IN THE COURT OF APPEAL
CRIMINAL DIVISION

On appeal from Basildon Crown Court
(His Honour Judge Hurst)
[2024] EWCA Crim 954

Case No: 2024/00022/A3

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 11th July 2024

B e f o r e:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE BRYAN

MRS JUSTICE THORNTON DBE

R E X

- v -

WILLIAM PETER JAYCOCK

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Mr M Ness appeared on behalf of the Appellant

Mr T Sleigh-Johnson appeared on behalf of the Crown

J U D G M E N T
(Approved)

Thursday 11th July 2024

LORD JUSTICE HOLROYDE:

1. This appeal against sentence, brought with the leave of the single judge, raises an issue as to the categorisation for sentencing purposes of offences contrary to section 1(1)(a) of the Protection of Children Act 1978.

2. The images concerned showed the faces of two teenage girls known to the appellant, aged about 13 and about 15 to 17 respectively when photographed, and one unidentified girl aged under 12. We shall refer to the identified girls as "C1" and "C2".

3. Directions under sections 45 and 46 of the Youth Justice and Criminal Evidence Act 1999 were given in the Crown Court in relation to C1, C2 and also an adult. For reasons which are not clear to this court the order in relation to C1 was made under section 45 of the 1999 Act and therefore endures only until C1 attains the age of 18; whereas the other two orders provide lifelong protection to the persons concerned. There being no obvious justification for that distinction, we direct that in the case of C1 the order be made under section 45A of the 1999 Act, with the result that C1 may not be identified in any report of the proceedings at any time in her life.

4. In addition, part of the sentencing process related to the activation of a suspended sentence for earlier offending. That earlier offending included sexual offences in respect of which the victims are entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, in their cases also no report of these proceedings may name any of those persons or include any details which may identify them. As we have said, all of the orders to which we have just referred will now provide lifelong protection for the persons concerned.

5. The appellant is now aged 60. He pleaded guilty before a magistrates' court to three offences of making indecent photographs or pseudo-photographs of a child, contrary to section 1(1)(a) of the 1978 Act. The charges related to eight category A indecent images of children, two category B images and one category C image. He also admitted an offence of failing to comply with notification requirements, contrary to section 9(1)(a) of the Sexual Offences Act 2003. He was committed for sentence to the Crown Court at Basildon.

6. The appellant was subject to notification requirements because in July 2021 he had been sentenced to a total of 14 months' imprisonment, suspended for two years, for earlier offences of making indecent photographs of children. He was subject to the suspended sentences when he committed the present offences.

7. In August 2022 police officers went to the appellant's home. He told them that he still had an attraction towards children. His home was later searched and computer equipment seized. One computer contained indecent images of children: one category A image of C1, seven category A images of C2, two category B images of C2, and one category C image of a naked child aged under 12, whose identity is unknown.

8. The image of C1 had been downloaded from Facebook, the appellant having befriended C1's mother at a music society. Some of the photographs of C2 had been taken by the appellant himself, when C2 had attended a summer camp and church groups. Another image had been accessed via Facebook.

9. The appellant had created the category A and B images by superimposing the faces of C1 and C2 onto downloaded images of adult women engaged in sexual activity. In some cases the appellant had superimposed images of himself. He told the author of a pre-sentence

report that he had made these images for sexual gratification and had masturbated to the imagery.

10. C1's mother had provided a Victim Personal Statement in which she spoke of the appellant's betrayal of her family and of how distressed and fearful her daughter would be if she learned what the appellant had done.

11. The judge, His Honour Judge Hurst, was referred to relevant case law, which we shall consider in more detail later in this judgment, and to the Sentencing Council's relevant definitive sentencing guideline. He held that in applying that guideline the appellant should be sentenced on the basis of production, rather than mere possession, of the pseudo-photographs. The judge said that the imagery found on the appellant's computer showed that he had taken images of real children and superimposed their faces onto "highly sexualised images of children or young girls in their late teens". Later in his sentencing remarks the judge said this:

> "You have not sat in front of children and filmed and photographed a child in real time and space, being sexually abused by an adult, but you have created a realistic pseudo-image of exactly that, by merging a real child known to you, photographed by you, and then turned into such by easy use of software. …
>
> … You have taken pornography and put a real live child into a position of extreme sexual exploitation."

