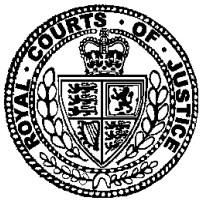

Neutral Citation Number: [2021] EWCA Crim 327

Case No: 201904576 B4
201904577 B4
202000108 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CENTRAL CRIMINAL COURT
THE COMMON SERJEANT
T20197108

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2021

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE HON MR JUSTICE SWEENEY
and
THE HON MRS JUSTICE ELLENBOGEN

- -

Between :

Novlett Robyn Williams **Jennifer Hodge** **Dido Massivi**	**Appellants**
- and -	
Regina	**Respondent**

- -
- -

Anesta Weekes QC (instructed by **Kingsley Napley LLP**) for the **First Appellant.**
Richard Wright QC (instructed by Crown Prosecution Service Appeals Unit) for the **Respondent**

Hearing dates : 18 February 2021

- -

Approved Judgment

Dame Victoria Sharp P :

Introduction

1. On 17 November 2019 the three applicants, Novlett Robyn Williams, Jennifer Hodge, and Dido Massivi were convicted after a three-week trial at the Central Criminal Court before the Common Serjeant and a jury, and sentenced on 26 November 2019 as follows:

    i) Ms Williams was convicted of possession of an indecent photograph of a child contrary to section 160(1) of the Criminal Justice Act 1988 (count 5). She was sentenced to a twelve-month community order, with a requirement to perform 200 hours of unpaid work and ordered to pay £2500 towards the cost of the prosecution by 31 May 2020. She was acquitted on one count, Count 6, corrupt or other improper exercise of police powers and privileges, contrary to section 26(1) of the Criminal Justice and Courts Act 2015;

    ii) Ms Hodge was convicted of one count: distributing an indecent photograph of a child contrary to section 1(1)(b) of the Protection of Children Act 1978 (count 4). She was sentenced to a twelve-month community order, with a requirement to perform 100 hours of unpaid work;

    iii) Mr Massivi was convicted on three counts: distributing an indecent photograph of children, contrary to section 1(1)(b) of the Protection of Children Act 1978 (count 1); possessing an extreme pornographic image, contrary to section 63(1) of the Criminal Justice and Immigration Act 2008 (count 2); and distributing an indecent photograph of a child, contrary to section 1(1)(b) of the Protection of Children Act 1978 (count 3). He was sentenced to eighteen months' imprisonment, suspended for two years, with a requirement to perform 200 hours of unpaid work.

2. On 22 January 2020, this court (Holroyde LJ, Soole J and HHJ Williams) refused the Attorney General's application for leave to refer the sentences of Mr Massivi and Ms Hodge as unduly lenient.

3. Ms Williams applies for an extension of time (32 days) in which to renew her application for leave to appeal against conviction. Her renewed application in respect of sentence was not pursued before us. Ms Hodge renews her application for an extension of time (20 days) in which to apply for leave to appeal against conviction. Mr Massivi renews his application for an extension of time (20 days) in which to apply for leave to appeal against conviction. Each of these applications was refused by the single judge. Ms Williams is represented by Ms Anesta Weekes QC who appeared for her at trial. The renewals of Ms Hodge and Mr Massivi are made on the papers only.

4. After hearing argument, we announced that all applications were refused. These are our reasons.

The facts

5. Ms Williams and Ms Hodge are sisters. At the time when the events with which we are concerned occurred, Mr Massivi and Ms Hodge had been partners for about 10 years and Ms Williams was a high-ranking police officer (she was at the time, serving as a temporary Chief Superintendent in the Metropolitan Police).

6. Mr Massivi was a member of a WhatsApp group whose members shared lawful adult pornography. In February 2018 he received the following from a member of that group: a video of an adult woman engaging in penetrative sexual activity with two children aged about 7 and 12 (count 1); a video of a woman having sexual intercourse with a horse – an extreme pornographic image (count 2); and a video of a girl aged about 5 performing oral sex on an adult man (count 3). The count 3 video is a Category A indecent image. The adult male cannot be identified but the child's face is clearly captured. The video is 50 to 56 seconds in length.

7. Mr Massivi was not the originator of those videos and had not asked for them to be sent to him. He distributed both the count 1 and count 2 videos five times. On 2 February 2018, Mr Massivi sent the count 3 video to Ms Hodge. He also sent it to two other persons. When Ms Hodge saw the count 3 video the following morning, she sent it to her sister and sixteen other persons via WhatsApp. She added a note which said: "Sorry had to send this. It's so sad that this person would put this out. Please post this and let's hope he gets life."

