (storage disc) HC card 8GB. This was the third incriminating item. It contained 3 moving Category C images, including 2 which were easily accessible and one which had a title "Miss Teen Crimea Naturist 2008 ... (Candid-Hd Nude Teens)". This had been created in 2010.

[9] A number of other discs were found, which did not form part of the conviction, but contained indecent or pornographic material. The first of these was a blue "Transcend" SD HC card 32GB, which was part of label 4. This contained 1 moving Category A image and 2 Category C images. It also held certain personal photographs, referable to the appellant. The files on this disc were not readily accessible, as they were in unallocated space. This meant that they had been deleted and were not retrievable without specialist software.

[10] Label 1 was a Samsung SD card 16GB. It contained an image of the appellant, apparently created in January 2013. It had Category A and C images of his partner's niece, but these were in "unallocated clusters". There were titles attached to the image files on this card, which were indicative of indecent images of children, such as "10Yo Nude Preteen Self Shots". One of the discs, for example disc 2 of label 2, showed images of bestiality. Discs 4 and 5 had file titles indicative of indecent child images, but these contained pornography featuring adults. Disc 10 of label 2 had images of the appellant's partner's niece, created on 29 December 2010.

[11] Label 3 was a WD 2 TB (Terabyte) hard drive, which had been found on the floor of a bedroom. It had been manufactured in 2012. Windows 7 had been installed in 2013 and the last log on was by "John" in November 2015. This showed moving images from rape scenes shown in films, indecent computer generated or cartoon images of children created in July 2015 and pornography dated June 2016. Possession of these items did not constitute an offence.

[12] A Lexar 64GB green and white USB, which formed part of label 4, contained images of the appellant's partner's niece, created in August 2015, as did the blue SD 32GB card. These were not accessible without recourse to specialist software. They too were in "unallocated clusters".

[13] The appellant testified that he had not known that there were any indecent images on the hardware seized. He often scavenged for computer parts. Third parties often left parts with him, if they had asked him to repair something and it turned out not to be economically viable. He did not check all accessible material on such parts. The appellant's partner gave evidence that she had never seen the appellant viewing indecent images of children.

Charge to the Jury

[14] The sheriff directed the jury that, for the purposes of charge (2), "possession" required "knowledge and control". Knowledge involved "awareness; knowing of something's existence". The sheriff described how the Crown had approached this by saying that they had invited the jury to infer that the appellant "had knowledge of all the accessible images" given: (a) their accessibility; (b) the appellant's skills with computers; and (c) that the images were found on a number of the discs or cards. The sheriff explained that the defence position had been that no such inference could be drawn, especially in the absence of evidence that the items could be opened by the appellant's computer. He went on to state that the appellant's position was that "he had not seen the ... material himself and did not know and did not have any cause to suspect that any material was indecent". The jury were told that absence of knowledge of the images was a defence. If the appellant proved, on a balance of probabilities, that he "had no knowledge or suspicion of the nature of the ... material", that would be a defence. In any event, continued the sheriff, knowledge was an essential ingredient of what the Crown required to establish "beyond reasonable doubt".

Grounds of appeal and submissions

Appellant

[15] The first ground of appeal was that the sheriff erred in failing to sustain a submission of no case to answer on the basis that there had been insufficient evidence to prove knowledge of the images. The appellant's knowledge of computers was irrelevant, as was the fact that the images were found in different units. There was no evidence that the devices could work on the computer in the appellant's house.

[16] The court queried whether the sheriff's directions on knowledge were correct, having regard to the reasoning in *R v Okoro (No 3)* [2019] 1 WLR 1638 and *R v Ping Cheng Cheung* [2009] EWCA Crim 2965. The appellant maintained that possession required knowledge that the person had custody or control of the illegal item. The word "knowingly" had to be read into the section (*Salmon v HM Advocate* 1999 JC 67 at 72-75; *Henvey v HM Advocate* 2005 SCCR 282 at 284-285 citing *R v Warner* [1969] 2 AC 256; *R v Porter* [2006] 2 Cr App R 25 at para 22, approved in *McLennan v HM advocate* 2012 SCL 957 at para [19]). Knowledge of the images themselves was necessary before the statutory defence became available. Where images were on the hard drive of a person's computer, possession could be inferred. Where they were on unlabelled discs, which were not otherwise linked to an accused, and there was no device proved capable of accessing the images, possession was more difficult to establish. *R v Ping Cheng Cheung* (supra) demonstrated that the accused required to have knowledge of the class of items into which the indecent photographs fell.

[17] The second ground, which was not heavily pressed, was that the reference to "suspicion" in the charge was a misdirection. Section 52A provided that the defence was that the appellant had not seen the images nor knew, or had any cause to suspect, that they were indecent.

