
**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2020] HCJAC 38**
**HCA/2020-000033/XC**

Lord Malcolm
Lord Glennie
Lord Pentland

OPINION OF THE COURT

delivered by LORD MALCOLM

in

APPEAL AGAINST CONVICTION

by

**FEVOS GEORGIOU**

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: Hay; Faculty Appeals Unit (for Murray Ormiston LLP, Aberdeen)**
**Respondent: Prentice QC AD (sol adv); the Crown**

15 September 2020

[1] This is an appeal against conviction by Fevos Georgiou. In November 2019 a jury found him guilty of contraventions of sections 52(1)(a) and 52A(1) of the Civic Government (Scotland) Act 1982. The sheriff imposed a community payback order which incorporated a 2 year supervision order and an unpaid work requirement of 250 hours. The appellant was also required to participate in a sex offenders programme.

[2] The charges concerned (1) the taking or permitting to be taken of indecent photographs of children, and (2) the possession of such photographs. At the close of the Crown case it was submitted that there was insufficient evidence identifying the appellant as the person responsible for the images found on his computer which had been seized by the police from his home.

**The no case to answer submission**

[3] On behalf of the appellant it was submitted that the sheriff erred when refusing the no case to answer submission. In her report to this court the sheriff set out the terms of a joint minute and the evidence led by the Crown. It is not necessary to repeat all of the evidence. She summarised the no case to answer submission as follows. While it was accepted that the appellant installed the operating system, the expert witness led by the Crown could not attribute the actions creating the images to a specific user. The appellant's partner, Ms X, had given evidence, and the Crown could not exclude her, as a user of the laptop, of having created the images. No connection had been established between the appellant and a Yahoo user account "tifftiffsub", and it had not been excluded that Ms X owned that account. There was no evidence of the deliberate manufacture of the images by the appellant, nor of anything from which such could be inferred. Ms X had used the appellant's laptop, had an interest in pornography, and had engaged in chat with like-minded persons online. The solicitor for the appellant asserted that Ms X conceded that she might have downloaded the images inadvertently. The inadvertent creation of the relevant files had not been ruled out. There was no evidence that the appellant had knowledge of the images. There was no evidence from which such could be inferred. There

were none of the usual adminicles of evidence found in this kind of case, such as deleted searches or an organised file structure.

**The sheriff's decision**

[4] When assessing the submission the sheriff considered that the evidence included the following. The laptop belonged to the appellant. The recovered images had been downloaded to his device between 10 May 2010 and 11 March 2017. A number of other devices had been examined, including some belonging to Ms X, with nothing of relevance being found. Other than system generated Guest and Admin accounts, the only user account on the laptop was called "Fevos". Its registered owner was listed as "Fevos". The computer name was listed as "Fevos-PC". Other material on the laptop linked it to the appellant. Evidence was given that all of the relevant data, including the operating system, was found in the "C" volume of the laptop associated with the "Fevos" account, with information suggesting that the user had a Yahoo Messenger account under the user name "tifftiffsub". Yahoo Messenger had been installed on 13 November 2016. It was not incumbent upon the Crown to exclude Ms X as the owner of that user name. Neither the Crown nor the defence asked her about it.

[5] The images were found in five separate locations on the device. In particular the system volume information and the unallocated space contained a significant volume of offending images. All were created by one of a number of different user actions, for example, by opening a file in Messenger; by clicking a file icon to preview its contents; or by way of a number of other actions listed by the sheriff.

[6] Ms X had said there was a possibility that she had used the appellant's laptop to view pornography and to interact with like-minded people. She did not say that in fact she

did so. Her evidence was that she did not knowingly download indecent images of children, going only as far as saying that, if it was possible to do so inadvertently, then it was a possibility that she may have done so. The witness PC Ahmed had agreed that it was technically possible for files to be created without a user's knowledge. He was not asked to opine on the likelihood or otherwise of this in respect of the relevant files on the laptop.

[7] All images were discovered in system generated folders, and the images were not accessible to a user who did not possess the requisite skills and knowledge. PC Ahmed indicated that the images had been visible to, accessible by, and interacted with by the user of the laptop at some point during the period of the libel.

[8] Finally the sheriff noted that there were other relevant adminicles of evidence, namely correspondence with and evidence from Ms X which suggested that the appellant is attracted to the young female form, and the existence of link files bearing female names to external storage devices, none of which had been recovered.

[9] The sheriff took the view that there was sufficient evidence for the jury to draw the necessary inferences in respect of each charge, and in particular that the appellant was the principal user of the laptop, that the images were there as a result of conscious and deliberate actions by him, and that, during the period of the libel, he was in control of them. All the files were found in locations associated with his user account. There was a significant volume of such images which had been downloaded by user action at different times and by different mechanisms. At some point during the period of the libel each had been interacted with in some way by the user, which involved a degree of user control, ie of the user doing something with the images. Each was still accessible to a user with the requisite skill and knowledge. The existence of other possible explanations for the

downloading of the material onto the laptop did not mean that these matters were not appropriate for consideration by the jury.

