CASE JUDGMENT: ENGLAND & WALES

CASE CITATION:
***R v LR* (not reported) Indictment number T20090048 (this is a transcript of the Ruling that was subsequently appealed by the Crown to the Court of Appeal, Criminal Division: *CPS v LR* [2010] EWCA Crim 924)**

NAME OF COURT:
Crown Court at Portsmouth

JUDGE:
His Honour Judge Pearson

DATE OF RULING:
15 January 2010

COUNSEL FOR THE PROSECUTION:
Mr A. Fleming

COUNSEL FOR THE DEFENDANT:
Mr F. Privett

Abusive images of children; judicial order to provide copies of images to defence; refusal by prosecution; reasonableness of judicial order and practical arrangements

This a corrected version by HH Judge Pearson of his ruling originally transcribed by Mendip-Wordwave, official court reporters to the Crown Court at Portsmouth

Ruling

On Monday of this week there was an application by the defence that these proceedings be stayed as an abuse of process and I deferred my decision so I could consider the matter fully and indicated that I would announce my decision and the reasons behind it this morning.

The defendant faces an indictment containing 20 counts of making indecent photographs of children, contrary to Section One of the Protection of Children Act 1978. I am told that the total number of images in question amounts to some 240. The defendant pleaded not guilty to all counts on that indictment and the trial was set down for next week, although it has been taken out of the list because whatever my decision the matter would not be trial-ready on Monday. The matter has been before this court on a number of occasions, both for Plea and Case Management Hearings and for a Further Directions hearing. The most significant of the hearings so far as this application is concerned was the hearing on the 8th of October of last year when I made a number of orders, they included an order that an album of images to be prepared for the use of the judge, the defence to be shown an identical copy, with appropriate undertakings and consideration to be given as to the manner in which the images are to be shown on screen for the jury. That order was made after comparatively brief arguments from counsel. The order was resisted by the Crown at that stage, but nevertheless the order was made. Since then the prosecution have not complied with the terms of the order and have invited me to reconsider the matter and to make a fresh and different order concerning the way in which the images should be dealt with. I heard the full argument on Monday and, as I have said, deferred the matter until today. It may be helpful at this stage if I indicate how these cases have been dealt with in Hampshire; there is no reason to suppose that the Hampshire practice is significantly different from other areas.

Now as it is well known it is quite common for the police nationally and locally to mount operations against suspected down-loaders of indecent images of children; they are given operation names and the most current operation happens to be called Operation Tardis, and this is one such case arising from Operation Tardis. Now to ensure consistency and continuity the Presiding Judges and the Resident Judges have decided to nominate a Serious Sexual Offences ticketed judge to hear all cases in specific areas arising from those operations. Generally speaking, it takes 12 to 18 months approximately for all the cases to filter through from the Magistrates Court and to be dealt with at the Crown Court. The nominated judge in Portsmouth certainly also deals with quite a high preponderance of stand-alone cases; that is downloading cases not connected with a particular operation. They are listed before the nominated judge as a matter of convenience by the List Office. Now I was the nominated judge to deal with all cases arising from Operation Tardis and I believe the appointment was at the end of 2007, early 2008. I think and believe this is the last case arising from that operation, no doubt a different ticketed judge will take over from me on the next operation. But inevitably, because of what I said, the nominated judge would have dealt with scores of such cases during the term of his

nomination, if I can call it that.