12. The judge held that as the images fell into category A, the guideline starting point was six years' custody, with a range from four to nine years. The judge said that the case had to be at the lower end of the production range because the appellant had not produced the actual sexual activity. He identified as aggravating factors the appellant's breach of the trust placed in him by C1's mother, the fact that C1 and C2 were known to him, the fact that the images

involved exploitation, bondage and some distress, and the previous convictions which had involved production by the appellant of a similar type of pseudo-photographs.

13. The principal mitigating factors were the appellant's admissions and the reduction in the scale of his offending.

14. The judge concluded that the appropriate total sentence after a trial would have been five years' imprisonment. The appellant was entitled to full credit for his very prompt guilty pleas. Taking the category A offence as the lead offence, the judge imposed concurrent sentences of three years and four months, six months and six months' imprisonment for the indecent image offences. For the breach of the notification requirements, which was a comparatively minor offence of its kind, he imposed a concurrent term of one month's imprisonment. He activated the suspended sentence consecutively, but, having regard to totality, he reduced the term from 14 months to six months' imprisonment. Thus, the total sentences was three years and ten months' imprisonment.

15. So far as is material for present purposes, section 1 of the Protection of Children Act 1978 provides:

> "… it is an offence for a person —
>
> (a) to take, or permit to be taken or to make, any indecent photograph or pseudo-photograph of a child;
>
> …"

16. By section 6 of the Act the maximum penalty for any such offence is on trial on indictment ten years' imprisonment and/or a fine.

17. The interpretation provisions in section 7 of the Act include the following:

> "(2) References to an indecent photograph include … a copy of an indecent photograph or film …
>
> …
>
> (7) 'Pseudo-photograph' means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.
>
> …"

18. Our attention has helpfully been drawn to three previous decisions of this court. The first in time was *R v Oliver* [2002] EWCA Crim 2766, which was decided before there was any sentencing guideline. At [11] of the judgment of the court, Rose LJ stated:

> "As to the nature of the offender's activity, the seriousness of an individual offence increases with the offender's proximity to, and responsibility for, the original abuse. …"

19. With effect from 14 May 2007, a guideline published by the then Sentencing Guidelines Council prescribed five different levels of seriousness of the subject matter of the images, and in relation to each identified a higher starting point for sentencing of those involved in the production of the images, as compared to those merely in possession of them for personal use.

20. The current definitive guideline published by the Sentencing Council came into effect on 1 April 2014. It prescribes three levels of seriousness of the subject matter of the images. At each level it sets differing starting points and category ranges for three categories: possession, distribution and production. The sentencing levels for production offences are higher than those for distribution offences and significantly higher than those for possession offences. A

note in the guideline explains that:

> "Production includes the taking or making of any image at source, for instance the original image. Making an image by simple downloading should be treated as possession for the purposes of sentencing."

21. That guideline was considered by this court in *R v Norval* [2015] EWCA Crim 1694. At [3] the court observed that the most serious category in the guideline covered offenders "who are involved in the actual taking or making of an image at source, in other words who are involved in producing the original image of a child". The circumstances of that case involved the creation of indecent images by superimposing the head of a child known to the offender onto photographs of naked adult women in indecent poses. At [11] the court said:

> "In our judgment, production offences do not include those where pseudo images of this nature are made using images taken from other sources. Whilst in a technical sense such images are produced, it seems to us that the production of such an image should be treated as an offence of possession rather than one of production within the guidelines. It follows that these offences fell to be treated as ones of possession not production and that the judge therefore adopted the wrong starting point. The pseudo images were undoubtedly extremely unpleasant and the knowledge of what the appellant had done with the images had distressed the victim as the judge said in his sentencing remarks. We do not think however that the creation of them was equivalent in terms of culpability or harm with creation of images in which children were actually being abused, as the judge appeared to think."

