HM ADVOCATE v GRAHAM

No 1
27 May 2010
[2010] HCJAC 50

Lord Justice-Clerk (Gill),
Lady Paton and Lord Hardie

Her Majesty's Advocate, Appellant—*Prentice (Solicitor-advocate) QC, A-D*
David William Graham, Respondent—*Taylor (Solicitor-advocate)*

Justiciary – Sentencing – High Court of Justiciary sentencing guidelines – Civic Government (Scotland) Act 1982 (cap 45), sec 52(1)(a), (b) – Criminal Procedure (Scotland) Act 1995 (cap 46), sec 118(7)

Justiciary – Sentencing – Making and distributing indecent images of children – Over 80,000 images of varying classifications including over 10,000 in the two most serious categories – Distribution by file sharing – Guilty plea tendered at continued preliminary hearing – Whether sentence of nine months' imprisonment unduly lenient – Whether discount of one-third appropriate – Whether Sentencing Guidelines Council definitive guideline to be followed – Whether sentencer should view images – Civic Government (Scotland) Act 1982 (cap 45), sec 52(1)(a), (b) – Criminal Procedure (Scotland) Act 1995 (cap 46), sec 118(7)

Section 52(1) of the Civic Government (Scotland) Act 1982 (cap 45) provides, *inter alia*, ''Any person who– (a) takes, permits to be taken, or makes any indecent photograph of pseudo-photograph of a child; (b) distributes or shows such an indecent photograph or pseudo-photograph … shall be guilty of an offence under this section.''

Section 118(7) the Criminal Procedure (Scotland) Act 1995 (cap 46) provides that in disposing of an appeal against sentence the High Court of Justiciary may ''pronounce an opinion on … the sentence or other disposal or order which is appropriate in any similar case'', that is to give guidance of general application.

On 14 August 2009, the respondent plead guilty to five charges involving sexual offences against children, including two charges of making and distributing indecent images of children, contrary to sec 52(1)(a) and (b) of the 1982 Act, respectively (charges 9 and 10). The offences had been committed between 4 August 2004 and 20 February 2009. A total of 127,269 indecent images were recovered from the respondent's computers, of which 80,205 were unique. Of those, 79,011 were still images and 1,194 moving image files. In excess of 10,000 images were of the two most serious categories for such images. The respondent classified and stored the images in various files on his computers and traded images with others. On 30 September 2009, he was sentenced on charges 9 and 10, to six months' imprisonment *in cumulo*, (discounted from nine months). He was sentenced to an extended sentence in respect of charge 1 with a custodial term of nine months and an extension period of five years, and a *cumulo* sentence of nine months' imprisonment, imposed in respect of the other charges (charges 3 and 5). The periods of imprisonment were to be served consecutively.

The Crown subsequently appealed to the High Court on the ground that the disposal on charges 9 and 10 was unduly lenient. The Crown also invited the court, under sec 118(7) of the 1995 Act, to give guidance on sentencing in respect of offences under sec 52 of the 1982 Act. Before the court, the Crown argued that: (1) the sentence had been unduly lenient, and had failed to reflect the seriousness of the offences; (2) the sentence failed to have a sufficient punitive and deterrent effect; (3) the court should adopt the sentencing guidelines followed in England and Wales under the Sentencing Guidelines Council's definitive guideline on the Sexual Offences Act 2003 (cap 42), in so far as it dealt with comparable offences to those under sec 52 of the 1982 Act; and (4) the court should give guidance on whether the sentencer should view some or all of the images in such cases. For the respondent, it was argued that: (1) the sentence had not been unduly lenient when viewed in relation to the

court's disposal on all charges, the sentence appealed against being inextricably bound up with those imposed on other charges; (2) the five-year extension period, in particular, applied across the board; (3) on sentencing policy there was an apparent conflict in the cases as to what constituted commercial distribution of images, which was an accepted aggravating factor; and (4) it was unnecessary for the sentencer to view the images if the Crown provided an agreed description of them, or the sentencer was familiar with such cases.

Held that: (1) the sentence imposed had been unduly lenient (paras 51, 53); (2) the requirements of punishment, denunciation and general deterrence were of paramount importance in a case of this nature (para 53); (3) the definitive guideline on the Sexual Offences Act 2003 issued by the Sentencing Guidelines Council on 30 April 2007 was helpful and should be used in all cases for as long as it remained the pre-eminent classification of such offences in the United Kingdom, and the Crown narrative in such cases should contain an analysis of the images in accordance with the definitive guideline (paras 23–25, 29); (4) the number of images and whether that constituted a small or large number of images was, to an extent, a matter for judgment in each particular case but a general benchmark was useful; images numbered in the low hundreds could be properly described as a small number while images numbered in high hundreds or thousands could properly be said to be a large number (para 32); (5) moving images were not to be regarded as more serious per se than still images, such an approach being too rigid; rather, while allowance should be made for the fact that moving images may be more vivid and corrupting than still images, the primary factors to be taken into account remained the nature of indecent activity depicted and the extent of the offender's involvement with it (para 33); (6) to distribute indecent images on a large scale, by exchanging them or placing them in shared computer folders fell to be equiparated with commercial distribution (para 37); (7) showing or distributing indecent images was to be regarded as a serious offence, and the additional aggravating factors set out in the definitive guideline were to be followed, and in all cases the period of downloading and distribution should be taken into account (para 40); (8) the mitigating factors set out in the definitive guideline were to be followed but while the fact that the offender was of good character was not irrelevant, it was not a factor to which the sentencer was obliged to attach much weight, nor could the fact that the offender had a disturbed background be a powerful consideration in mitigation (paras 41–43); (9) in cases of this nature the Crown would seldom be able to lead evidence from the children abused in the making of the images and there would therefore be no question of saving vulnerable witnesses from the ordeal of giving evidence; accordingly, an early guilty plea would not normally have all the merits that would attract a discount of one third (para 45); the guidance on discount provided in *Spence v HM Advocate* should be followed (para 46); (10) as the court made clear in *HM Advocate v Millbank*, every sentencing judge in Scotland had a discretion whether or not to look at productions and while he may think it useful in cases of this sort, he may equally conclude that the specification of the offences in the indictment and Crown narrative was sufficient (paras 49, 50); (11) in this case, having regard to the number and nature of the images, the period of time involved, his sophisticated approach to the classification, storage and trading of the material, and to the decisions of the court in *Brown v HM Advocate* and *Jordan v HM Advocate*, a *cumulo* sentence of seven years' imprisonment was the appropriate starting point (para 55); (12) there having been no question of a substantive defence in the case, nor any vulnerable witnesses spared the ordeal of giving evidence, and the plea having been tendered at a continued preliminary hearing, the appropriate discount in the case was one-tenth (paras 56–58); and appeal *allowed* and sentence on charges 9 and 10 quashed and a sentence of six years and four months substituted (para 59).