Respondent

[18] The advocate depute maintained that there was sufficient evidence of possession. The Crown had to establish that the appellant knew of the existence, and had control, of the images themselves (*McMurdo v HM Advocate* 2015 SLT 277). Where the images were on an item or a device, and it was possible to access them, then whether the appellant had possession of them was a matter for the jury. It was not necessary for the Crown to prove that he knew that the items contained indecent images of children. It was sufficient that he knew that he had the item or device which was in his custody or control. Thereafter, it was for the appellant to establish the statutory defence (*R v Okoro (No 3)* (*supra*) and *R v Ping Cheng Cheung* (*supra*)).

[19] The items were owned by, and in the possession of, the appellant in terms of section 52A(1). He had raised the statutory defence under section 52A(2). This had been met in the Crown case by there being 15 easily accessible indecent images, spread over three devices and found in the appellant's house. There were other images on other devices which were supportive of the idea that the appellant was interested in indecent images generally. All the circumstances merited an inference of knowledge.

[20] The sheriff's directions, in so far as they appeared to suggest that the appellant required to have knowledge of the individual images, had been in favour of the appellant and placed a greater burden on the Crown than was necessary.

Decision

[21] The offence under section 52A of the Civic Government (Scotland) Act 1982 is one of a person having indecent photographs of children "in his possession". Photographs include "data stored on a computer disc ... which is capable of conversion into a photograph". That

being so, it is sufficient for the Crown to prove that the appellant was in possession of data stored on computer discs which could produce photographs of some kind. There is no need for the Crown to prove that the appellant had knowledge of the nature of the images to which the data would convert. In this respect the court agrees with the reasoning of the Court of Appeal in England and Wales in *R v Okoro (No. 3)* [2019] 1 WLR 1638, Irwin LJ at para 40 citing King J in *R v Ping Chen Cheung* [2009] EWCA Crim 2965. The Crown have to prove knowledge of the existence of the “things” that were in the appellant’s control (ie data convertible to images) but not his knowledge of the quality or content of the things. Knowledge of the content is addressed in the context of the statutory defence.

[22] In *Ping Chen Cheung*, the pictures were on DVDs which had been found in a bag being carried by the accused. In refusing leave to appeal to the Court of Appeal, King J said (at paras 15 and 16):

“15 For present purposes it is sufficient to state that it was not enough for the prosecution to establish that the appellant was in physical possession of the offending DVD images as a matter of fact in the sense of their actually being within his custody or control in the bag he was carrying. Before any question of the statutory defence could arise, the prosecution had also to establish to the criminal standard of proof that the appellant had knowledge of the existence of the ‘things’ that were in his custody or control. However, this will in the ordinary case be quite sufficient to establish possession. The prosecution do not have to prove that the defendant knew that the ‘thing’ which was to his knowledge in his custody or control had the requisite quality giving rise to the offence, in this case that the DVD contained an extreme pornographic image. Otherwise the defence under section 65(2)(b) [corresponding to s 52A(2)(b) of the 1982 Act] would be *otiose*. ...

16 If the jury are sure that the defendant was knowingly in possession of an extreme image in the above sense then the burden shifts to the defendant to establish on the balance of probabilities that the matters making up the statutory defence – in this case that he had not seen the image concerned and did not know nor had any cause to suspect it to be an extreme pornographic image.”

Similarly, in *Okoro* the images were stored on the accused’s mobile. Having reviewed the authorities, notably *R v Porter* [2006] 1 WLR 2633, Irwin J said (at para 45):

“We are clear that the statute requires proof by the Crown of possession of the pornography or images of child abuse, as a preliminary step before the burden of proof shifts to the accused, to establish the statutory defences. An accused cannot be convicted in relation to material of which he was genuinely totally unaware. Nor could a defendant be said to be in possession of a digital file if it was in practical terms impossible for him to access that file. However, for these statutory purposes we are clear that possession is established if the accused can be shown to have been aware of a relevant digital file or package of files which he had the capacity to access, even if he cannot be shown to have opened or scrutinised the material. That represents the closest possible parallel to the test laid down in the authorities set out above, and appears to us to be consistent with the criminal law of possession in other fields, such as unlawful possession of drugs.”

[23] That is an end of the matter so far as the no case to answer submission is concerned.

There was sufficient evidence from which an inference could be drawn that the appellant was aware that he had a number of discs containing data. Some of the data related to the appellant’s personal life and its existence must have been known to him. The volume of such data over a series of discs, including those containing images, the possession of which was not criminal, would be sufficient for the inference to be drawn. In addition, a glance at some of the file titles on the disc would indicate the nature of their content. The requisite knowledge having been established, the only true issue in the case was whether the appellant’s defence under section 52A(2) had been made out. In that respect, the onus was on the appellant (*McMurdo v HM Advocate* 2015 SLT 277, LJC (Carloway), delivering the opinion of the court at para [10], citing *Adam v HM Advocate*, Lord Menzies, delivering the opinion of the court at paras [20], [24] and [25]).

[24] It follows from this that the directions given by the trial judge were erroneous, but in favour of the appellant. The second ground of appeal falls to be rejected and the appeal refused.