England and Wales

Court of Appeal (Criminal Division) Decisions

Porter, R. v [2006] EWCA Crim 560 (16 March 2006)

Neutral Citation Number: [2006] EWCA Crim 560 Case No: 2005/02818/D3

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SNARESBROOK CROWN COURT
HIS HONOUR JUDGE BING

Royal Courts of Justice
Strand, London, WC2A 2LL
16/03/2006

B e f o r e :

LORD JUSTICE DYSON
MR JUSTICE GRIGSON
and
MR JUSTICE WALKER

_____

Between:

Regina

Respondent

- and -

Ross Warwick Porter

Appellant

_____

Mr. A. Korda (instructed by C.P.S.) for the Respondent
Mr. A. H. Milne (instructed by Messrs Edwards Duthie) for the Appellant
Hearing dates : Monday 6th March 2006

Lord Justice Dyson : this is the judgment of the court.

1. On 26 April 2005, the appellant was convicted at Snaresbrook Crown Court by a majority of ten to two on fifteen counts of making an indecent photograph of a child contrary to section 1(1)(a) of the Protection of Children Act 1978 and two counts (counts 16 and 17) of possessing indecent photographs of children contrary to section 160(1) of the Criminal Justice Act 1988 ("the 1988 Act").

With the leave of the single judge, **he appeals in part against his convictions on counts 16 and 17.** This appeal raises an important point as to the meaning of "possession" in section 160(1) of the 1988 Act.

2. So far as material, section 160 of the 1988 Act provides:

> "(1) Subject to subsection (1A), it is an offence for a person to have any indecent photograph or pseudo-photograph of a child in his possession.
>
> (2) Where a person is charged with an offence under subsection (1) above, it shall be a defence for him to prove-
>
> (a) that he had a legitimate reason for having the photograph or pseudo-photograph in his possession; or
>
> (b) that he had not himself seen the photograph or pseudo-photograph and did not know, nor had any cause to suspect, it to be indecent; or
>
> (c) that the photograph or pseudo-photograph was sent to him without any prior request made by him or on his behalf and he did not keep it for an unreasonable time."

Section 160(7) provides that a "pseudo-photograph" means "an image, whether made by computer graphics or otherwise howsoever, which appears to be a photograph".

The facts

3. **On 5 November 2002, the police raided the appellant's house and seized some hard drives and two computers (referred to as exhibits EOR31 and EOR 43) which were linked to the internet almost permanently. The appellant worked in the field of information technology and had built two computers. 3575 still images and 40 movie files of child pornography were recovered from the hard disk drives of the two computers.** The still images were the subject of count 16 and the movie files the subject of count 17. The Crown chose to indict the appellant with possession on 5 November 2002 in these two counts.

4. Of the 3575 still images, 2 were found in EOR31 and the remaining 3573 in EOR43. The 2 still images found in EOR31 and 873 of the remaining 3573 found in EOR43 had been deleted in the sense that they had been placed in the "recycle bin" of the computer which had then been emptied. The remaining 2700 still images were saved in a database of a programme called ACDSee. This programme is designed for viewing graphical images and is used by photographers. When opened in the "gallery view", the programme creates "thumbnail" images of the pictures viewed. These would originally have been larger images associated with each thumbnail. If one had clicked on the thumbnail, the larger image could have been viewed. All of the larger images had, however, been deleted. The effect of deleting the larger images was that the thumbnail could no longer be viewed in the gallery view. But a trace of each thumbnail ("the metadata") remained in the database of the programme.

5. Of the 40 movie files, 7 were recovered from EOR31. All of these had been placed in the recycle bin which had then been emptied. The remaining 33 files were recovered from EOR43: they had not been saved, but were recovered from the cache (temporary internet files) record of the two hard disk drives.

6. **It was conceded by the Crown that (i) all the deleted items had been deleted before 5 November 2002, (ii) the appellant did not have the software to retrieve or view the deleted still or movie files and (iii) the thumbnail images were only retrievable with the use of specialist forensic techniques and equipment provided by the US Federal Government which would not have been available to the public.** It is common ground that the appellant could have acquired software to enable him to retrieve the items which had been emptied from the recycle bin. Such software could have been downloaded from the internet or otherwise purchased. There was no evidence that the appellant had attempted to do this.

