



**IN THE CAYMAN ISLANDS COURT OF APPEAL**

**CRIMINAL APPEAL 3/2022**

IND.51/2021

SC#01141/2021

**BETWEEN:**

**Kayson Ricardo Holness**

**Appellant**

- and -

His Majesty the King

**Respondent**

**BEFORE:**

**The Rt. Hon Sir John Goldring, President  
The Hon Sir Richard Field, Justice of Appeal  
The Hon Sir Michael Birt, Justice of Appeal**

**Date of Hearing:**

11<sup>th</sup> May 2023

**Appearances:**

Mr Keith Myers of Kelly Myers, Attorneys for Appellant  
Mr Scott Wainwright of the Office of the DPP for the Respondent

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**JUDGMENT**

Transcript of oral judgment dated 11<sup>th</sup> May 2023 and Approved for Release 5<sup>th</sup> June 2023

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**BIRT, J.A.**

1. This is an application by the Applicant for leave to appeal against a sentence totaling 33 months' imprisonment imposed in the Grand Court by Richards J on 3 February 2022 for three offences involving child pornography.



2. Count 1 was a charge of possessing videos containing child pornography contrary to section 228B(1)(a) of the Penal Code (2019 Revision). Count 2 was a charge of transmitting videos containing child pornography via WhatsApp Messenger between 30 April and 12 June 2020 contrary to section 228B(1)(b) of the Penal Code. Count 3 was a similar charge of transmitting child pornography relating to transmission of a single video on 26 June 2020 via Facebook Messenger. The Applicant pleaded guilty to all three counts at the first opportunity.
3. The videos in counts 1 and 2 fell into Categories A and B, but the video in count 3 was Category B. Category A relates to images involving penetrative sexual activity with a child, whereas Category B relates to images involving non-penetrative sexual activity with a child.
4. The factual background was as follows.
5. On 20 June 2020, the police began an investigation into a Facebook posting under the name "*Djfreshlink Holness*". This resulted from an email sent to the police from a local news organisation which contained a screenshot from a posting showing an adult male having sexual intercourse with an infant. A copy of the video from which the screenshot came was subsequently obtained from the news organisation.
6. The Facebook posting was traced to the Applicant, who was arrested on 26 June 2020. When interviewed, he admitted downloading the video and then sharing it on Facebook. He said that he did this because he thought that the family of the child would see it and notice that their child was being abused. He said he did not know it was illegal to transmit such images.
7. His mobile phone was subsequently analysed. This disclosed that he had downloaded not only the video already referred to but also some other videos containing child pornography falling within Categories A and B. These had been on his phone from 30 April to 26 June 2020 and had been transmitted via WhatsApp Messenger Service some eight times over a 12-day period within that period, and that is count 2. One Category B video had been transmitted via Facebook on 26 June 2020, and that is count 3.



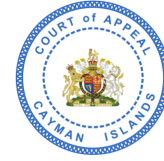
8. The judge noted that three previous Cayman cases had been drawn to her attention. However, in none of them was there a reported judgment and therefore the extent to which the factual circumstances of those cases were similar to the present case was unclear.
9. In the absence of any local sentencing guidelines, she considered the sentencing guidelines issued by the Sentencing Council of England and Wales, which I shall refer to simply as "the Sentencing Guidelines". The process adopted by the Sentencing Guidelines is to fix upon a starting point, then to increase this to reflect any aggravating factors, followed by a reduction to reflect any mitigating factors and finally a further reduction to reflect a guilty plea.
10. The judge considered count 2 first, being the most serious offence as it comprised transmission of Category A material. She noted that the starting point in the Sentencing Guidelines for distribution of Category A material is 3 years' imprisonment. However, she also noted that the maximum sentence for such an offence in England and Wales is 10 years, whereas in this jurisdiction it is 25 years. She had regard to the observation of this Court in *R v Aspinall*, 6 December 2016 at paragraph 44, to the effect that a higher maximum sentence for a particular offence in this jurisdiction compared with the equivalent offence in England and Wales had to be taken into account when considering the Sentencing Guidelines on the basis that the higher maximum sentence in the Cayman Islands is an explicit statutory direction as to how seriously an offence is regarded in this jurisdiction.
11. Accordingly, she increased the starting point for count 2 from 3 years, as it would have been in England and Wales, to 5 years. She then identified two aggravating factors as listed in the Sentencing Guidelines, namely, the age of the child and any discernible pain or distress suffered by the child depicted. In this case, the child was assessed as being between 4 and 18 months old and was crying in the video, indicating not surprisingly that the child was in clear distress. Taking these two aggravating factors into account led her to increase the sentence to 5 years 8 months.
12. She then took into account the mitigation which she summarised as follows. The Applicant had no previous convictions. He was remorseful. He made early admissions, and he cooperated with investigators throughout. His background as outlined in the social inquiry report raised no concerns or issues and portrayed a man who was gainfully employed and by all accounts had been a productive member of society to date. He had two children in his home jurisdiction of Jamaica and was present in their lives. Incarceration in this jurisdiction would be difficult for him as he would



be away from his family. There had also been some delay in respect to the proceedings which had not been the fault of the Applicant.