**The submissions for the appellant**

[10] The submissions on behalf of the appellant criticising the sheriff's decision can be summarised as follows. The expert witness was unable to attribute the creation of images to any specific user. The Crown had not excluded the appellant's partner as being the responsible party in circumstances where she was a second user of the computer. No connection had been established between the appellant and the Yahoo Messenger account, and his partner had not been excluded from being the user of the account. It was not in the appellant's name, and connection to the account was essential for the purposes of charge 1. There was no evidence that the creation of the images was by way of a deliberate and positive action by the appellant, nor anything that would allow such to be inferred. The appellant had said that she may have downloaded the images inadvertently. The Crown had not ruled out inadvertent downloading by whichever user. There was no evidence that the appellant was aware of the images, nor of anything from which such knowledge could be inferred. There was no evidence of file-sharing, retained or saved chat histories, internet searches, or organised file structures, and none of the other common types of evidence found in cases of this kind.

[11] It was submitted that the sheriff indulged in illegitimate speculation with regard to the email correspondence suggesting an attraction to the young female form and in respect of the linked files bearing female names. A similar submission was made in respect of the statement that the evidence could support a conclusion that the images were the result of deliberate actions by the appellant, and also in respect of a number of other observations

made by the sheriff in support of her decision. While the appellant was shown to be the main user, he was not the only user, and there was no evidence that he downloaded the images, knew about them, or interacted with them. The sheriff ought to have upheld the no case to answer submission.

[12] Reference was made to the decisions in *Harris* v *HMA* 2012 SCCR 234 and *Redpath* v *HMA* 2019 SCCR 266. Particular reference was made to *Redpath* at paragraphs 21/22 in the opinion of the court delivered by the Lord Justice General, Lord Carloway. First it was incumbent upon the Crown to prove possession as a matter of fact, in that the offending material was within the custody and control of the appellant. It was also necessary to prove knowledge of the existence of the things under his custody and control. The Crown case fell down in respect of this second stage requirement. There was no evidence that the appellant had knowledge of the existence of the things in his custody or control.

[13] The Crown sought to make use of deletions made by the appellant from files on 9 and 10 March 2019, the search taking place on 11 March 2019. Counsel submitted that this involved illegitimate speculation. While it was accepted that the appellant was in possession of the device at this time, and that his partner was elsewhere on those days, the Crown could not demonstrate that he was aware of what was in the deleted cache, which consisted of 73% of the file. There was no evidence that the deleted files contained indecent images.

**The submissions for the Crown**

[14] The Crown submitted that the sheriff correctly repelled the no case to answer submission. There was a clear sufficiency of evidence. Much of the defence submission addressed matters which did not form part of the Crown case. The focus should be on the

evidence led by the Crown. This was a straightforward case. The appellant owned the laptop and was the principal user of it. His partner was an occasional user. Ms X gave evidence that she had no knowledge of the images. The Crown could exclude her as the party responsible for the images. It was not disputed that the appellant was the main user, see paragraph 50 of the sheriff's report. It was not disputed that the relevant images had been downloaded onto the appellant's device. The relevant activity was associated with the "Fevos" account.

[15] During cross-examination a number of scenarios had been raised with Ms X and PC Ahmed as to possible ways in which downloads could take place, but these were no more than propositions put to the witnesses. There was no evidence that any of this had occurred. The obvious inference was that the content of images on his laptop was known to the appellant and that he interacted with them. The evidence of a large number of deletions should not be looked at in isolation, but as part of the larger picture.

**Analysis and decision**

[16] Under reference to the note of appeal, the sheriff states that this was not a "shared laptop". The evidence indicated that it was the appellant's property which his partner was "sure she must have" used occasionally. Furthermore, Ms X did not say that she used it to view pornography, merely that there was a possibility that she did so. She did not give evidence that she downloaded the material. She did not say that she viewed it, or knew about it. The sheriff considered that there was nothing in Ms X's evidence which removed the available inference that it was on the laptop because of the actions of its owner.

[17] The question for the sheriff was whether, taking the evidence at its highest for the Crown, it was capable of supporting a guilty verdict on each charge. The relevant evidence

has been set out above. The court agrees with the sheriff that the answer to the question is yes. Much of the submission for the appellant concentrated on matters not forming part of the evidence, or on possibilities which had not been "ruled out" by the Crown. However the focus should be on the evidence before the jury, and it is not necessary for the prosecution to exclude every possibility which might exculpate an accused person. The appellant's case glosses over the wealth of circumstantial evidence pointing to his guilt, all narrated in detail by the sheriff, and which would allow the jury to reach reasonable inferences as to his responsibility in respect of both charges. We reject the submission that when refusing the no case to answer application the sheriff indulged in illegitimate speculation. We agree with the advocate depute that this was a straightforward case, and we have found no fault in the sheriff's careful analysis of the evidence and why it was appropriate for it to be placed before the jury.

[18] In the course of submissions to this court reference was made to the decisions in *Harris* and *Redpath*, cited earlier, particularly in respect of paragraphs 21/22 in the latter. The proposition was that the Crown fell down in respect of the need to prove knowledge on the part of the appellant of the "things" in his possession. (For a conviction under section 52A of the Act the Crown does not have to prove knowledge of the quality or content of items under his control; that would be a matter for a defence in terms of section 52A(2), see *Redpath* at paragraph 23.) In our view there was ample evidence in this regard, including that relating to the significant amount of deletions made by the appellant shortly before the police took his laptop.

[19] The sheriff did not err when refusing the no case to answer submission, and it follows that the appeal is refused.