Observed (per Lord Justice-Clerk (Gill)) that: (1) sentencing guidelines, while providing a structure and framework for sentencing, were not intended to remove judicial discretion (para 21); (2) guidelines should not be applied too rigidly, nor should they be taken to identify the correct sentence; the

responsibility for fixing the sentence in every case rested on the sentencer alone, involving his judgment and discretion, and taking into account the particular circumstances of each case (para 22).

David William Graham was indicted at the instance of the Right Honourable Elish F Angiolini QC, Her Majesty's Advocate, the libel of which included charges of making and distributing indecent images of children, contrary to sec 52(1)(a) and (b) of the Civic Government (Scotland) Act 1982, respectively (charges 9 and 10). At a continued preliminary hearing on 14 August 2009, before Lord Brodie at the High Court of Justiciary in Glasgow, the respondent pled guilty, *inter alia*, to charges 9 and 10. On 30 September 2009, he was sentenced on those charges, to six months' imprisonment *in cumulo* (discounted from nine months). The Crown subsequently appealed to the High Court on the ground that the disposal on charges 9 and 10 was unduly lenient.

Cases referred to:
Advocate (HM) v Bell 1995 SLT 350; 1995 SCCR 244
Advocate (HM) v Boyle [2009] HCJAC 89; 2010 SLT 29; 2010 SCCR 103; 2010 SCL 198
Advocate (HM) v Clark [2010] HCJAC 4; 2010 JC 90; 2010 SCCR 210; 2010 SCL 613
Advocate (HM) v McKay 1996 JC 110; 1996 SLT 697; 1996 SCCR 410
Advocate (HM) v McKenzie 1990 JC 62; 1990 SLT 28; 1989 SCCR 587
Advocate (HM) v Millbank 2002 SLT 1116; 2002 SCCR 771
Advocate (HM) v Peebles 7 August 2009 unreported
Advocate (HM) v Thomson; HM Advocate v Dick [2006] HCJAC 32; 2006 SCCR 265; 2006 GWD 11-205
Attorney-General's Reference (No 89 of 2004) (Re) sub nom R v Cox [2004] EWCA Crim 3222
Attorney-General's Reference (Nos 14 and 15 of 2006) (Re) sub nom R v Webster; R v French [2006] EWCA Crim 1335; [2007] 1 All ER 718; [2007] 1 Cr App R (S) 40; [2006] Crim LR 943
Barron v HM Advocate [2007] HCJAC 39; 2007 SCCR 335; 2007 GWD 26-455
Brown v HM Advocate [2010] HCJAC 24; 2010 SLT 964; 2010 SCCR 393; 2010 SCL 899
Du Plooy v HM Advocate 2005 1 JC 1; 2003 SLT 1237; 2003 SCCR 640
Hendry v HM Advocate 6 June 2007 unreported
Hughes v HM Advocate [2007] HCJAC 43; 2007 SCL 96; 2007 GWD 26-454
Jordan v HM Advocate [2008] HCJAC 24; 2008 JC 345; 2008 SLT 489; 2008 SCCR 618; 2008 SCL 729
Kay v HM Advocate [2005] HCJAC 48
Lawson v HM Advocate 20 July 2006, unreported
McGaffney v HM Advocate 2004 SCCR 384; 2004 GWD 16-361
Ogilvie v HM Advocate 2002 JC 74; 2001 SCCR 792; 2001 SLT 1391
Peebles v HM Advocate [2007] HCJAC 6; 2007 JC 93; 2007 SLT 197
Quinn v HM Advocate 13 November 2009, unreported
R v Barber [2009] EWCA Crim 774
R v Beaney [2004] EWCA Crim 449; [2004] 2 Cr App R (S) 82; [2004] Crim LR 480
R v Bloomfield [2007] EWCA Crim 3394
R v Brooks [2004] EWCA Crim 579
R v Dooley [2005] EWCA Crim 3093; [2006] 1 WLR 775; [2006] 1 Cr App R 21; [2006] Crim LR 544
R v Edwards [2005] EWCA Crim 402
R v Feather [2003] EWCA Crim 3433
R v Feuer [2005] EWCA Crim 2415
R v Fillary [2003] EWCA Crim 2682
R v Handley [2009] EWCA Crim 1827
R v Hardy [2005] EWCA Crim 1636
R v Lewis [2008] EWCA Crim 2519
R v Maunder [2007] EWCA Crim 1254
R v Millberry; R v Lackenby; R v Morgan [2002] EWCA Crim 2891; [2003] 1 WLR 546; [2003] 2 All ER 939; [2003] 2 Cr App R (S) 31
R v Oliver; R v Hartrey; R v Baldwin [2002] EWCA Crim 2766; [2003] 1 Cr App R 28; [2003] 2 Cr App R (S) 15; [2003] Crim LR 127

R v Oosthuizen [2005] EWCA Crim 1978; [2006] 1 Cr App R (S) 73; [2005] Crim LR 979
R v Peters; R v Campbell; R v Palmer [2005] EWCA Crim 605; [2005] 2 Cr App R (S) 101; [2005] Crim LR 492
R v Phillips [2007] EWCA Crim 983
R v Senior [2003] EWCA Crim 3331
R v Somerset [2006] EWCA Crim 2469
R v T [2009] EWCA Crim 2522
R v Tatam [2004] EWCA Crim 1856; [2005] 1 Cr App R (S) 57
R v Thompson [2004] EWCA Crim 669; [2005] 2 Cr App R 16; [2005] 1 Cr App R (S) 1; (2004) 148 SJLB 417
R v Wild (No 1) [2001] EWCA Crim 1272; [2002] 1 Cr App R (S) 37; [2001] Crim LR 665
Robinson v HM Advocate 3 November 2005, unreported
Roulston v HM Advocate [2005] HCJAC 12; 2006 JC 1; 2005 SCCR 193
Spence v HM Advocate [2007] HCJAC 64; 2008 JC 174; 2007 SLT 1218; 2007 SCCR 592; 2008 SCL 256

