Neutral Citation No: [2019] NIMag 1	*Ref:* **2019NIMAG1**
Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:* **27/02/19**

ICOS: 18/056789

PPS

v

TIMOTHY BOOMER

IN THE PETTY SESSIONS DISTRICT OF FERMANAGH AND TYRONE

Strabane Youth Court

Michael Ranaghan DJ (MC)

Introduction

1. This contested hearing was heard by a Youth Court Panel ("the Panel") sitting at Strabane Magistrates' Court on 31 January 2019. Timothy Boomer ("the defendant"), date of birth 13 June 2000, is charged with five counts of committing an act of a lewd obscene and disgusting nature and outraging public decency contrary to common law. The charges relate to covert video recordings of two teachers, Sally Rees and Carol McKeown, made by the defendant whilst a pupil at Enniskillen Royal School, formerly Portora Royal School.

2. The images were taken on various dates between 1 February 2015 and 13 September 2016. This timeframe was then narrowed as set out in the agreed statement of facts. On 24 November 2016 a USB memory stick was found in an ICT room of the school. On examination the memory stick was found to contain the images the subject of the charges and also other documents which demonstrated that the memory stick belonged to the defendant. During after caution interview the defendanT accepted that he owned the memory stick

and was responsible for recording the images. There was no evidence that at any stage had the defendant shared, or attempted to share, the content of the images with any third party.

3. The defendant was represented by Frank O'Donoghue Q.C. and Mr Michael Chambers appeared on behalf of the Public Prosecution Service. Skeleton arguments and an agreed booklet of authorities had been lodged by counsel in advance of the hearing. The agreed booklet of authorities included a copy of The Law Commission Report No. 358 of 2015, with a proposal to simplify, among other matters, the common law offence of outraging public decency. No witnesses were called at the contested hearing which ran on the papers and the following agreed set of facts was submitted to the Panel.

1. On the 24th November 2016 a memory stick was found in the grounds of Enniskillen Grammar School ("the School"). This memory stick belonged to the defendant Timothy Boomer.

2. On the memory stick were 5 videos, all taken by Timothy Boomer on the occasions set out below. Each video contains "upskirt" videos of Sally Rees or Carol McKeown, two teachers employed in the School.

*3. Video 1 Image 7634 is of Sally Rees. It was taken by Timothy Boomer ~~at 17.02~~ **outside of normal school hours** on the 30th September 2015. This was taken in an outdoor mobile classroom at the School. On the video a number of other pupils can be heard in the background in the mobile classroom.*

4. Video 2 Image 7642 is of Carol McKeown. It was taken by Timothy Boomer on the 1st February 2015 at the T5 Computer Lab in the School. The video lasts 33 seconds.

5. Video 3 Image 7643 is of Carol McKeown. It was taken by Timothy Boomer also on the 1st February 2015 at the T5 Computer Lab in the School. The video lasts 40 seconds.

*6. Video 4 Image 8544 is of Sally Rees. It was taken by Timothy Boomer on the 8th May 2016 in an area to the side of ~~area known as~~ the Quad which lies between the drama studio and the main school building. **The Quad is an enclosed courtyard surrounded by school buildings**. The video lasts 4 seconds.*

7. Video 5 Image 8545 is also of Sally Rees. It was taken by Timothy Boomer also on the 8th May 2016 and it is taken inside the main school building on a set of stairs outside of the dining hall. The video lasts 7 seconds.

8. The Prosecution and the Defendant have agreed the relevant content of the Defendant's interview following caution.

9. The Prosecution agrees that no adverse inference falls to be drawn from any failure by the Defendant to give evidence.

10. The following witness statements have been agreed to be admitted without the need for formal proof:

(a) Sally Rees of the 25th June 2018.

(b) Carol McKeown of the 25th June 2018.

(c) Elizabeth Armstrong of the 18th December 2017.

(d) James Neill Morton dated the 22nd December 2017 and 14th August 2018.

11. In May 2018 the Education and Training Inspectorate published a document entitled "Report of a Baseline Monitoring Inspection (Involving Action short of strike)" relating to the School. In the Appendix to the report the author stated that "the school needs to review the security arrangements of the access to and within the school grounds at both sites".

4. At hearing one agreed amendment was made to the agreed statement of facts, namely that in **all** of the covert recordings other pupils at the school could be heard in the background.

5. As set out in the agreed statement of facts there is no dispute that the defendant made the recordings, the contention lies in whether the facts, as agreed, amount to the common law offence of committing an act of a lewd obscene and disgusting nature and outraging public decency.