22. The third case cited to us is *R v Bateman* [2020] EWCA Crim 1333. Again, the circumstances of the case involved an offender creating an image by superimposing the face of a young girl onto one of the bodies of two adult women engaged in sexual activity. The court stated that it was wrong to construe the guideline as requiring a rigid dichotomy between an image which was possessed and an image which was produced or created. At

[20] the court said that general conclusions to be drawn from the guideline included the following:

> "… (1) mere downloading without more amounts to possession; (2) the taking of an image at source (for example the original image) is producing or creating that image; (3) because of the word 'include' in the explanatory note in the Guidelines (see paragraph [14] above) the description in (2) is not a definitive statement of the circumstances when an image is produced or created; (4) the divide between possession and production/ creation is not fixed in stone and the concepts are not mutually exclusive; common sense indicates that an image might start as a merely downloaded copy (and be possessed) but then be produced into something altogether different and more offensive. There are in real life innumerable permutations."

23. Returning to the present case, the judge in his sentencing remarks indicated that he was guided by and followed the decision in *Bateman*.

24. On behalf of the appellant, Mr Ness submits that the total sentence was manifestly excessive for two reasons. First, it is said that the judge put the case into the production category of the guideline and therefore took too high a starting point. It is submitted that the judge should have followed *Norval* and put the case into the possession category. Secondly, it is said that the judge wrongly found that the photographs which were the source of the bodies in the images were photographs of children and were therefore themselves indecent images, when in fact they were lawful (although pornographic) photographs of adults. That error, it is submitted, is likely to have resulted in an increase in the sentence.

25. In relation to the first ground Mr Ness submits that the court in *Norval* followed the earlier decision in *Oliver* in recognising that the creation of such images is not commensurate with production of real images. Mr Ness, having helpfully researched the question, informs us that *Norval* was not cited to the court in *Bateman*. He argues that to the extent that

Bateman diverged from the principles stated in *Norval*, it was wrongly decided. Mr Ness goes on to submit, in accordance with *Young v Bristol Aeroplane Company Limited* [1944] KB 718, that this is a case where there are conflicting decisions of the Court of Appeal and where this court is entitled to choose which of those decisions to follow. He invites us to prefer the decision in *Norval*.

26. The grounds of appeal are opposed by the respondent, on whose behalf Mr Sleigh-Johnson submits that *Norval* and *Bateman* can be distinguished, the one from the other, on their facts, because in the latter case, as in this case, the offender had himself photographed the child concerned. If there is a conflict between *Norval* and *Bateman*, Mr Sleigh-Johnson submits that *Bateman* should be preferred. He argues that the guideline expressly states that production includes the taking or making of images at source. The gravamen of a production offence can properly be considered to be the creation of a new indecent image of a child, whereas possession does not involve the creation of new indecent images.

27. As to the second ground of appeal, Mr Sleigh-Johnson accepts that the judge was in error in identifying the bodies in the photographs as being those of children, but he submits that the error is unlikely to have increased the sentence imposed.

28. We are very grateful to both counsel. This court has the advantage, not available to the court in either *Norval* or *Bateman*, of having heard full submissions on both sides. In each of the two earlier cases the Crown was not represented.

29. Having reflected on the submissions, we have reached the following conclusions. We begin by stating the obvious. The 1978 Act does not create different offences of possession or production of photographs. Each of the three offences to which the appellant pleaded guilty was an offence of making an indecent photograph or pseudo-photograph of a child.

The submissions of counsel do not therefore relate to the correct interpretation of the statute. They relate to the approach to be taken by a sentencing court in discharging its general duty under section 59 of the Sentencing Code to follow a relevant guideline.

30. The guideline applicable to offences of making indecent photographs of children describes nine different categories of seriousness, with a sentence starting point and category range for each of those nine categories. By section 60(4) of the Sentencing Code, the sentencer's duty includes a duty to decide "which of the categories most resembles the offender's case in order to identify the starting point in the offence range" (unless the court is of the opinion that none of the categories sufficiently resembles the offender's case: see section 60(5)).

31. In the note to which we have referred, the guideline itself reflects the section 60(4) duty by stating: (1) that the category of production offences includes, though is not limited to, the taking or making of the original image; and (2) that simple downloading, notwithstanding that it may technically be said to amount to an act of production of a photograph, should be treated for sentencing purposes as being in the category of possession offences.