Textbooks etc referred to:
Ashworth, A, *Sentencing and Criminal Justice* (5th ed, Cambridge University Press, Cambridge, 2010), pp 27, 28
Gillespie, A, ''*Tackling Child Pornography: The approach in England and Wales*'' in *Viewing Child Pornography on the Internet: Understanding the offence, managing the offender, helping the victims* (Quayle and Taylor eds, Russell House Publishing, Lyme Regis, 2005), p 4
Internet Watch Foundation, *Annual and Charity Report 2008* (IWF, Cambridge, 2010), p 7 (Online: http://www.iwf.org.uk/accountability/annual-reports/2008-annual-report (11 October 2010))
Rook, PFG, and Ward, R, *Sexual Offences: Law and practice* (3rd ed, Sweet and Maxwell, London, 2004), pp 127–129
Sentencing Advisory Panel, *Offences Involving Child Pornography* (Home Office Communication Directorate, London, August 2002), para 20
Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea* (Rev ed, Sentencing Guidelines Secretariat, London, July 2007), pp 5, 6
Sentencing Guidelines Council, *Sexual Offences Act 2003* (J281004) (Sentencing Guidelines Secretariat, London, April 2007), pp 109–114
Taylor, M, et al, ''*Typology of Paedophile Picture Collections*'' (2001) 74 *The Police Journal* 98
Taylor, M, and Quayle, E, *Child Pornography: An Internet Crime* (Brunner-Routledge, Hove, 2003), pp 45, 46, 159, 160

The appeal called before the High Court of Justiciary, comprising the Lord Justice-Clerk (Gill), Lady Paton and Lord Hardie, for a hearing on 9 and 10 March 2010. At advising, on 27 May 2010—

Lord Justice-Clerk (Gill)—

Introduction

[1] On 14 August 2009 at Glasgow High Court, the respondent pled guilty to a charge of lewd, indecent and libidinous conduct against boys; to two charges of grooming under sec 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 9), and to two charges under sec 52 of the Civic Government (Scotland) Act 1982 (cap 45) ('the 1982 Act'). The latter charges were in the following terms:

> '(9) between 4 August 2004 and 20 February 2009, both dates inclusive, at [the *locus*] you DAVID WILLIAM GRAHAM did take or permit to be taken or make indecent photographs or pseudo-photographs of children:

CONTRARY to the Civic Government (Scotland) Act 1982, Section 52(1)(a) as amended;

(10) between 1 January 2005 and 20 February 2009, both dates inclusive, at [the *locus*] you DAVID WILLIAM GRAHAM did distribute or show indecent photographs or pseudo-photographs of children:

CONTRARY to the Civic Government (Scotland) Act 1982, Section 52(1)(b) as amended'.

[2] On 30 September 2009 the sentencing judge imposed an extended sentence in terms of sec 210A of the Criminal Procedure (Scotland) Act 1995 (cap 46) ('the 1995 Act') of five years and nine months on the charge of lewd and libidinous practices. This sentence comprised a custodial term of nine months, discounted from 12 months, and an extension period of five years. He imposed a *cumulo* sentence of nine months' imprisonment, discounted from 12 months, for the two grooming offences, this sentence to run consecutively to the sentence imposed on the charge of lewd and libidinous practices.

[3] On charges (9) and (10) the sentencing judge also imposed a *cumulo* sentence of six months' imprisonment, discounted from nine months because of the plea of guilty, this sentence to run consecutively to the sentences imposed on the other charges. The Lord Advocate appeals against the sentence imposed on these charges on the ground that it is unduly lenient.

Facts

[4] The respondent is aged 22. In late 2008 Strathclyde Police became aware that he had subscribed to a website displaying indecent images of young boys. They seized items of computer equipment at his home. When interviewed under caution, the respondent admitted that he had been downloading indecent images of children since he was about 17.

[5] The respondent admitted to searching on the internet for indecent images of children; to paying by credit card for subscription-only websites; and to storing the images and categorising them under various headings on his computers. He said that his preference was for images of naked boys aged between five and 13. He admitted that he had downloaded images of acts of penetrative sexual abuse of young boys and of children younger than five, including babies, but said that he did not necessarily see all of the images that he downloaded. He said that he wished to maintain a collection of images that did not necessarily appeal to him so that he could trade them on the internet for images that did.

[6] 127,269 indecent images were recovered from the respondent's computers, 80,205 of which were unique. Of these, 79,011 were still images and 1,194 were moving image files.

[7] In his report the sentencing judge has followed the approach taken by the Crown at the sentencing diet in categorising the images by reference to their rating on the COPINE scale. I shall discuss this later. For the moment I mention that the sentencing judge describes the COPINE scale as categorising offences of this nature in five levels of ascending severity. His categorisation of the images using this measure is as follows: 56,897 images at level 1; 4,293 images at level 2; 8,162 images at level 3; 9,218 images at level 4; and 1,635 images at level 5.

Sentencing judge's reasons

[8] The sentencing judge had a social enquiry report, a report from the Clyde Quay Project, a social work services project for the help of sex offenders, and two reports from a forensic clinical psychologist instructed on behalf of the respondent. The reports suggest that the respondent is of average intelligence, but is immature; that he has an inappropriate sexual interest in young children, particularly boys; that although strategies may be available to help him, his interest is likely to remain, and that he represents a significant risk to children. The reports recommend that he should be subject to supervision in terms of an appropriately structured regime.