The trial

7. At the close of the prosecution case, it was submitted on behalf of the appellant that there was no case to answer in relation to the entirety of the subject of count 16 and in relation to 7 of the movie files that were the subject of count 17. It was argued that none of these images was in the appellant's possession, since he had done all that he could do to divest himself of possession by placing them in the recycle bin which he had then emptied. It was conceded on his behalf that the 33 files that were in the cache were retrievable and were, therefore, in his possession. In rejecting these submissions, the judge said:

> "In my judgment, the determination of the submission should really be decided by analysing what, as Mr Douglas put in his slide show, is in the box. What is in the box is a hard drive. Within the hard drive there are files. Files in the hard drive may or may not include an index. Files are of three categories, operating files, application files and data files. For the purposes of this submission the photographs are, of course, data files and not application or operating system files.
>
> If a file is an active file then, in my judgment, the evidence has established that the user of the computer can without any real difficulty activate and engage the contents of the file on the hard drive; but, in my judgment, a file remains on the hard drive even if it has been deleted or lost because the evidence of Mr Douglas before the jury has been to that effect. A file does not cease to be a file on a hard drive if it has been deleted. It remains a file, albeit a deleted file.
>
> Therefore, the court interprets the word 'possession' in this sense; that the defendant possessed the files within his computer whether they were in an active category or a deleted category. The single point in this submission, therefore, fails….."

8. In his summing up, the judge dealt with the issue of possession in the following way:

> "….possession, as a matter of law, in Count 16, means having something under your custody or control with the knowledge that you have such a thing in your custody and control and for practical purposes there is little difference in that definition and the definition of making, because as I defined to you in Counts 1 to 15, if a person deliberately and intentionally downloads an image, he makes that image and if that action is done with the knowledge that the downloaded image is or likely to be indecent, the offence is made out, but you must be sure, in relation to Count 16, that before you find the defendant 'guilty' of having custody or control on his hard disk of those images, that he knew that they were or likely to be indecent.
>
> And once again, members of the jury, the direction in relation to deleting the files, in relation to Count 16, applies in the same way as Counts 1 to 15, because you have heard the experts tell you that the nature of a computer is that on the hard disk there are a number of files, data files. Such files may be active or deleted, recovered, lost or unallocated and the mere fact that an image is on a deleted file, rather than an active file, does not mean that the user is not in possession, because the file deleted or not, is one of the files he had on a hard disk which was in his possession, was his computer and his hard disk. The issue in this case, is whether he knew that the images were indecent, or likely to be indecent."

The parties' submissions

9. On behalf of the appellant, Mr Milne submits that a person does not commit the offence of possession of indecent photographs or pseudo-photographs on the hard disk drive of his computer unless the images are "readily accessible to the accused for viewing at the time when they are said to be possessed, or capable of being made so accessible without the need to obtain additional specialist software". He further submits that a person who has at some time in the past been in possession of such images, but who has taken all reasonable steps to destroy them or make them irretrievable by him (such as by placing them in the recycle bin of his computer and emptying the bin) is no longer in possession of them. Applying that approach to the facts of this case, Mr Milne does not seek to appeal against the conviction in relation to the 33 files in the cache that were the subject of count 17. But he says that the appeal should be allowed in respect of the remaining items in count 17 and all of the items that were the subject of count 16.

10. On behalf of the Crown, Mr Korda submits that, so long as images remain on the hard disk drive and are recoverable and capable of being viewed, they are in the possession of a person who has control of the hard disk drive. Applying that approach to this case, Mr Korda concedes that the appellant was not in possession of the 2700 stills which were had been saved by the ACDSee programme. But he submits that the 7 movie files and 875 still images which had been emptied from the recycle bin were in his possession.

11. These rival assertions concern the physical state of affairs that is necessary in order to constitute the offence of possession contrary to section 160(1). The oral argument before us did not specifically address the mental element necessary to constitute the offence, although it is mentioned briefly in the appellant's amended skeleton argument.

12. It should also be noted that the question before us would not have arisen if the appellant had been charged with possession during the period from the time when he viewed the images until he deleted them. At trial the Crown did not seek to amend the indictment to specify any such period. We have not sought any explanation for this, but we recognise that there may be practical reasons why the Crown would wish to be able to charge defendants with possession of images at the time when the computer in question is seized, rather than at some earlier date.