32. In the present case it is, in our view, clear beyond argument that this appellant did in fact produce, and did not merely possess, the images which are the subject of the charges. It was he who digitally manipulated existing images to produce a new image. It was he who started with two images, one a lawful and decent photograph of a child, the other, a lawful (although pornographic) photograph of an adult, and ended with three, the third being an unlawful, indecent pseudo-photograph of a child. His activity was, in our view, substantially more serious than that of an offender who merely downloads for his own use an image produced by someone else. From the point of view of those whose photographs he manipulated – principally the children concerned, but also the adults who may well have been content for

their bodies to be depicted in adult pornography but wholly unwilling to contribute to the creation of an indecent image of a child – it was he who invaded their rights to private lives and created a risk that the indecent images may be circulated on the internet.

33. Should that conduct, although serious and although amounting to production as a matter of fact, nonetheless have been treated for sentencing purposes as if it comprised only possession offences? We are not persuaded that *Norval* required the judge to do so. The court in *Norval* was clearly correct to say that the creation of the images in that case was not equivalent in terms of culpability or harm to the creation of images in which children were actually being abused. As we read the judgment, the basis of the decision on the facts of that appeal was that the sentencing judge had wrongly treated the images as being so equivalent.

34. We recognise that part of the passage which we have quoted from [11] of the court's judgment in *Norval* was expressed in more general terms, going beyond what we take to be the ratio of the court's decision on the appeal. If and in so far as those general terms were intended to lay down a rule of general application, the later decision in *Bateman* is inconsistent with such an approach. To the extent that the decisions are inconsistent, we respectfully prefer the approach adopted in *Bateman*. We do not do so on the basis of drawing a factual distinction dependent on who took one or more of the original photographs used in creating a new image. We do so because the guideline itself makes clear that production includes, but is not limited to, the taking of an image at source. Whether an offender himself took a photograph used to create an indecent image may well be capable of being an aggravating feature of a particular case. But in our view it is not in itself a basis for deciding whether what is in fact production should be sentenced as production, or sentenced only as possession.

35. We are, therefore, satisfied that where conduct such as superimposing a picture of a

child's face onto a picture of an adult body in a sexual pose or sexual activity amounts in fact to the creation of a new indecent image of a child, the offence of making an indecent photograph or pseudo-photograph of a child may properly, and in our view generally should, be treated for sentencing purposes as a production offence. The judge in the present case was therefore correct to take that approach.

36. That is not, of course, the end of the matter. Although offences of this kind are properly to be treated as production offences, the sentencer should in the usual way consider whether an immediate adjustment upwards or downwards should be made to the guideline starting point to reflect particular aspects of culpability and/or harm. The distinction rightly drawn in *Norval* is important in this regard. The production of an image recording the actual sexual abuse of a child is of course more serious than the production of an image such as those created by this appellant. The judge was therefore correct in the circumstances of this case to move at once to the lower end of the appropriate category range, before considering aggravating and mitigation factors.

37. For those reasons we find no error in the judge's approach to the sentencing of this appellant. Ground one accordingly fails.

38. We can address ground 2 briefly. The judge certainly fell into error in saying that the appellant had superimposed the faces of C1 and C2 onto images of children or young girls in their late teens. We are not, however, persuaded that that error continued into, and significantly affected, his decision as to the appropriate length of sentence. In a careful analysis, the judge correctly identified all relevant aggravating and mitigating factors. The list of aggravating factors did not include any mention of the ages of the persons whose bodies were depicted. Had the judge regarded that as a relevant factor in sentencing, we see no reason to doubt that he would have mentioned it. Ground two therefore also fails.

39. We add, for completeness and in fairness to the appellant, that we can see no other basis on which it could be said that the total sentence was manifestly excessive.

40. This appeal accordingly fails and is dismissed.

41. We add, finally, that, thanks to the vigilance of the Criminal Appeal Office for which as always we are grateful, it is clear that the statutory surcharge was imposed by the judge below in error. Having regard to the date of the offending which was the subject of the previous suspended sentence orders, no surcharge should have been imposed. Accordingly, the record should be amended to show that no surcharge is payable.
