

EDITORIAL NOTE: NO SUPPRESSION APPLIED.

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2017-004-001218
[2017] NZDC 10368**

THE QUEEN

v

JOHN NEIL CARDWELL

Hearing: 18 May 2017

Appearances: C McDiarmid for the Crown
P Heaslip for the Defendant

Judgment: 18 May 2017

NOTES OF JUDGE N R DAWSON ON SENTENCING

[1] Mr Cardwell, you appear in Court today for sentencing on one charge of knowingly distributing objectionable publications, a representative charge that has a maximum sentence of 14 years' imprisonment. You also appear for sentencing on a charge of exporting objectionable publications, again a representative charge that has a maximum sentence of a \$5000 fine and finally, you appear for a charge of possession of a Class C drug namely cannabis.

[2] You are 67 years of age and you have never appeared in a New Zealand Court before. On 10 October 2016 you used a factitious name and distributed to a New Zealand Department of Internal Affairs investigator a link containing 53 objectionable images and video files depicting the sexual exploitation of children.

[3] On 26 October 2016 using a factitious name, you distributed to the investigator a link containing an objectionable image depicting the sexual exploitation of a child. On 28 October 2016 using a factitious name, you distributed to the investigator three links containing three objectionable image files depicting the sexual exploitation of children.

[4] An example of the type of image distributed was of a naked female child and naked male child, the female child performs fellatio on the male and the young male then performs oral sex on the female and then has intercourse with her. An erect, adult male penis is also present during the video.

[5] Between 1 November 2016 and 19 December 2016 you uploaded to an internet chat room based outside of New Zealand three objectionable publications depicting the sexual exploitation of children. The uploading was reported to New Zealand law enforcement authorities as it was believed the offender was within New Zealand.

[6] The following is an example of a publication exported. The female child was wearing no pants and the female's legs are parted exposing her vagina. Enquiries by Customs into the internet protocol numbers distributing and uploading the publications identified your address. On 2 February 2017 when you were departing

New Zealand on a holiday you were redirected by a Customs officer and your smart mobile phone was retained for forensic examination.

[7] At the same time a search warrant was executed on your address and electronic devices were retained from the search for forensic examination and approximately five grams of cannabis was also located at your property.

[8] When you were questioned at the airport you made statements that you use factitious names and you were a regular user of chat websites, you would share links with people including internationally that contained children aged approximately 12 years of age, that you knew child exploitation publications were illegal, you knew the chat website was not based in New Zealand and the cannabis at the address was for your own personal use. You were then arrested.

[9] I have read the pre-sentence report that has been produced for the Court. I have also read and noted the United Kingdom Sentencing and Advisory Board Guidelines for sentencings of this type and I have also read the psychological assessment of you that has been produced by your counsel. I have also read and heard substantial submissions from your counsel.

[10] When I sentence you I need to impose a sentence that promotes within you a sense of responsibility and an acknowledgement for the harm to the children depicted in the publications. The abuse of these children would not occur if it were not for the existence of end users of these publications. You were not only viewing them but passing them on to others for their viewing thereby multiplying the damage done to the victims.

[11] Denunciation and deterrence are prime sentencing factors. It is offending that is utterly repugnant to any right thinking person. The gravity and your degree of culpability are both high in that you actively sought out these publications and passed them on to others. The effect on the victims of the offending cannot be overlooked.

[12] There are aggravating factors to you offending. The first is the extent of harm from the offence which is high. It helps fuel the market for the sexual abuse and exploitation of children who should never be treated in this way. The abuse is also ongoing as they remain on the internet and the distribution of their abuse continues in perpetuity worldwide. The victims are very obviously vulnerable to exploitation and sexual abuse. Your premeditation is inherent in this type of offending but I need to take into account the repeated nature of your offending.

[13] In mitigation you have entered guilty pleas at an early stage and you are entitled to a 25 percent discount. You have also expressed remorse through your counsel for your activities. You are a person previously of good character and this is a very significant fall from grace for you. You have also made considerable rehabilitative efforts since your arrest.

[14] The probation report assessed that should you not access professional assistance for yourself, your addiction to viewing illicit material now at medium risk of re-offending may escalate. It does also note that you have undertaken five sessions with a psychologist. The psychological report notes that you are at a low/moderate risk of internet sexual recidivism. Based on the information available at the time of writing the report there was no evidence to indicate that you might be at risk of future contact offending against a child. It notes to your credit you express remorse and victim empathy, shame and motivation to desist which impressed as sincere and you had meaningfully engaged in five sessions of offence focused psychological intervention. Those were all matters that I can take into account to your credit.

[15] The maximum sentence for this type of offending increased in June 2015. Davison J in the *Tilyard* case considered the application of the 2015 amendment to penalties of this type of offending. He said:

“This is a cycle we are aiming to disrupt by increasing the penalties for the possession, production and distribution of child exploitation material. This legislation sends a clear message that it is a repugnant series of conduct that encourages the abuse of children for which New Zealand has zero tolerance. The legislation seeks to address this increased activity by criminalising indecent communications with children and ensuring that those who possess

or trade in child exploitation material receive a sentence that reflects the very grave nature of the offending.”

He goes on to say, “Possessing and trading in images depicting the sexual exploitation of children is grave offending that in my view warrants stronger penalties than other types of objectionable publications.”

[16] In my view the offending in your case is more serious than that described in the case of *Tilyard*. The images included a significant number of what are described as Category A publications in the United Kingdom Sentencing Advisory Board Guidelines, which is the most serious category in that it involves actual penetration through intercourse and objects, a large number of moving images and younger victims. The distribution in the present case also occurred over approximately nine weeks compared to a single day in *Tilyard*.

[17] Taking all submissions and cases referred to this Court into account I am of the view that for the lead offence of knowingly distributing objectionable publications an appropriate starting point is a sentence of imprisonment of three years and nine months. That would be uplifted by one month for the cannabis charge to three years and ten months. For your remorse, insight and not having had previous convictions I deduct four months from that sentence. For your rehabilitative efforts I deduct a further four months reducing it to three years and two months. For your guilty plea I deduct 25 percent which is 10 months reducing your sentence to two years and four months.

[18] On the charge of knowingly distributing objectionable publications you are sentenced to imprisonment for two years and four months. The charge of exploiting objectionable publications is a fine only matter and for that charge you are convicted and discharged. The charge of possession of cannabis you are convicted and sentenced to one month’s imprisonment to serve concurrently. I also make an order for the destruction of your laptop.

[19] I now need to consider the application to have the suppression of your name continue. The presumption for applications of this type is in favour of open justice. The reasons that have been advanced for name suppression include health concerns

for you and emotional stress and a risk of self-harm if name suppression is not granted. It also concerns the health and safety of your partner and it is submitted that undue suspicion would fall upon your two adult children and three grandchildren. It is also submitted that it would bring unfair attention and suspicion upon your recent former work colleagues.

[20] In my view the health concerns of you and your partner could both be managed by appropriate medical assistance. The risk of self-harm potential is not particularised and could be monitored while you are in prison. Embarrassment, self loathing and emotional distress are reactions that are not uncommon in relation to this type of offending.

[21] Your actions in no way reflect adversely upon your partner, children, grandchildren or your former work colleagues. They were actions which you alone are responsible for. The publication of your name in this case does not amount to undue hardship. It is a predictable outcome of this offending. The application for permanent name suppression is therefore declined.

N R Dawson
District Court Judge