[9] The sentencing judge says that he understood *Ogilvie v HM Advocate* to be the guideline judgment on sentencing for contraventions of sec 52 of the 1982 Act and was unaware of the decision in *McGaffney v HM Advocate* in which this court held, *inter alia*, that distribution of indecent images by exchange or barter is more serious than downloading for personal use. He says that if he had had that decision in mind, and had focused on questions of retribution and deterrence, he might well have imposed a significantly longer sentence on these charges. He explains why he imposed the sentences appealed against as follows:

> 'In imposing what I would accept was a modest additional custodial period in respect of charges (9) and (10) I was attempting to produce a composite sentence which achieved my objectives while remaining proportionate because I saw there to be significant mitigating factors which had to be had regard to. The respondent was relatively young, certainly immature, and a first offender. It is commonplace for it to be suggested that an offender is remorseful. Here that case was very powerfully and convincingly made under reference to the co-operation the respondent had given the police; his expressions of self-disgust, both reported and expressed directly in his and his parents' letters; and his early plea. I gave him credit for that plea in allowing a discount of one-third in the custodial elements of his sentence but in my opinion it remained relevant to have regard to that remorse and the associated willingness to co-operate with interventions which may minimise the risk of re-offending. It seemed to me at least possible that an overly punitive sentence might have an adverse impact on the prospects for risk minimisation.'

Submissions for the Crown

[10] The Advocate-depute contended that the *cumulo* sentence of six months' imprisonment imposed on charges (9) and (10) failed adequately to reflect the seriousness of the offences, given the quantity and nature of the images. A sentence of this length was within summary limits. The sentencing judge had failed to take into account that users such as the respondent maintained the market for material of this kind. The sentence failed to have a sufficient deterrent effect. Punishment and the protection of the public, and particularly of young children, required that there should be a substantial custodial sentence.

[11] The Advocate-depute invited us to issue guidance in terms of sec 118(7) of the 1995 Act on the sentences that are appropriate for offences under sec 52 of the 1982 Act. In particular, he invited us to adopt the sentencing guidelines followed in England and Wales under the Sentencing Guidelines Council's definitive guideline on the Sexual Offences Act 2003 ('the definitive guideline'). He also invited us to give general guidance on the question whether it was necessary for a sentencer to view all or a sample of the productions in every case.

Submissions for the respondent

[12] The solicitor-advocate for the respondent accepted that, looked at in isolation, the sentence appealed against might at first sight appear to be unduly lenient. The question, however, was whether the disposal in relation to all charges taken together was to be regarded as unduly lenient. The sentencing judge had been fully aware of the facts. In looking at the respondent's conduct as a whole, he had sought to impose a carefully structured sentence that took account of all relevant factors. The five-year extension period imposed for the lewd and libidinous practices charge applied across the board. The sentence appealed against was inextricably bound up with those imposed on the other charges. Charges (9) and (10) were serious, but if the appeal succeeded it would have the incongruous result that a longer custodial sentence would be imposed on these charges than on the contact offences of lewd and libidinous practices and grooming. The respondent had served the custodial term of his sentence and had been released on strict licence conditions. He was young. He fully accepted his guilt and was genuinely remorseful. We should not interfere with the sentencing judge's decision (*HM Advocate v Bell*).

[13] On the wider questions of sentencing policy the solicitor-advocate for the respondent accepted that commercial distribution of indecent images was an aggravating factor but he pointed out that there is an apparent conflict between *McGaffney v HM Advocate* and *Brown v HM Advocate* as to what constitutes commercial distribution. He suggested that it would be unnecessary for the sentencer to view the material if the Crown provided an agreed description of it or if the sentencer had experience of such cases.

Statutory provisions and previous judicial guidance

[14] Sections 52 and 52A of the Civic Government (Scotland) Act 1982 (as amended) provide, *inter alia*, as follows:

'**Indecent photographs etc. of children**

52.–(1) Any person who–

(a) takes, or permits to be taken, or makes any indecent photograph or pseudo-photograph of a child;
(b) distributes or shows such an indecent photograph or pseudo-photograph;
(c) has in his possession such an indecent photograph or pseudo-photograph with a view to its being distributed or shown by himself or others; or
(d) publishes or causes to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such an indecent photograph or pseudo-photograph, or intends to do so

shall be guilty of an offence under this section.

(2) In subsection (1) above 'child' means ... a person under the age of 18 ...

(3) A person guilty of an offence under this section shall be liable ...

(b) on conviction on indictment, to imprisonment for a period not exceeding 10 years or to a fine or to both. ...

Possession of indecent photographs of children

52A.–(1) It is an offence for a person to have any indecent photograph or pseudo-photograph of a child in his possession. ...

(3) A person shall be liable ...

(b) on conviction on indictment of such an offence to imprisonment for a period not exceeding 5 years or to a fine or to both.'

[15] In *Ogilvie v HM Advocate* this court held that it would be in only the most exceptional cases that a sentence in excess of nine to 12 months would be imposed for an offence of downloading a pre-existing image without any distribution. Sentences up to the statutory maximum, which at that time was three years' imprisonment, would be imposed where there was a contested case, evidence of commercial or large-scale exploitation and a significant amount of material. Non-custodial disposals would normally be reserved for isolated offences where the amount of material was small and was intended for personal use or for use within a restricted circle, where there was no commercial element and where the accused had pled guilty and was a first offender. At what point between these extremes a particular case fell would depend on the circumstances, such as the quality, quantity and nature of the material, whether there was any element of exploitation or commercial gain, and the character of the accused (*Ogilvie*, para 7).

[16] Soon after *Ogilvie* the Criminal Justice (Scotland) Act 2003 (asp 7) increased the maximum sentence for a contravention of sec 52(1) of the 1982 Act from three to ten years (sec 19(1)(a)) and made it competent for the offence of possession of indecent images to be prosecuted on indictment (sec 19(1)(b)). Thereafter, in *McGaffney v HM Advocate* this court held, *inter alia*, that the downloading of moving images is more serious than the downloading of still images; that the distribution of such images by exchange or barter is more serious than downloading for personal use; and that distribution for financial gain is more serious still (*McGaffney*, paras 8, 9).