8. Ms Williams tried to call Ms Hodge on WhatsApp at 11.45 am, that is about an hour after the count 3 video (hereafter 'the video') was delivered to her telephone, and then sent a message via WhatsApp to her sister which said: "Please call". Ms Hodge tried to call Ms Williams at 1.34 pm but did not get through. Ms Hodge subsequently sent a further message to her sister in which she said: "Hi, I called yes, it's so bad, Dido sent this to me last night, could you find out if its been reported, I'm going to see a friend in hospital soon". At 7 pm that evening Ms Hodge called Ms Williams. The call connected for 3 minutes and 22 seconds. On the following day, 4 February 2018, the sisters met at the gym at about 1 pm and spent about 8 hours in each other's company. At 10.41 pm Ms Hodge sent a message to Ms Williams saying that she had got home.

9. On 4 February 2019, one of those who had received the video from Ms Hodge the previous day, reported her receipt of it to the police and that night, Ms Hodge and Mr Massivi were arrested. Ms Hodge rang her sister from police custody the following morning. As a result of what Mr Massivi told the police, enquiries were made of Ms Williams; she was spoken to on 5 February 2019, and her telephone was partially downloaded. This revealed the video she had received from Ms Hodge.

10. In their police interviews, the applicants said as follows. Ms Williams said that she had never seen the video and did not know that her sister had sent her an indecent image of a child. Mr Massivi said that Ms Hodge had sent the video to her sister precisely because she was a police officer. Ms Hodge was interviewed on three occasions. She said that she was angry at seeing the video and wanted to let people know what was on social media. Although she initially denied having spoken to her sister that weekend, she then accepted that they had seen each other at the gym on the Sunday. In an interview on 28 June 2018, she accepted that she had spoken to her sister on the Saturday evening (the 3 February) and had mentioned the video that had

been sent in that call. She said she wanted the video reported and had sent it to her sister for that reason.

The trial

11. The prosecution did not allege that any of the applicants had any sexual interest in the count 3 video, or that they were distributing it or possessing it for any sinister purpose. Instead, it was said that each of them had made serious errors of judgement about how to handle it; and in dealing with it in they way they did, each had committed serious criminal offences.

12. In opening the case, it was acknowledged by the prosecution that this was a sad case. So far as Ms Williams was concerned, the prosecution case was that she had an obligation to report the video because she was a police officer of high rank. She had not done so and failed to exercise her powers of a police officer in that connection because she knew this would place her sister and her sister's partner at risk of arrest and criminal investigation. It was said that in a sad chain of events, she had committed herself to a lie. Rather than face the fact that she had made an error of judgment when confronted with the impossible situation her sister had created by sending her the video, namely accepting that she had received it, had agonised over what to do with it, knowing that to report it would see her sister arrested and then made the calamitous decision to do nothing and hope for the best, she had, instead, committed herself to the lie that she had never seen the image and did not know that her sister had sent her an indecent image of a child.

13. To prove their case, the prosecution relied principally on expert evidence about the data extracted from the applicants' mobile telephones, including a chronological series of WhatsApp messages passing between the sisters; agreed evidence from individuals to whom Ms Hodge had sent the video; oral evidence from two women to whom Ms Hodge had sent the video; the fact that the sisters had spent much of the day after the video was sent by Ms Hodge to Ms Williams, together, despite having had no plans to do so; a tile or thumbnail of what Ms Williams would have seen on her telephone when her sister sent her the video, which was the first frame of the video, and the fact that after Ms Hodge was arrested, and called her sister on the telephone (from the police station where Ms Hodge was being held in custody) Ms Williams had made no effort to contact the police station, or surrender her telephone to the police, or to interrogate it.

14. In a little more detail, the unchallenged or agreed expert evidence included the following. The "Sorry" message from Ms Hodges to Ms Williams reached Ms Williams' telephone at 11.00 am. It was opened at 11.44 am. When the video was forwarded to her and when she entered the chat thread at 11.44 am. Ms Williams' telephone was connected to the WiFi This meant that the thumbnail image as it appeared on her telephone would have been clear and not blurred from the moment it arrived. The image put in evidence before the jury, was exactly how the thumbnail would have appeared on Ms Williams' telephone. It showed a very young girl with an adult penis in her mouth. After Ms Williams entered the chat thread at 11.44 am, she had the screen open with that image for 12 seconds. Within a minute of entering the chat thread, Ms Williams had rung Ms Hodges. Ms Hodges did not pick up the call.