6. At hearing counsel expanded on their skeleton arguments and made submissions in relation to the opposing argument. Prior to the hearing the Panel had not viewed the recordings in an attempt to avoid further embarrassment to Ms Rees and Ms McKeown. As the oral submissions unfolded however it became clear that the Panel had to view the recordings. The Panel viewed the recordings at the close of the oral submissions.

7. In short the prosecution contends that the actions of the defendant are in breach of all of the elements of the common law offence of outraging public decency. Defence counsel contend that, in the particular facts of this case, the fact that the images were taken cannot of itself be sufficient evidence that the defendant's conduct was capable of outraging public decency. The defence contend that rather the defendant's actions amount to a schoolboy prank, albeit an unsavoury one.

8. The defence further contend that the prosecution is attempting to shoehorn the facts of this case to fit the common law offence. The defence say that a school is not an area to which the general public has access, and even if it were, pupils and members of staff at the school are not members of the public.

9. It says that there is no, or insufficient evidence, that the defendant's acts took place in the presence of two or more persons from the general public, nor indeed that they took place in the presence of two or more persons.

10. The Panel would like to thank both counsel for their helpful written and oral submissions. Following the oral submissions the Panel retired to view the recordings, consider the facts, the oral and written submissions and the elements of the common law offence .

11. In its consideration the Panel agreed the following approach: it acknowledged that the acts committed by the defendant cannot have been envisaged when the common law offence was first considered and the move by the Law Commission to simplify or update the particular offence. It agreed that no adverse inference would be drawn from the defendant not giving evidence before the panel. The Panel agreed that the proper approach in reaching its decision required it to focus on the acts of the defendant rather than on his motive or the outcome of his acts. The Panel also noted that a slightly differing approach was adopted by counsel concerning the number of elements constituting the common law offence, albeit all potential factors were considered and argued by both counsel. For the avoidance of doubt the Panel considered the offence in its broadest sense. In doing so the Panel largely followed the structure of the four elements as set out in the prosecution's skeleton argument. The Panel also gave separate consideration

in relation to the defence argument as to which of the categories of potential witnesses might be capable of being outraged.

12. The Panel was again mindful of the absence of a specific statutory offence covering the act of upskirting using a mobile phone in this jurisdiction. The common law offence has existed from a time when modern day technology, required for such an offence, could not have been envisaged. The Law Commission report, referred to above, and more recent developments in England and Wales, clearly demonstrates the need to update the statute book to cover advances in technology. It is also clear that the common law offence has been successfully prosecuted in cases were mobile phones etc. have been used to take upskirt images.

13. At all times in its deliberations the Panel considered the acts of the defendant, in their particular setting, with full regard to the various elements of the common law offence.

Decision

14. The Panel first considered whether the act of taking the upskirt images was one that could be considered lewd, obscene and disgusting. In short the Panel considered that the defendant's acts satisfied this element of the offence. The Panel considered the facts and findings of R v Hamilton [2008] QB 224, where a defendant was convicted of the common law offence after taking upskirt images of women using a camera concealed in a rucksack. The Panel found that the acts of the defendant were, as the prosecution contend, essentially identical to those considered in the Hamilton case. The Panel found that the defendant's acts could also be distinguished from those of the defendant in R v Rowley 1991 4 ALL ER 649, referred to in the defence skeleton argument. In that case it was held that the leaving of notes, in themselves innocuous, in lavatories with the intention of making contact with teenage boys for immoral purposes, could not be described as lewd obscene and disgusting acts. It was held that the defendant's motive for leaving the notes could not alter that finding.

15. In the defendant's case however the Panel found that the pointing of a mobile phone up the skirt of female teachers was entirely different to the facts of the Rowley case and could only be considered to be lewd obscene and disgusting.

16. The acts committed by the defendant could not have had any innocuous purpose, the Panel found as a question of fact that the acts of the defendant were lewd, obscene and disgusting. The Panel made this finding without regard to the motive of the defendant at the relevant times.

17. Having made this finding the Panel went on to consider if those acts were of such nature as to outrage minimum standards of public decency. The leading authority cited to the Panel was Knuller (Publishing, Printing and Promotions) Ltd v DPP [1973]. This authority adds that the minimum standards of decency are to be as those judged by a jury in contemporary society. The Panel were pointed to the test as set out in Knuller in relation to the meaning of outrage as being "a very strong word" and one which "goes considerably beyond offending the susceptibilities of, or even shocking reasonable people". Having considered this authority the Panel accepts that the bar for 'outraging' public decency is set high.