Development of sentencing guidelines in England and Wales

COPINE scale

[17] COPINE (Combating Paedophile Information Networks in Europe) is a European Union funded research programme carried out at University College, Cork. Members of the project are academics, but research has developed in collaboration with law enforcement agencies and other professions and disciplines. One of the purposes of the COPINE scale was to help law enforcement agencies to categorise indecent images. It was a descriptive classification comprising ten levels. It was not intended to be a scale of severity (Sentencing Advisory Panel, *Advice to the Court of Appeal on Offences Involving Child Pornography*, para 20; Taylor, Holland and Quayle, '*Typology of Paedophile Picture Collections*', p 98; Gillespie, '*Tackling Child Pornography: The Approach in England and Wales*', p 4). Images at levels 2 and 3 of the COPINE scale are not of themselves pornographic (*R v Oliver*, para 10).

Oliver guidance

[18] In *R v Wild (No 1)* the Court of Appeal asked the Sentencing Advisory Panel to draw up guidelines on offences involving child pornography under provisions corresponding with those of the 1982 Act. The panel's advice was substantially adopted by the Court of Appeal in the guideline judgment in *R v Oliver*.

Definitive guideline

[19] The guidance set out in *Oliver* was reviewed and amended by the definitive guideline on the Sexual Offences Act 2003 issued by the Sentencing Guidelines Council ('the council') on 30 April 2007. In the definitive guideline, the council amended the *Oliver* classification of offences in terms of the nature of the images at each level. The key change from the *Oliver* classification relates to images depicting penetrative sexual activity. Images of such activity between children were placed at level 2 on the *Oliver* guidelines and were treated as being less serious than images depicting non-penetrative sexual activity between adults and children, which were at level 3. Under the definitive guideline images depicting penetrative sexual activity involving a child or children, or both children and adults, are now placed at level 4 (*cf* Rook and Ward, *Sexual Offences: Law and practice*, pp 127, 128). I shall refer to this as the definitive guideline, although I understand that in the English courts it is referred to informally as the *Oliver* scale.

[20] This court has referred to the original *Oliver* scale in some recent decisions (eg *Hughes v HM Advocate*; *Barron v HM Advocate*); and it seems that on occasions there has been confusion between the definitive guideline and the COPINE scale (eg *Brown v HM Advocate*, paras 5, 8). In *Lawson v HM Advocate* there appears from the sheriff's report to have been a misunderstanding on the part of the procurator fiscal regarding the number and significance of the levels in the *Oliver* scale.

Use of sentencing guidelines

[21] The essence of sentencing guidelines in England and Wales is to provide ranges of sentence for different levels of seriousness and, within each range, to indicate a common starting point. Guidelines provide a structure for, but do not remove, judicial discretion. They are a framework within which the court can categorise the offence in question; reflect the facts of the case, including the aggravating and mitigating factors, and place it appropriately within the relevant range or, if the circumstances should require, outside it (*cf* Ashworth, *Sentencing and Criminal Justice*, pp 27, 28).

[22] This approach should not be applied too rigidly. Guidelines should not lead to a mechanistic approach. They do not purport to identify the correct sentence. The responsibility for fixing the sentence in every case rests on the sentencer alone (*HM Advocate v McKenzie*). Sentencing therefore should always involve the sentencer's judgment and discretion, which he must in every case exercise by making due allowance for the particular circumstances of the case (*HM Advocate v Boyle*). The English decisions are to the same effect (*R v Millberry*, Lord Woolf of Barnes CJ, para 34; *R v Peters*, Judge LJ (as he then was), para 3; *cf R v Lewis*, Owen J, para 5; *R v Oosthuizen*, Rose LJ, p 391; *Attorney-General's Reference (Nos 14 and 15 of 2006)*, para 52). As Rose LJ put the point in *Oliver* (para 13), guidelines are intended to help sentencers. They are not a straitjacket from which they cannot escape.

Reference to English guidelines

[23] Although the legislation governing the making and distribution of indecent images of children is contained in different statutes in Scotland (the 1982 Act) and in England and Wales (Protection of Children Act 1978 (cap 37); Criminal Justice Act 1988 (cap 33)), it strikes at the same conduct.

[24] In *Roulston v HM Advocate* I said that it was helpful, particularly in offences under UK legislation, to look at the guidelines applied by the English courts and to consider, to the extent that they are relevant, the specific factors on which those guidelines are based; but that in doing so, the court should not lose sight of its overall duty to assess the sentence that in all the circumstances of the case most justly reflects the culpability of the accused and the mitigating factors, if any, that are found to exist (*Roulston*, para 17).

[25] In my opinion, the definitive guideline (pp 109–114) is helpful to us in deciding this appeal. I will rehearse it so far as it is relevant to Scots law and practice.

Definitive guideline

Classification

[26] The definitive guideline sets out the following levels of offences. These are levels of severity.

[27] The definitive guideline classifies indecent images on the following scale (para 6A.2):

'Level 1	Images depicting erotic posing with no sexual activity
Level 2	Non-penetrative sexual activity between children, or solo masturbation by a child
Level 3	Non-penetrative sexual activity between adults and children
Level 4	Penetrative sexual activity involving a child or children, or both children and adults
Level 5	Sadism or penetration of, or by, an animal'.

The guidance is as follows:

'(a) Where an offender has (i) commissioned or encouraged the production of level 4 or 5 images, or (ii) has been involved in the production of level 4 or 5 images, the starting point should be six years' imprisonment. Sentences in the range of four to nine years' imprisonment will generally be appropriate.

(b) Where an offender has shown or distributed images at levels 4 or 5, the starting point should be three years' imprisonment. Sentences in the range of two to five years' imprisonment will generally be appropriate.

(c) Where an offender has been involved in the production of, or has traded in, material at levels 1 to 3, the starting point should be two years' imprisonment. Sentences in the range of one to four years' imprisonment will generally be appropriate.

(d) Where an offender (i) possesses a large amount of level 4 or 5 material for his personal use only, or (ii) has shown or distributed a large number of level 3 images, the starting point should be 12 months' imprisonment. Sentences in the range of 26 weeks to two years' imprisonment will generally be appropriate.

(e) Where an offender (i) possesses a large amount of level 3 material for personal use; (ii) possesses a small number of images at levels 4 or 5; (iii) shows or distributes a large number of level 2 images; or (iv) shows or distributes a small number of level 3 images, the starting point should be 26 weeks' imprisonment. Sentences in the range of one month to 18 months' imprisonment will generally be appropriate.