13. In the light of this mitigation, she reduced the sentence from 5 years 8 months to 4 years 2 months. She then deducted one-third to reflect the Applicant's early guilty plea, leading to a sentence of 33 months. She imposed concurrent sentences of 16 months on count 1 and 12 months on count 3; hence, the total sentence of 33 months.
14. Now, on this appeal, Mr Myers submitted that the sentence of 5 years 8 months before mitigation and credit for the guilty plea was manifestly excessive. There were two main limbs to his submission.
15. First, he submitted that there was no good reason to move the starting point for an offence of transmitting child pornography from the 3-year figure in the Sentencing Guidelines to 5 years in this jurisdiction.
16. In our judgment, there are two reasons why the judge was entitled to increase the starting point to 5 years. In the first place, as this Court has said previously, the courts of this jurisdiction are not bound by sentencing levels in England and Wales and are free to set their own reasonable sentencing levels. A convenient summary of this important constitutional point is to be found in the judgment of a seven judge panel of the Guernsey Court of Appeal in the case of *Wicks v The Law Officers of the Crown* (22 March 2012) at paragraphs 19 and 20, which are in the following terms:

*"19 The difficulty with the observation in Gunter..... is that it appears to suggest that, when the elements of the offence in question and the statutory maximum sentences are the same in Guernsey as in England and Wales, the Guernsey courts may only depart from English sentencing levels if there is a significant difference in social or other conditions between Guernsey on the one hand and England and Wales on the other. We must respectfully disagree. Such an approach is wholly inconsistent with Guernsey's position as a separate jurisdiction. Naturally, where the elements of the offence in question are comparable in the two jurisdictions and the statutory maximum sentence of the offence is also comparable, the Guernsey courts may well derive considerable*



*assistance from the sentencing practice applied in England because of its larger size and the greater number of cases which will come before the courts of that jurisdiction.....*

20 *But there is no need for there to be a significant difference in social or other conditions for the Guernsey courts to take a different approach from England and Wales and adopt a different level of sentencing. The Guernsey courts may simply consider that the sentencing levels for England are either too high or too low and should not be followed. They are perfectly free to do so. It is wrong to start from the position that sentencing levels in England are correct and that there must be some specific reason to depart from them. Rather, the position from which it is right to start is that the Guernsey courts must determine the appropriate sentencing levels for offences committed in Guernsey and that, in doing so, they may or may not derive assistance from what is done in England and Wales or in any other jurisdiction."*

17. This important statement of principle is as applicable to the Cayman Islands as it is to Guernsey.
18. Secondly, as this Court said in *Aspinall*, the fact that the maximum sentence in this jurisdiction for transmitting child pornography is 25 years' imprisonment compared with 10 years' imprisonment for the equivalent offence in England and Wales is an indication of how seriously the offence is regarded in this jurisdiction and should be taken into account by the courts when considering the sentencing levels suggested in the Sentencing Guidelines.
19. This morning Mr Myers suggested that the judge should not have placed weight on this observation in *Aspinall*. But in our judgment, that statement in *Aspinall* is a statement of general application and reflects the principle which one would expect to find, namely, that where the legislature has indicated its view of the seriousness of an offence by reference to its maximum sentence, the courts of this jurisdiction should take note and take that into account. Accordingly, we reject the first limb of Mr Myers' submissions.
20. His second limb is that the sentence passed in this case was inconsistent with the sentences passed in three previous Cayman cases, although, as he rightly said, there is no sentencing judgment in any of those cases.



21. In *R v Daley*, (unreported, Summary Court 2017) following guilty pleas, the defendant was sentenced to a total of 2 years' imprisonment in respect of 100 indecent videos of children on his laptop and phones. We are told by Mr Myers that there were eight counts of possession and one of transmittal. However, there is no information as to the categories within which the images fell; and, accordingly, no assistance can be derived from that case.
22. In *R v Rameau* (unreported Grand Court IND. 9 of 2018) the defendant was sentenced to a total of 3½ years' imprisonment after pleading guilty to 12 counts of possession of indecent images of children falling within Categories A to C. However, all the counts were for possession and there were no charges of transmitting indecent images, unlike in the present case, and of course transmission of indecent images is a more serious offence with a higher maximum sentence than the offence of possession.
23. In *R v Hervias* (unreported Grand Court IND. 40 of 2020), the defendant pleaded guilty to possession of indecent photographs of children for which he was sentenced to 22 months' imprisonment with a suspended sentence supervision order. We were informed that the offences related only to Category C material, which was on the defendant's phone for only one day. It was, therefore, a very different case; and, again, there was no transmitting of such material.
24. In the circumstances, we agree with the judge that no useful assistance can be derived from these three cases. The facts appear to vary considerably, and there is no explanation of the sentences or of the surrounding circumstances. Furthermore, all of them appear to be less serious in certain respects than the present case.
25. As has often been stated, offences of possession or transmission of indecent images of children are not victimless crimes. Real children are sexually abused in order to produce the images. Those who download or transmit such images help fuel the market for their production. In this case, a child between 4 and 18 months old was sexually penetrated by an adult male and clearly suffered considerably.
26. In our judgment, the total sentence in this case cannot be said to be manifestly excessive. For the reasons we have explained, the judge was entitled to take a starting point of 5 years for transmission of Category A material and was also entitled to increase that by 8 months in order to reflect the two aggravating features of the child's very young age and the distress caused to the child. She then

allowed a total reduction of 2 years 11 months to reflect the available mitigation and the guilty plea, and this figure cannot be said to be inadequate.

27. The points raised by Mr Myers were not unarguable, but in our judgment, they must fail. In the circumstances, we grant leave to appeal, but we dismiss this appeal.