The proper interpretation of section 160(1) of the 1988 Act

13. In *Warner v Commissioner of Police of the Metropolis* [1969] 2 AC 256, 304F, Lord Pearce said:

> "Again Lord Parker CJ in *Towers & Co Ltd v Gray* [1961] 2 QB 361 after observing that the term "possession" is always giving rise to trouble, and after considering various cases there cited, concluded, rightly as I think, that in each case its meaning must depend on the context in which it is used".

14. The apparently unqualified language of section 160(1) is in fact subject to certain qualifications. First, a person is not guilty of the offence of possession under section 160(1) unless he *knows* that he has the photographs or pseudo-photographs in his possession. This was decided by the Divisional Court in *Atkins v Director of Public Prosecutions* [2002] 2 Cr App R 248, 261-262. Secondly, section 160(2) provides three defences. Section 160(2)(c) is of some significance: a person is not guilty of the offence of possessing an indecent photograph or pseudo-photograph if it was sent to him without any prior request by him or on his behalf and he did not keep it for an unreasonable time.

15. The retention of hard copy indecent photographs of a child which are sent to a person without prior request presents no particular difficulty. It will be a matter for the jury on the facts of any individual case to decide whether the defendant who received such a photograph kept it for an unreasonable time. Once he knows that he has received it, the item will be in his possession until he has got rid of it, but he is not guilty of the offence if he gets rid of it within a reasonable time. The section 160(2)(c) defence is only available where the photograph or pseudo-photograph is sent to the defendant without any prior request by him or on his behalf. It follows that if a hard copy photograph or pseudo-photograph is sent to a person at his request, then on the assumption that he knows that he has received it and that it is in his custody or control, he will be in breach of section 160(1) even if he gets rid of it within a reasonable time.

16. But possession of indecent images of children on a computer presents special problems. It may seem superficially attractive to say that all that is required to prove a breach of section 160(1) of the 1988 Act is that, to the knowledge of the defendant, the images were on the defendant's hard disk drive within the computer which was in his custody and control at the material time. It can be argued that possession is an ordinary English word which should be given its normal meaning. **Parliament has mitigated the harshness that would result from giving the word its normal meaning by expressly providing three defences in section 160(2) and impliedly providing that knowledge is an essential element of the offence.** On this interpretation (which was adopted by the judge in the present case), the fact that the images may be difficult or even impossible to retrieve is irrelevant.

17. But this interpretation could give rise to consequences so unreasonable that we are not willing to accept it unless we are compelled to do so by the express words of the statute or by necessary implication. Its unreasonableness is well illustrated by the present case. The only way in which the

appellant could have retrieved the 2700 still images which had been saved by the ACDSee programme would have been by the use of specialist techniques and equipment supplied only with the authorisation of the US Federal Government and which were not available to the general public. It is accepted by the Crown that in reality the appellant could not have retrieved these images. In our judgment, it offends common sense to say that they were in the possession of the appellant on 5 November 2002. As we have said, Mr Korda does not so contend.

18. It is not, however, necessary to postulate such an extreme example to demonstrate that the judge's view leads to unreasonable results. Suppose that a person receives unsolicited images of child pornography as an attachment to an email. He is shocked by what he sees and immediately deletes the attachment and deletes it from the recycle bin. Suppose further that he knows that the images are retrievable from the hard disk drive, but he believes that they can only be retrieved and removed by specialists who have software and equipment which he does not have. It does not occur to him to seek to acquire the software or engage a specialist for this purpose. So far as he is concerned, he has no intention of ever seeking to retrieve the images and he has done all that is reasonably necessary to make them irretrievable. We think that it would be surprising if Parliament had intended that such a person should be guilty of an offence under section 160(1) of the 1988 Act.

19. Moreover, an interpretation which rendered such a person guilty of a breach of section 160(1) would sit uneasily with section 160(2)(c). This provision shows that Parliament intended that persons who inadvertently come into possession of images and get rid of them within a reasonable time are not guilty of the offence of possession. In these circumstances, it would be surprising if Parliament had intended that this defence should not be available to persons who inadvertently come into possession of images on their computers. But on the judge's interpretation, the section 160(2)(c) defence would not be available even to a person who had saved the images in ACDSee or in a similar programme. It is true that the defendant in the present case could not invoke section 160(2)(c) because he could not say that the images had not been sent to him at his request. But the point remains that, on the judge's interpretation, the section 160(2)(c) defence may be available to a defendant who has received hard copy photographs or pseudo-photographs and has adopted the simple remedy of getting rid of them within a reasonable time, whereas it is not available to a defendant who has received such images on his computer, even if they are saved in ACDSee or a similar programme, because the images are still on the hard disk drive of the computer.