(f) Where an offender (i) possesses a large amount of material at level 2 or a small amount of material at level 3; (ii) shows or distributes material at level 1 or 2 on a limited scale; or (iii) exchanges images at levels 1 or 2 with others, but with no element of financial gain, the starting point should be three months' imprisonment. Sentences in the range of one month to 26 weeks imprisonment will generally be appropriate.

(g) Where an offender possesses a large amount of level 1 material and/or no more than a small amount of material at level 2, and the material is for personal use and has not been distributed or shown to others, the starting point should be a community service order, although probation or a fine may be appropriate.'

Approach to sentencing in cases of this kind

Process of child sexual abuse

[28] Viewing, downloading and distributing indecent images of children is part of the process of child sexual abuse. Each photograph represents the serious abuse of the child depicted. Those who access this material through the internet bear responsibility for the abuse by creating a demand for the material (*Jordan v HM Advocate*; *Ogilvie v HM Advocate*, para 6). Such offences can properly be said to contribute to the pain, discomfort and fear suffered by children who are physically abused, and to the psychological harm that the children concerned would suffer from knowing that others would get perverted pleasure from looking at the material (*R v Beaney*, para 9).

Use of the definitive guideline

[29] In my opinion, the definitive guideline should be used in all cases for as long as it remains the pre-eminent classification of these offences in the United Kingdom. That is the established practice in England (eg *R v T*; *R v Barber*; *R v Bloomfield*; *R v Phillips*). Furthermore, in my opinion, the Crown narrative in all prosecutions under secs 52 and 52A of the 1982 Act should contain an analysis of the material in accordance with the definitive guideline (*cf Hughes v HM Advocate*, para 3). It follows that in sentencing for offences of this kind, reference to the COPINE scale is no longer appropriate.

Number and types of the images

[30] In *Oliver* the Court of Appeal referred to 'small' and 'large' quantities of images but did not define those terms. The court said that it was impossible to be precise as to numbers and that sentencers should make their own assessment on the point (*Oliver*, para 20; *cf R v Hardy*, para 7; *R v Senior*, para 11). The Court of Appeal has not, I think, taken a consistent line on this point (*cf R v Fillary*; *R v Brooks*; *R v Edwards*; *R v Feuer*).

[31] This court has described a quantity of 6,600 images as 'very substantial' (*McGaffney v HM Advocate*, para 8). In *Quinn v HM Advocate* a quantity of 638 images was described as being a 'low number'. In *Robinson v HM Advocate* a quantity of 152 images was said to be a relatively small number of images by comparison with other cases (para 5). In *HM Advocate v Peebles*, a Crown appeal against sentence, the court observed that 171 images was quite a small number by comparison with many other cases (para 8).

[32] The number of indecent images downloaded by offenders reflects the ease with which they can access such material through the internet. Research by the

COPINE project has shown that offenders can soon amass collections of considerable size. It is not unusual for offenders to have more than 40,000 images. The reported Scottish decisions relate to collections numbered in thousands (*Brown v HM Advocate*; *McGaffney*) and tens of thousands (*Ogilvie v HM Advocate*). In *R v Tatam* the number was almost half a million. In my opinion, what is a small or large quantity of material must be, to an extent, a matter of judgment in each particular case; but a general benchmark would be useful. Having reviewed the cases and the literature on the subject, I consider that an offender who takes, distributes or possesses a quantity of indecent images numbered in low hundreds can properly be said to have accessed a small number of images. Quantities of images numbered in high hundreds or in thousands can properly be said to be large.

Moving images

[33] A question arises as to sentencing policy in relation to moving images such as video files. In *McGaffney* this court held, *inter alia*, that the sentencing sheriff was entitled to regard the downloading of moving images as more serious per se than the downloading of still images (para 8). In my view, that proposition is too rigid. Whether a video clip is worse than a still image will depend in every case on its length, on what it depicts and how it depicts it. In short, each case should be judged on its facts (*R v Handley*). In counting the quantity of material downloaded, it is not realistic, in my view, to treat a moving image as if it were equivalent to a multiplicity of stills: nor is it realistic to treat each moving image as if it were equivalent to one still. The sensible approach is simply to make an allowance for the fact that a moving image may be more vivid and corrupting than a still and to make this allowance without attempting any detailed arithmetical computation (*R v Somerset*, paras 10, 13). While each case will turn on its own facts, the primary factors to which sentencers must have regard remain the nature of the indecent activity depicted in the images and the extent of the offender's involvement with it. I think that we can give nothing more definite than that by way of guidance on the point.

What constitutes commercial distribution of indecent images?

[34] The solicitor-advocate for the respondent referred to an apparent inconsistency between *McGaffney v HM Advocate* and *Brown v HM Advocate* as to the meaning of commercial distribution. In *McGaffney* this court held that commercial distribution, in the sense of distribution for financial gain, was more serious than distribution by exchange or barter (para 9). In *Brown*, however, this court took the view that where the appellant was thoroughly immersed in the distribution and exchange of the offending material, although not for financial reward, it could not be said that he did not profit thereby. He was actively engaged, in a significant way, in trading, and encouraging others to trade, with similarly minded persons. In that sense his activities could properly be characterised as commercial (*Brown*, para 9).

[35] Although indecent images of children are commercially available through certain websites, most child pornography is traded through internet chat rooms, news groups and bulletin boards (*cf Barron v HM Advocate*, para 3). In *Attorney-General's Reference (No 89 of 2004)* it was suggested that internet bulletin boards are 'the life blood of the paedophile community' (Kennedy LJ, para 3). It appears that little commercial exchange of child pornography, in the sense referred to in *McGaffney*, takes place through these channels. The COPINE researchers report

that most material can be obtained by offenders without any financial outlay. Offenders often trade images and allow other offenders access to the material in their possession (Taylor and Quayle, *Child Pornography: An Internet crime*, pp 159, 160). In the appeal against conviction in *Peebles v HM Advocate*, this court held that on the extended concept of distribution in sec 52(4) of the 1982 Act, a person who held an indecent computer image in a shared computer folder 'with a view to its being distributed or shown' and therefore committed an offence under sec 52(1)(c), committed the further offence of distributing it, under sec 52(1)(b), when another person accessed it. In *Peebles* (para 6) and in *R v Maunder*, *R v Dooley* and *R v Feather* the images were distributed through file sharing software.