The cases tend to follow a very similar pattern. The majority are guilty pleas and in these cases the practice has arisen that the officer in the case prepares a schedule of the images, they are given a brief description as to the acts in which the images allegedly depict, they are given a number under the Copine Scale (that is the scale from 1 to 5) and the defence either agree that or they do not. Generally speaking the defence do agree, having looked at the particular images, that the categorisation is correct as undertaken by the officer in the case. In these circumstances there is usually no need therefore for the judge to see the images, or if he does the judge would tend to see only a small representative sample and he deals with the matter on the basis of Section 10 admission that the schedule is accurate.[1] If the pleas are not guilty then, in the majority of cases, a similar position applies because, again, a schedule is prepared and tends to be agreed. The majority of not guilty cases arise on two bases. In the first type the defendant indicates that he was not responsible for the downloading and thus it tends to be a fairly simple factual dispute as to whether the defendant was the downloader of what is, in the main, agreed to be indecent images of children. A second category arises quite frequently on not guilty pleas and is where the defendant indicates that there may have been a downloading, but there cannot be any possession because the images have been deleted from the hard drive, or whatever. This is the so-called *Atkins v DPP* defence,[2] or the *Crown v Porter* defence,[3] and it needs in the main in those cases expert evidence being heard as to where the images may have been stored or cached at various times. Either way the standard practice is for the prosecution and defence to agree the number and nature of the images and therefore again, even on not guilty pleas there is, generally speaking, no need for the judge or jury to be troubled with seeing the actual images. The defence obviously, whether it be a guilty plea or a not guilty plea, are permitted facilities for counsel, and experts if necessary, to view the images in a controlled situation, generally at a particular police station. Occasionally, and it is more unusual, a defence is raised that the images are not those of children and/or that the images are not indecent. This is quite a different situation because quite apart from anything else the jury in those circumstances will have to decide those two points; that is to say, are the images those of children and are they indecent? And the jury will have to do that by reference to a detailed examination of specific images and the jury therefore will have to see those specific images and see them, it would seem to me, in some detail. In those types of case, which are relatively unusual, the defendant would also need to discuss with his counsel, in detail, image by image as to why he is saying a specific image is not that of a child, or if it is not indecent. This is one such case of those slightly unusual circumstances because the two defence case statements raise the defence that some, or all, of the images are images of adults, not children. For that reason, and for the fact that of course we would need a detailed consideration of the 240 images, I made the order that I did – that the images be copied, either in album form or, perhaps, by way of a DVD on a laptop and that they be supplied on strict undertakings as to their retention, for example not to be copied and matters of that nature. Now there is no protocol that applies here between the courts and the CPS,[4] it is just an ad-hoc practice that has grown up over the last few years. There is apparently a document called Memorandum of Understanding between the Director of Public Prosecutions and the Association of Chief Police Officers, which applies to the making of images in downloading cases, or the copying of images in downloading cases, for evidential purposes. That was referred to in the CPS letter of the 10th December. I asked the prosecution if there was a copy of that Memorandum of Understanding available; there is not apparently and I do not think it takes the matter much further, but certainly it has obviously been considered by the CPS and the police to what should apply between them, but there is no protocol, as I have said, that applies between the CPS and the courts.

That is the background.

Now the defence position is this; that the images themselves are what could be called primary disclosure, I know that is a slightly out of date term now because disclosure is a continuing obligation, but the defence say this is primary disclosure under the Criminal Procedure Investigations Act 1996 and the images should therefore be disclosed and they should be disclosed in such a way as to allow the defence to have

[1] *Criminal Justice Act 1967.*
[2] *Atkins v DPP; Goodlands v DPP [2000] 2 Cr.App.R. 248.*
[3] *R v Porter [2006] EWCA Crim 560.*
[4] *Crown Prosecution Service.*

the opportunity to present fully their case. The prosecution's offer to view this material in a conference room here at court, but in sight and within earshot of the officer in the case, the defence say is not acceptable. The defence say that if the jury are to be shown in some form, either by way of hard copies of the photographs, or by way of images on a laptop and that the jury should be in a position to view those images in the privacy of their room during deliberations then the defence should be in no worse position than the jury, that they should be dealt with in exactly the same way. The defence say that they would comply with any undertakings necessary as to dissemination and the return of the copies of the DVD at the conclusion of the case. They would undertake not to photocopy further and things of that nature, and they say that in the circumstances, bearing in mind the slightly unusual nature of this defence being put forward, the prosecution should comply with my original order and their failure to do so technically puts the Crown in contempt of court.

Now what of the prosecution position? Well that is largely set out in the letter of the 10th of December. What the prosecution says it that disclosure can take place adequately without the need for making of copies either by way of hard copies or by way of a DVD to view on a laptop. The perusal of the items concerned would be sufficient if it takes place in the interview room here at the court. Making copies of such images should be avoided at all costs; they go further and they say that any Crown Prosecution Service employee could be committing an offence if he copied, either by way of hard copies or by way of DVD, the images in question and supplied those to the defence and there is a clear public policy that requests of this nature from the defence should be refused and orders of the court should also be refused in the particular circumstances.