18. It is beyond contention that for an act to be capable of outraging public decency there must have at least been the potential for at least two people to have witnessed the act. Again it is without contention that there was no evidence that anybody actually did witness the acts of the defendant. The Panel found that there were any number of potential witnesses to the defendant's acts; fellow pupils, teachers other than the victims of the act, other staff within the school, and workmen at the school or indeed other visitors to the school. The following passage from the agreed statement of Sally Rees demonstrates how wide the potential pool of witnesses actually was. When discussing image 8544 (count No 4 on the summons) she stated:

'IMG 8544 is taken outside the classroom. It is the area between the drama studio and the main school building known as the Quad (an area open to, and frequented by, dog walking members of the general public. Members of the public are also given access through this door when the school is hired out to a Motorhome/caravanning club). The perpetrator is directly behind me, filming on his mobile phone. You can hear my

voice and other pupils. …….This is also one of the main access doors to outside play areas used during lunch, so pupils, staff, cleaners, workmen could have come out the door…..'

Further weight was added to this finding after the Panel viewed the images. Viewing the images clearly demonstrated that other people (presumably pupils) could be heard in the background as the images were being recorded.

19. The Panel then moved on to consider whether or not any potential witnesses were capable of being outraged by the defendant's acts. Applying the test in Knuller, were his acts nothing more than conduct amounting to mere irresponsible teenage bravado, as the defence contend, or a gross and humiliating attack on the dignity of two female teachers while at their place of work as the prosecution submit?

20. The Panel approached this test by considering the effect of the acts of the defendant on members of the potential pool of witnesses. There was no dispute that those depicted in the images did not witness them being recorded. The Panel agreed with the defence contention that the subsequent, and entirely understandable horrified reaction of the victims, was strictly irrelevant to this consideration.

21. The defence contend that members of staff who were capable of witnessing the acts of the defendant might have regarded them as acts as worthy of discipline, but falling far short of the high test set out in Knuller. The Panel, applying minimum standards of public decency as judged by contemporary standards, reject this contention. The acts in themselves were so invasive and deplorable that any teacher witnessing them would, in the view of the Panel, be capable of being outraged. In addition the Panel were satisfied that any reasonable and mature member of modern day society, such as visitors and workmen at the school, would have the same or similar reaction to the acts of the defendant.

22. The Panel had some difficulty in assessing whether or not the defendant's immediate peer group would have been so outraged. That particular grouping might in the Panel's view have viewed the taking of the images as falling into the category of being seen as a schoolboy prank or irresponsible

teenage bravado, as the defence submit. However, even taking into account the wide range of maturity in that peer group, the Panel found, given the invasive and deplorable nature of the defendant's acts that this grouping would also have been capable of being outraged. The Panel reached the same finding in relation to the wider body of pupils which would have included pupils presumably more mature than the defendant's peer group.

23. The Panel was invited to consider the defendant's age (c. 14 years) when he committed the acts complained of when considering the 'outrage' element of the offence. Mr O'Donoghue made a persuasive argument in relation to the act being tied up with the actor.

24. He submitted that the prosecution were seeking to criminalise the conduct of a boy and asked the Panel to consider what if the acts had been committed by a 5 or 6 year old.

25. The Panel gave detailed consideration to this point in the particular facts of this case. Put simply, the defendant was not a 5 or 6 year old when the acts were committed. It is without doubt that he was young and, more likely than not, somewhat immature. Regardless of that the Panel found that reasonable, mature members of contemporary society would have been capable of being outraged by the act of a 14 year old boy positioning his hand so as to film up the skirt of female teachers.

26. It was also submitted on the defendant's behalf that there was no evidence before the Panel as to the manner by which he took the images, whether or not his acts endured a significant period of time nor that they were conducted in the presence of others who were capable of seeing his mobile phone when he recorded the images. The defence contend that the absence of this evidence means that it could not be determined that the defendant's acts were anything more than a schoolboy prank.

27. The Panel made two findings on this submission. Firstly, having viewed the recordings and agreed evidence, there is evidence of their duration, (see agreed statement of facts) and some evidence that they were made surreptitiously (in so far as the recording device was secreted from the victims). There is also, in the recordings, a clear line of sight between the

phone used to make the recordings and the subjects of the recordings. From this the Panel can reasonably infer that the phone must have been capable of being seen by others in the vicinity. Even if the phone itself were not visible to others, the act of pointing a hand up the rear of a female teachers skirt is capable of being seen as lewd, obscene and disgusting and therefore not a mere schoolboy prank.