[36] The Internet Watch Foundation ('IWF'), a European Union funded body that tracks illegal online content, reports that in 2003 to 2008 fewer than one per cent of internet sites depicting child sexual abuse appear to have been hosted in the United Kingdom (2008 annual report, p 7). This material proliferates through file sharing, trading and exchange.

[37] Each case will turn on its facts; but, in general, to distribute indecent images on a large scale, by exchanging them or placing them on shared computer folders should, in my view, be equiparated with commercial distribution. Although such offenders do not necessarily benefit financially, they benefit by having the opportunity to access similar material.

[38] I therefore agree with the conclusion of the court in *Brown*. In my view the suggestion to the contrary in *McGaffney* should be disapproved.

Aggravating factors

[39] Pseudo-images should generally be treated as less serious than real images; but they can be just as serious as real photographs; for example, where the imagery is particularly grotesque and beyond the scope of normal photography. Showing or distributing indecent images or pseudo-images, even on a small scale, is to be regarded as a serious offence. Wide-scale distribution of it is in the most serious category of such behaviour.

[40] I agree with the view expressed in the definitive guideline that the following are to be regarded as additional aggravating factors in all cases:

> 'where the images are shown or distributed to others, especially children;
>
> where the offender's collection is systematically stored or organised, indicating a sophisticated approach to trading or a high level of personal interest;
>
> where the images are stored, made available or distributed in such a way that they can be inadvertently accessed by others; and
>
> financial or other gain.'

I agree too that in cases of contact abuse where the offender takes or makes an indecent image of a child contrary to sec 52(1) of the 1982 Act, the following are to be regarded as additional aggravating factors:

> 'the use of drugs, alcohol or other substance to facilitate the offence;
>
> a background of intimidation or coercion;
>
> threats to prevent the complainer reporting the activity; and
>
> threats to disclose the complainer's activity to friends or relatives.'

In all cases the sentencer should have regard to the period of downloading and distribution that is libelled.

Mitigating factors

[41] I agree with the definitive guideline that the following should be regarded as mitigating factors:

> 'where a few images are held solely for personal use;
>
> where the images have been viewed online but not stored; and
>
> where a few images are held solely for personal use and it is established both that the subject of the image is aged 16 or 17 and that he or she was consenting.'

[42] In cases of this kind the good character or background of the accused is often relied on in mitigation. In my opinion, while the good character of the accused is not entirely irrelevant (eg *McGaffney v HM Advocate*, para 10), a sentencer is not obliged to attach much weight to it (*cf Hendry v HM Advocate*). The same view is taken in England and Wales (*cf Oliver*, para 21). The fact that an offender has come from a stable family is a relevant consideration; but it may be double-edged. An offender who has had such good fortune may be regarded as being more reprehensible than one who, for example, has suffered an abused or deprived childhood (*HM Advocate v Clark*, para 11).

[43] Conversely, where the offender's own background has been disturbed, that cannot, in my view, be a powerful consideration in mitigation. I repeat what I said in *HM Advocate v Millbank* (para 28), a case involving charges of lewd and libidinous practices and the taking of indecent photographs of children:

> 'The sentencing judge took into account mitigating factors relating to the respondent's own misfortunes in life. Such factors should not be overlooked; but in a case such as this, the predominant considerations must be the nature and effects of the offences and the need to impose a sentence that will mark the court's view of the gravity of the case.'

Sentence discounts

[44] We have a responsibility to see that the exercise of the sentence discount does not result in there being overall sentences that are inappropriate (*Brown v HM Advocate*, para 12; *cf Du Plooy v HM Advocate*, paras 7, 26).

[45] In cases of this kind, the Crown will seldom be able to lead evidence from the children concerned. An increasing amount of material originates in Asia, Russia and Eastern Europe (*cf* Taylor and Quayle, *Child Pornography: An Internet crime*, pp 45, 46). There will usually be no question of saving vulnerable witnesses from the ordeal of giving evidence (*cf Kay v HM Advocate*, para 4). Therefore an early plea of guilty will not normally have all the merits that would attract a discount of one-third (*McGaffney v HM Advocate*, para 11). In *Brown*, where the sentencing judge allowed a discount of one-third following a plea of guilty, the court recognised that where there was no conceivable defence, and where none had ever been suggested, and where the appellant had made full admissions at the outset, a discount of one-third of the sentence, despite the early plea, was inappropriate (*Brown*, para 10). I agree entirely.

[46] In *Spence v HM Advocate* (para 14) the guidance provided by this court as to appropriate levels of discount is identical to that suggested in the definitive guideline on *Reduction in Sentence for a Guilty Plea* (pp 5, 6). In my view, the guidance given on the point in *Spence* is sound.

Section 197 of the 1995 Act

[47] Since I understand that your Lordship and your Ladyship agree with this opinion, our decision will be one to which sentencers should have regard, subject always to the exercise of their own judicial discretion in the circumstances of the case (1995 Act, sec 197).

Viewing the images before sentence

[48] The Advocate-depute observed that in cases of this nature, there appears to be an inconsistent approach by sentencers to viewing the images libelled before passing sentence. He suggested that a full understanding of the nature of the images in these cases is best obtained by the sentencer's viewing a selection of images before imposing sentence. He suggested that we should give guidance as to whether sentencers should view the offending material (*Oliver*) or a sample of it (*R v Thompson*).

[49] In giving the opinion of the court in *HM Advocate v Millbank* I said that every sentencing judge has a discretion whether or not to look at individual productions. He may think it useful to do so if it would give him a better understanding of the nature of the offences and of their degree of gravity. On the other hand, he may conclude that the specification of the offences in the indictment, amplified by the Crown narrative, is sufficient for his purpose (*Millbank*, para 17). We drew this decision to the attention of the Advocate-depute.