Well that is the background, what of the law regarding abuse of process? Well the principles are set out in Archbold at Chapter 4, paragraphs 48 onwards.[5] I have to, of course, deal with any abuse of process within the context of Article 6 of the European Convention on Human Rights including Article 6(3)(b) – that the defence have adequate facility for the preparation of their defence and that, overall, the trial must be fair. It is a matter of course for the defence to satisfy me on the balance of probabilities that the continuation of this trial would be an abuse of process. What are the principles? Well they are well known and of course they are all set out, as I have indicated, in Chapter 4, paragraphs 48 onwards, *Connelly v DPP*[6] says, "What all their Lordships do seem to agree upon it that the court has a general and inherent power to protect its process from abuse. This power must include a power to safeguard an accursed person from oppression or prejudice". The matter is further developed so far as authorities in cases like *Attorney General of Trinidad and Tobago v Phillip*.[7] In *Hui Chi-Ming v R*[8] an abuse of process was defined in that case as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceedings". Two strands of authorities have been identified by the Court of Appeal where abuse of process may arise, namely (a) where the defendant would not receive a fair trial and/or (b) where it be unfair for the defendant to be tried (*see R v Beckford*[9]). And this latter type will include cases where the prosecution "have manipulated or misused the process of the court so as to deprive the defendant of protection provided by the law or to take unfair advantage of a technicality" and *R v Derby Crown Court*[10] refers to a situation where it may " be contrary to public interest and the integrity of the criminal justice system that a trial should take place."

I have been referred to the authority of *R v Early*,[11] which is the eavesdropping authority and the defence suggest that for the OIC[12] to stand outside an interview room with the defendant and his counsel both within view and potentially within earshot would be inappropriate and they say it is analogous to the *R v Early* situation. The authorities make clear that each case will depend on its own facts, that of course each case is unique and I must decide this case on the particular facts that apply here. There is no direct authority on this particular point to assist me. The nearest direct authority in the authorities is set out at page 402 of Archbold, which is summarised, "A stay should also be granted, if the behaviour of the prosecution has been so bad that it is not fair that the defendant should be tried." And then in this regard, a useful test is that there should be either an element of bad faith or at least some serious fault on behalf of the prosecution.

Well would the Crown have discharged their relevant duty of disclosure adequately by allowing access by the

[5] *Archbold: Criminal Pleading, Evidence and Practice (Sweet & Maxwell).*
[6] *[1964] AC 1254, HL.*
[7] *[1995] 1 AC 396, [1994] 3 WLR 1134, [1995] 1 All ER 93.*
[8] *[1992] 1 AC 34.*
[9] *[1996] 1 Cr App R 94.*
[10] *R v Derby Crown Court ex p. Brooks, 80 Cr. App.R.164, DC.*
[11] *[2002] EWCA Crim 1904, [2003] 1 Cr.App.R 19, CA.*
[12] *Officer in the case.*

expert only at the police station, and then purely in the conference room here at court, with the defendant and counsel in full view and potentially in earshot of the OIC. I have actually inspected the available rooms, it seems to me quite clear that the officer in the case, if he wishes to ensure that the material stays in his view, would have to be very close by the interview room. They are not sound proofed and it would seem to me that it is highly likely that the OIC would be in a position to hear what is passing between the defendant and his counsel. In my view that is not satisfactory. In this case, the jury will have to have the images either in printed album form or on a laptop and the jury, as I say, will be or should be entitled, and would be entitled to consider those images in the privacy of their retiring room. I see no reason why the defendant should be in a worse position than the jury. And in my view, therefore, the disclosure duty upon the prosecution would not have been discharged adequately by the suggestion from the Crown.

That is the first issue, have they discharged their burden of disclosure. Would it be fair for the trial to proceeding in that manner, and I have come to the view that it would not be fair.

