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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (No. 8 of 2009)
CHRISTOPHER McCARTNEY

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

Morgan LCJ

[1] This is the judgment of the court.

[2] On 20 April 2009 the offender pleaded guilty on arraignment to 30 counts of making an indecent image of a child and was sentenced at Craigavon Crown Court on 29 May 2009 to three years probation on each count with a condition that he participate in a sex offenders programme. Each sentence was ordered to run concurrently. A Sexual Offences Prevention Order was also made but no issue arises on that in this application. The Attorney General applies for leave to refer the sentence under section 36 of the Criminal Justice Act 1988 on the ground that it is unduly lenient.

[3] The offender was born on 20 February 1988. The offences relate to activities of the offender between 18 January 2004 when he was 15 years and 10 months and 4 April 2008 when he was 20 years and one month. On 4 April 2008 the offender's home was searched on suspicion that there were indecent images of children on computer equipment at his address and two computers were seized. At interview on the day of his arrest the offender admitted that he had viewed indecent images of children using a search engine for internet searches and file sharing programmes. Although he said that he had done this for about a year examination of the computers revealed a large amount of child pornography with a total of 9610 still images and 418 video clips downloaded over a period of 4 years.

Guidelines

[4] This court has not issued guidelines setting out the appropriate range of sentence for offences of this nature but for some years now sentencers have relied upon the guidelines issued by the English Court of Appeal in R v

Oliver and others [2002] EWCA Crim 2766. We agree with that court that the primary factors determinative of the seriousness of a particular offence are the nature of the indecent material and the extent of the offender's involvement with it. The well established categorisation of indecent material set out in Oliver is now widely used by police forces in the United Kingdom including the PSNI to assess the increasing seriousness of the material.

> "(1) images depicting erotic posing with no sexual activity;
> (2) sexual activity between children, or solo masturbation by a child;
> (3) non-penetrative sexual activity between adults and children;
> (4) penetrative sexual activity between children and adults;
> (5) sadism or bestiality."

[5] The downloading or possession of a large quantity of material at levels 4 or 5 is a serious offence and for an adult offender without previous convictions after a contested trial a custodial sentence of between 12 months and three years will generally be appropriate. The Sentencing Guidelines Council in England and Wales has now suggested a slightly lower range but we see no reason to depart from the range set out in Oliver. The age of the children involved may be an aggravating feature and assaults on babies or very young children are particularly repugnant because of the fear or distress they may have induced in the victim. The manner in which the images are stored on the computer may indicate a high level of personal interest in the material. Distribution of material at any level will be a serious aggravating factor and distribution of images at levels 4 or 5 would justify sentences in excess of three years. Where the distribution is for commercial gain or by way of swapping substantially increased sentences are appropriate.

[6] Those who distribute or make available pornographic images on the internet must expect severe sentences because the accessibility of this material has the potential to corrupt in particular the young. That is recognised in Oliver where the court notes that these kind of offences very rarely result in the prosecution or cautioning of offenders under the age of 18. Where such a person has to be sentenced the emphasis should be on finding a suitable treatment programme.

Background

[7] The offences in this case began when the offender was 15. The materials before the court indicate that the offender was confused about sexual matters and his own sexual orientation. His parents had separated when he was very young but reconciled at about this time. He felt isolated

from them. He used his computer to communicate with others via internet chat rooms. He communicated mainly with homosexual males who suggested images for him to look at. Over time his viewing of the images of child sexual abuse became an addiction and as with many addictions he became involved with more serious images as time went on. In order to access these images and to obtain images from peer-to-peer software it was necessary for the offender to disable the safe search mode on his Google search engine. One of the disturbing aspects of this case is the ease with which this can be accomplished. This is, therefore, a case of an offender who was corrupted as a child and his culpability lies in the fact that as he got older he failed to take steps to deal with his addiction and continued to download and store increasingly serious images of child sex abuse. There is no suggestion that he was engaged in the distribution or showing of any of this material.

[8] There are significant aggravating factors in this case. The offender had gathered and stored a large number of images and the extent of images in the various categories is set out in the table below.

Category 1	4034 images
Category 2	3031 images
Category 3	1777 images
Category 4	453 images
Category 5	733 images

Some of the images related to children as young as three and five and the images were stored on the offender's computer so as to be accessible to him thereby demonstrating a high level of personal interest. Mr Simpson QC also relied on the fact that these images had been gathered over a period in excess of four years.

[9] In mitigation it was accepted that the offender had made an early admission about his involvement before his computer had been examined although he had asserted that he had only been offending for a period of one year and suggested that the children involved in the images were no younger than 10. The offender had a previous clear record but in cases of this kind involving the exploitation of children for sexual gratification some but not much weight is attached to good character. The real thrust of the submission by Mr Lyttle QC on behalf of the offender was that this case was properly treated as exceptional by the learned trial Judge because the origin of the offending lay in the corruption of the offender as a child when he was at a vulnerable stage in his life, isolated and confused about his sexuality.