[50] Rook and Ward (p 129) suggest that, although it may be distressing, judges should view a good sample of the material before them so that they can form their own impression of its seriousness and of the accused's proclivities. In Scotland, however, following *Millbank*, sentencers retain a discretion whether or not to view the material or a representative sample. The Crown's recent practice of making available an agreed sample of the images is helpful. In cases with a high volume of images, the Crown has in the past invited the court to pronounce sentence on the basis of a categorisation of an agreed sample of images. A sentencer who has not dealt with cases of this kind may find it useful to view such a sample. The decision in every case must lie with the individual sentencer. My own view is that if the sentencer thinks it appropriate to view all or a sample of the images, he should be conscious of the ever-present danger of passing sentence when his emotions have been raised by what he has seen.

Decision in this appeal

[51] The test in this appeal is whether the sentence was unduly lenient; that is to say, whether it is outwith the range of sentences that the sentencer, applying his mind to all relevant factors, could reasonably have imposed (*HM Advocate v Bell*, p 353). In my opinion, it is.

[52] The respondent downloaded over 79,000 still images of child sexual abuse and almost 1,200 moving images over a period of four-and-a-half years. He distributed the images over a period of four years. The images ranged across the entire *Oliver* scale, many thousands of them being at levels 4 and 5. The respondent's methodical approach to trading and exchanging them was to store them under specific subject headings. The material is vile. I shall not describe it. The respondent's claim that he downloaded and stored it in order to trade with others does not reduce the gravity of the offence. If anything, it increases it (*cf McGaffney v HM Advocate*, para 9).

[53] The sentence was unduly lenient. We must therefore consider the sentence afresh. The respondent is a first offender. He co-operated with the investigating authorities and expressed remorse. However, for the reasons that I have given, I consider that the requirements of punishment, denunciation and general deterrence are paramount in a case of this nature.

[54] In addition to the English sentencing guidelines to which I have referred, two recent decisions of this court (*Brown v HM Advocate*; *Jordan v HM Advocate*) give further guidance. In *Brown*, a first offender pled guilty to making indecent photographs for two years by downloading from the internet and to distributing indecent photographs for 13-and-a-half months. He had 4,542 images across the whole *Oliver* scale. This court imposed a sentence of six years' imprisonment, discounted from seven-and-a-half years, with an extension period of four years. In *Jordan* the appellant pled guilty to a single charge of making indecent photographs of children by downloading over 8,000 indecent images. He had previous convictions for sex offences. This court imposed an extended sentence of ten years, being a custodial term of four years and eight months, discounted from a starting point of seven years, and an extension period of five years and four months.

[55] This appeal demonstrates how too rigid an adherence to guidelines can distort the sentencing exercise and produce an unjust result. If one looked no further than the definitive guideline a sentence in the range of two to five years' imprisonment would seem appropriate. The sentence must, however, reflect the culpability of the respondent. Having regard to the number and nature of the images; the period of time involved; his sophisticated approach to the classification, storage and trading of the material, and to the decisions of this court in *Brown* and *Jordan*, with which I agree, I consider that a *cumulo* sentence of seven years' imprisonment should be the starting point on the charges with which we are concerned.

[56] The sentencing judge found that the respondent was remorseful and that he cooperated with the authorities (report, p 21). Nonetheless, the evidence was conclusive; there was no question of there being a substantive defence, or of sparing vulnerable witnesses or complainers from the ordeal of giving evidence. In these circumstances, the discount of one-third is plainly excessive. The respondent could have pled at the outset by procedure under sec 76 of the 1995 Act. Instead he delayed the plea until there was a continued preliminary hearing. The sentencing judge says that that delay was referable to a concern on the part of the defence that the respondent fully understood the implications of his admissions of guilt. There is no suggestion that the respondent is disadvantaged by, for example, learning difficulties (*cf Peebles v HM Advocate*). On the contrary, he has shown considerable expertise in the commission of these offences. So the delay in tendering the plea must be reflected in the amount of the discount that this court can properly allow (*cf* my observations in *HM Advocate v Thomson*, para 27).

[57] In *Spence v HM Advocate* (para 14), the court took the view that a clear indication of an intention to plead guilty at the first calling of a case at a preliminary hearing might attract a discount in the order of one-quarter. Thereafter, any discount can be expected to reduce further. I agree with that approach.

[58] In the whole circumstances, I consider that the discount in this case should be restricted to one-tenth.

Disposal

[59] I propose to your Ladyship and your Lordship that we should allow the appeal, quash the sentence imposed on charges (9) and (10) and substitute a sentence of six years and four months' imprisonment. I propose that this sentence, like the sentence appealed against, should run consecutively to the periods of imprisonment imposed on the other charges.

Postscript

[60] We widened the scope of this appeal in light of the Crown's request that we should provide guidance on these matters in terms of sec 118(7) of the 1995 Act. I agree entirely with the view that judicial guidance on sentencing in offences of this kind is now opportune. I greatly regret that the Crown failed to give us submissions appropriate to that purpose. The written case and argument for the Crown failed to refer to the decision of this court in *HM Advocate v Millbank*. It became apparent at the hearing that it had been overlooked. The submission for the Crown proceeded on an incomplete understanding of the COPINE and *Oliver* scales. The submissions on the relative seriousness of still and moving indecent images were not supported by reference to the approach of the Court of Appeal. On the issue of what should constitute commercial distribution, there was no submission on the conflict between the decisions in *McGaffney v HM Advocate* and *Brown v HM Advocate*. In the result, in giving such guidance as we can, we have had to rely to a great extent on some useful insights offered by the solicitor-advocate for the respondent and on the research resources available to us.

[61] In *HM Advocate v McKay* this court took the view that in appeals under what is now sec 108(2) of the 1995 Act it is entitled to expect from those representing the Crown a high standard of care and accuracy from the outset. The court's observations in that case apply with even greater force when the Crown seeks a guideline judgment of this kind.

Lady Paton— [62] I agree with your Lordship in the chair and have nothing to add.

Lord Hardie— [63] The opinion of your Lordship in the chair comprehensively reviews the relevant authorities in England and Scotland as well as the definitive guideline from which it has been possible to provide some guidance to the approach to sentencing in cases of this kind. I am entirely in agreement with that guidance.

[64] I also agree with the disposal proposed by your Lordship in the chair in this case and have nothing further to add.

The Court allowed the appeal.

Crown Agent – MFY Partnership (Airdrie)