The second issue is the question of public policy and that is, in broad terms, the Crown say, well there should really be almost a blanket ban on the copying of images of this type. Yes, I entirely agree with that, what I do not agree with is that the Crown could say that any employee who makes copies as a direct result of a court order would be liable to prosecution. I regard that as somewhat fanciful. There will be a clear defence under Section 1, sub-section 4, paragraph (a) of the Protection of Children Act 1978 and it reads as follows, "Where a person is charged with an offence under subsection (1)," that is taking or making, "it shall be a defence for him to prove that he had a legitimate reason for distributing or showing the photographs or having them in his possession." So there is a clear statutory defence there set out. This is mirrored to a very similar extent in the Criminal Justice Act 1988, Section 160 because sub-section 2 of 160 reads, "Where a person is charged with an offence under subsection (1) above," that is basically having in his possession indecent images, "it shall be a defence for him to prove that he had a legitimate reason for having the photograph or pseudo-photograph in his possession."

I agree that both of those statutory offences involve what is called the reverse burden of proof, that is to say it will be up to a particular employee to satisfy a court the he had such a defence. But it seems to me that if the material was copied, as a result of a specific direction from a judge, it would be inconceivable that any staff member would be prosecuted. And even if they were, no doubt the prosecution would be stopped at the very earliest stage on an application by defence counsel.

Now I am very very reluctant indeed to stay proceedings, particularly in relation to alleged offences regarding images of child abuse, such images are very wide spread, they are deeply unpleasant and these are pernicious offences which have to be dealt with most severely. But in this particular case, I am driven to the conclusion that I must stay these proceedings as an abuse of process; the defence have satisfied me on a balance of probabilities that is appropriate to do so. In my view, the orders that I made in October as to the disclosure of the images were reasonable and proportionate and the minimum necessary to ensure a fair trial. The images would have been supplied only subject to strict undertakings from the defence, as I say, as to their safe custody, that they are returned, the way in which they should be viewed and a prohibition on making additional copies. The alternative arrangement suggested by the Crown would have been insufficient. I will mention at this stage that a least one previous trial before me, the case of *R v Aldridge* has been tried and has been dealt with satisfactorily, very much on the basis of similar orders I made in this case in October; that is to say the defence and the jury on Newport, Isle of Wight, had copies of the images and they had to examine them one by one to form a view as to whether the images in question with those of children, and whether they were indecent. It seems to me that that case proceeded satisfactorily, as it turns out, that defendant was convicted and has been sentenced. It seems to me that if it worked satisfactorily in that case there is no reason, I suppose, it would not work satisfactorily in this case.

I make clear therefore that my decision that these proceedings must be stayed is only on the basis that the Crown Prosecution Service have failed to comply with the order that I have made as to the copying of the images for the defence. The stay therefore is subject to that order not being complied with. If the Crown Prosecution Service, on reflection, decide that they wish to comply, then in my view the case will proceed and

should proceed to trial.

That is my decision and I have given the full reasons. Now I am aware that this may amount to a terminating ruling under Section 58 of the Criminal Justice Act 2003. And it may be that the prosecution wish to appeal it, I do not know, if they do I will deal with the mechanics of that now so we know where they stand.[13]

[13] *His Honour Judge Pearson granted permission for the Ruling to be published in the Review by an exchange of letters and e-mails with the editor, and he corrected a number of typographical errors that were published in the transcript. It is probable that a judicial judgment is the copyright of the Crown, although it might rest with the individual Judge in England & Wales. In responding to the Gowers Review of Intellectual Property (HMSO, November 2006), Philip Leith, Professor of Law at Queen's University of Belfast submitted a short paper Copyright in the Digital Age: court judgments, in which he briefly illustrated the position of copyright of judgments in Ireland and the UK (considered to be unsatisfactory), and suggested that both countries should harmonise the position in relation to the practice in the USA and the EU, available at http://www.hm-treasury.gov.uk/d/queens_university_of_belfast_237_kb.pdf. It is possible that section 163 of the Copyright, Designs and Patents Act 1988 applies to judicial judgments, although the reader is also referred to 'Crown copyright: An overview for government departments' (October 2010) and 'UK Government Licensing Framework for public sector information' (National Archives), available at http://www.nationalarchives.gov.uk/information-management/uk-gov-licensing-framework.htm. Of interest, the National Archives claim that the latter document is 'delivered' by the National Archives. A postman or postwoman delivers the post, but the National Archives can only write and make available a document.*