20. In our judgment, such an interpretation is not compelled either by the express words of the statute or by necessary implication. So what is the correct interpretation? In *DPP v Brooks* [1974] AC 862, 866H, Lord Diplock giving the judgment of the Privy Council said: "In the ordinary use of the word "possession", one has in one's possession whatever is, to one's knowledge, physically in one's custody or under one's physical control." That was said in the context of a case about unlawful possession of drugs. In a similar context and to similar effect, Lord Scarman said in *R v Boyesen* [1982] AC 768, 773H: "Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control."

21. It is true that the context of possession of photographs or pseudo-photographs on the hard drive of a computer is different from the context of possession of drugs. Making allowance for those differences, however, in seeking to elucidate the meaning of "possession" in section 160(1) in the present context, we see no reason not to import the concept of having custody or control of the images. In the special case of deleted computer images, if a person cannot retrieve or gain access to an image, in our view he no longer has custody or control of it. He has put it beyond his reach just as does a person who destroys or otherwise gets rid of a hard copy photograph. For this reason, it is not appropriate to say that a person who cannot retrieve an image from the hard disk drive is in possession of the image because he is in possession of the hard disk drive and the computer.

22. It seems to us that both counsel in the present case were, in substance, adopting a test of custody or control, although they described it in terms of accessibility. The only difference between the formulations advanced by counsel is that Mr Milne argues for the less stringent test of reasonable accessibility; whereas Mr Korda contends for a simple test of accessibility. Our starting point in resolving this conflict is that the first question for the jury is whether the defendant in a case of this kind has possession of the image at the relevant time, in the sense of custody or control of the image at that time. If at the alleged time of possession the image is beyond his control, then for the reasons given earlier he will not possess it. If, however, at that time the image is within his control, for example, because he has the ability to produce it on his screen, to make a hard copy of it, or to send it to someone else, then he will possess it. It will be a matter for the jury to decide whether images

are beyond the control of the defendant having regard to all the factors in the case, including his knowledge and particular circumstances. Thus, images which have been emptied from the recycle bin may be considered to be within the control of a defendant who is skilled in the use of computers and in fact owns the software necessary to retrieve such images; whereas such images may be considered not to be within the control of a defendant who does not possess these skills and does not own such software.

23. We acknowledge that this introduces a subjective element into the concept of physical possession. But we note that the defences provided by section 160(2) import a consideration of the knowledge and behaviour of the particular defendant. Moreover, on any view, an important element of subjectivity is introduced by the requirement of knowledge. It follows that this is not an area where Parliament has enacted an absolute offence. In these circumstances, we see no objection to interpreting the word "possession" in the particular context of the possession of images in a computer as referring to images that are within the defendant's control.

24. It will, therefore, be a matter for the jury to decide whether images on a hard disk drive are within the control of the defendant, and to do so having regard to all the circumstances of the case. Such is the speed at which computer technology is developing that what a jury may consider not to be within a defendant's control today may be considered by a jury to be within a defendant's control in the near future. Further, in the course of time more and more people will become skilled in the use of computers. This too will be a relevant factor for the jury to take into account.

The outcome of this appeal

25. It follows from what we have said that the judge was right not to accede to the submission that counts 16 and 17 should be withdrawn from the jury. But his summing up to the jury was flawed. He directed them that the only issue for them to decide was whether the defendant knew that the images were indecent or likely to be indecent. He did not direct them about the factual state of affairs necessary to constitute possession, and the result is that a vital issue was wrongly removed from the jury. Nor did he direct them about the mental element required to constitute possession. It seems to us that in principle this would require proof that the defendant did not believe that the image in question was beyond his control. However, as we have not heard argument on the point, we express no concluded view on it.

26. For these reasons, the convictions on counts 16 and 17 must be quashed. The appeal is, therefore, allowed.

URL: *http://www.bailii.org/ew/cases/EWCA/Crim/2006/560.html*

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