28. The second finding of the Panel is that this point, as argued by Mr Chambers, focusses on the motive behind the act rather than the act itself. It was agreed by the parties and accepted by the Panel, after a review of the authorities, that motive was irrelevant to the commission of the common law offence. The Panel therefore placed little weight on this submission.

29. Having found that the defendant's acts were lewd, obscene and disgusting and of such a nature to outrage minimum standards of decency the Panel went on to consider whether those acts, committed in the setting of a school, could be said to satisfy the public element of the offence.

30. There is little authority on this point given the particular setting of the defendant's acts. The Panel took as its starting point here the comments of Laws J in R v Walker [1996] 1 Cr App R 111 – *'The requirement is that the offence be committed where there exists a real possibility that members of the general public might witness what happens. It does not mean that the very spot where the act is done must itself be a place of public resort, though that, no doubt, is the paradigm case. But it must be a place where the public are able to see what takes place.'* That this is a settled position is confirmed in Archbold 2018 and Blackstone 2018, albeit Archbold adds the requirement that members of the *general* public might see it. In Hamilton [2008] QB 224 the Court of Appeal clarified the position further by holding that for the public element to be satisfied it was not necessary that two people actually see the acts but it was sufficient if at least two people are *present* and the accused's acts are *capable* of being seen by them.

31. It is clear from the evidence that access to Enniskillen Royal School, formerly Portora Royal School, was, and is, restricted as one would expect from similar

institutions. From the evidence of the both the retired Principal and the current Principal it is clear that the school has a strict policy, which was revised in 2015, in relation to access to the school premises. Members of the public do not have free access. Any member of the public would have to report to the reception office at the school, explain why they were seeking access, sign in and then wait for the person they were on the premises to visit.

32. The Panel was satisfied that there are therefore potentially two distinct groups who could have had access to the school grounds, firstly the pupils and members of staff and, secondly lawful visitors to the school premises. The Panel recognised that there was a potential third grouping, which is trespassers to the school, but did not consider that this grouping warranted further consideration given the nature of the common law offence.

33. Considering the first grouping, the pupils and staff at the school, seem, at first instance to be a private group and therefore not members of the general public. Each of this group has a right to attend the school for a particular purpose, be that to educate, be educated or assist in the running of the school. Broadly speaking they form the 'school body'. The Panel found the prosecution's argument that, despite this, members of this group would consider themselves to be in the public domain when on school premises, persuasive. The expectation of privacy that exists when a person is at their home is, as a question of fact, absent in a school setting.

34. A pupil or teacher may know those whom they encounter on a daily basis but the Panel found that this does not include the wider school body. Similarly it is more likely that lawful visitors to the school may be completely unknown to members of the school body. The Panel has seen nothing in the cited authorities which require that to satisfy the public element of the offence, it must have occurred in a place to which there is a completely unfettered public right of access.

35. The modern authorities in relation to upskirting offences occurred in places more commonly recognised as public places, such as shopping centres and public toilets. In the Panel's consideration a school setting is no different from those settings in terms of ones expectation of privacy and is very different

from such as exists in a home setting. The Panel found, as a matter of fact, that the pupils and staff on a school premises are not necessarily in a private setting and that they form members of the general public. The Panel did consider the defence point in relation to the inclusion of the word 'general' members of the public in the authorities. However as the panel found that this grouping would consider that they were in the public domain whilst on the school premises, the presence of the word *general* was of no substantive effect. The panel finds that the public element of the common law offence is satisfied.

36. As the Panel reached this conclusion in relation to the pupils and staff attending a school it was not necessary to go on to consider the second potential grouping, i.e. lawful visitors to the school premises. However, for the avoidance of doubt, the Panel did go on to give separate consideration to this grouping. The Panel had no hesitation in finding, having considered the competing arguments, that this grouping also consisted of members of the general public and therefore would satisfy the public element of the offence.

37. In summary the Panel made the following findings of fact:

- The acts of the defendant were lewd, obscene and disgusting,
- Those acts were such as to outrage public decency,
- There was a wide body of potential witnesses to those acts who were capable of being outraged by those acts. This included the pupils and teachers of the school as well as lawful visitors to the school premises,
- A school is not a private place despite having a restricted access policy,
- There was sufficient evidence that those acts took place in the presence of two or more people who were capable of seeing the nature of the act.
- Pupils, members of staff at the school and lawful visitors can be considered to be members of the general public.

38. The decision of the Panel is that the elements of the common law offence are satisfied, in the particular facts and circumstances of this case, and make a finding of guilt for each of the five complaints laid against the defendant.