[10] It is also in the offender's favour that shortly after his arrest he sought treatment from a consultant in psychosexual health and a specialist cognitive

behavioural therapist. The consultant recorded that the evidence demonstrated a strong fixation with both adult and child sexual images. He concluded that the offender presents as having a moderate to low sexual risk coupled with a moderate to low treatment need in respect of his behaviour. The Pre Sentence Report assessed him as having a medium likelihood of re-offending within the next two years. In support of that assessment the probation officer noted his confusion with regard to his sexuality, his loneliness within the family setting and his peers, his lack of social outlets and networks, his lack of social and problem solving skills, his distorted reasoning and limited awareness of victim related issues. In her report for the court on 29 May 2009 the probation officer assessed the offender as needing to gain greater insight into his motivation to offend. She considered that he would benefit from attending the PBNI Community Sex Offenders Group Work Programme which would assist the offender to address risk factors associated with his offending behaviour.

[11] Since the making of the probation order on 29 May 2009 the offender has been engaged in work each week with this probation officer as part of his preparation for the Community Sex Offenders Group Work Programme. He has also been subject to unannounced monthly visits. He was assessed by the Local Area Public Protection Panel on 23 July 2009 and his category of risk was set at 1 which is defined as someone whose previous offending, current behaviour and current circumstances present little evidence that they will cause serious harm. He is engaging in third level education and arrangements have been made with the institution in which he is studying to ensure that risk management strategies are in place. He has complied with the conditions of his probation order and is engaging positively in weekly sessions.

Consideration

[12] This court has referred on previous occasions to the purpose of the criminal law in the field of sexual offences as identified by the Wolfenden Committee.

> "To preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced or in a state of special physical, official or economic dependence."

It follows, therefore, that in cases involving the downloading of images of children at levels four or five the extent of exploitation is such that condign punishment generally requires the imposition of a custodial sentence within

the range set out in paragraph 5 above whatever the personal needs of the offender for rehabilitation or treatment and whatever difficulties the offender may experience in undergoing his prison sentence.

[13] Sentencing guidelines are intended to be an aid to the sentencer in getting the outcome to the case which justice requires. It is for that reason that guidelines can never become tram lines within which the sentencer must operate. This court has previously approved the observation in Attorney General's Reference (No 4 of 1989) (The Times 11 November 1989) that the trial judge is particularly well placed to assess the weight to be given to various competing considerations. In Attorney General's Reference (No 1 of 1989) [1989] NI 245 the court also recognised that there will be exceptional cases where because of very special circumstances the judge in passing sentence will be justified in departing from established guidelines and where the Court of Appeal would accordingly not take the view that the sentence was unduly lenient.

[14] In this case the special circumstance which is put before us relates to the fact that this offender was corrupted as a child and his offending is the product of that corruption. Of the 30 counts to which he has pleaded guilty 20 relate to a period when he was 18 and 8 relate to periods when he was 19 or 20. Mr Simpson QC accepts that corruption of children is an important factor in the assessment of these cases particularly where rehabilitation and treatment is appropriate. There are public interest reasons for this approach since clearly the rehabilitation and treatment of those who have been corrupted as children will prevent any further offending. He contends, however, that there is a bright line at age 18 at which stage the needs of retribution and deterrence take over from the public interest in rehabilitation and treatment.

[15] Although we entirely accept that even a corrupted offender must accept increasing culpability as he moves from adolescence to adulthood we do not accept that in every case the effect of the corruption can be said to have so dissipated by the age of 18 that the offender must face a sentence of imprisonment. We consider that this case probably represents the outer boundary of the discretion available to a judge to select a rehabilitative disposal but we consider that the pattern of corruption in this case and the circumstances of the offender were such that it was open to the learned judge to treat the corruption as a significant factor in the offending that occurred after the offender's 18th birthday justifying a rehabilitative sentence. Accordingly are not persuaded that the sentence was unduly lenient. We dismiss the application.

[16] The internet has revolutionised the way in which we live. It has provided us with ready access to information and facilitated social contact. Children have enjoyed many positive educational experiences but it is in the

social sphere that the change has been most marked. An Ofcom survey carried out last year found that 49% of children aged 8 to 17 have an online profile on a social network and indeed more than a quarter of 8 to 11-year-olds in the United Kingdom also have such a profile. A survey published this week by the University of Ulster found that 48% of P7s use social network sites even though the providers of those sites purport to prohibit children of that age from such use. Although it is clear that there is much that is positive about the internet this case demonstrates the dangers to which children can be exposed as a result of which they may be corrupted or indeed in some cases exploited. The ease with which an adolescent boy could disable the safe search facility in this case is of great concern. This case illustrates graphically the dangers faced by adolescents with unsupervised access to the internet and the need for parents to be aware of the requirement for a high degree of supervision of the use of computer equipment. It also raises serious questions as to whether service providers are doing enough to prevent the dissemination of this type of dangerous and degrading material on the internet and indeed whether there is in fact a legal obligation on them to do so.