Eleven seconds later, Ms Williams messaged her sister saying, "Please call.". When she typed that message, the thumbnail would have been on the screen, directly above where she was typing.

15. Further matters relied on (at trial, and at the close of the evidence) were the message from Ms Hodge read by Ms Williams, asking her to check if "it" had been reported, the fact that at 7 pm that evening, the sisters had spoken for more than three minutes; the fact that Ms Hodge told the police she had discussed the image with her sister in that conversation; she had repeated this in her first defence statement, recanted it in her second defence statement, and in evidence denied that they had discussed the image. The prosecution said that the jury were entitled to conclude that Ms Hodge was lying to protect her sister, and that therefore the women had discussed the image. Yet further, the sisters spent the next day and evening in each other's company. Though Mr Massivi and Ms Hodge had said Ms Hodge travelled to London to discuss the image with her sister, Ms Hodge said they had no opportunity to do so and forgot to raise it with her. Again, the jury were entitled to conclude so the prosecution said, that the evidence of the applicants amounted to a dishonest exercise in seeking to exculpate Ms Williams.

16. The applicants all gave evidence in their own defence. The underlying fact of possession or distribution as the case may be, in relation to the various counts was not in dispute nor was the nature of the material found. In relation to counts 1 to 5. The applicants relied upon the statutory defences available in respect of the charges they faced, which the burden was upon them to establish, on the balance of probabilities. It is convenient to set out the statutory defences here, the material parts of which are as follows:

    i) Section 1(4) of the Protection of Children Act 1978 provides that it is a defence for a person charged with an offence under section 1(1)(b) or (c) of that Act of distributing or possessing with a view to distribution an indecent photograph or pseudo photograph of a child to prove – (a) that he had a legitimate reason for distributing or showing the photographs or pseudo-photographs, or (as the case may be) having them in his possession; or (b) that he had not himself seen the photographs or pseudo-photographs and did not know, nor had any cause to suspect, them to be indecent;

    ii) Section 65 of the Criminal Justice and Immigration Act 2008 provides that it is a defence for a person charged with an offence under section 63(1) of that Act of being in possession of an extreme pornographic image to prove: "(a) that the person had a legitimate reason for being in possession of the image concerned;(b) that the person had not seen the image concerned and did not know, nor had any cause to suspect, it to be an extreme pornographic image; (c) that the person—(i) was sent the image concerned without any prior request having been made by or on behalf of the person, and (ii) did not keep it for an unreasonable time."

    iii) Section 160(2) of the Criminal Justice Act 1988 provides that it is a defence for a person charged with an offence under s160(1) of that Act of possession of an indecent photograph or pseudo photograph of a child 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 that he did not keep it for an unreasonable time.

17. So far as their individual cases were concerned, the applicants' position at trial was as follows.

18. The defence case for Ms Williams was that at no point did she view the image that was the subject of count 5. She knew that her sister had sent her something on WhatsApp but did not know it might be an indecent image until she received the telephone call from her sister in custody on 5 February 2020. She did not see the image on her telephone at any time when it was in her possession. She had no reason to suspect it was an indecent image and she did not click on the thumbnail to play the video. She did not accept that she and her sister had talked about the indecent image on the day it was sent to her, or that her sister had asked her to report it.

19. In her evidence in chief Ms Williams said: "I do not remember looking at the phone at this time. It is possible I saw a message and the thumbnail, but I have no recollection of that specifically and I saw nothing that looked like an indecent image." In cross-examination, she said: "I did not know what I was seeing. The fact that the thumbnail was open on my screen does not mean that I had registered, understood or engaged with it." She further relied on the fact that it was agreed by the experts that there was no evidence that she had actually played the video. She also relied on evidence of her good character, which came from a number of impressive sources.

20. Ms Hodge's case was that she had a legitimate reason for distributing the video and she had a defence therefore under section 1(4)(b) of the Protection of Children Act 1978. Mr Massivi had sent her the video and she had been shocked at its content. She was horrified that such material was available on the internet and forwarded it to her friends for "awareness" to alert them about it and in the hope that something could be done. In respect of her sister, she was especially seeking her advice about what official action could be taken. She discussed the video with Mr Massivi that evening and agreed to discuss it with her sister the following day in private. Ms Hodge said that the video was not discussed between the sisters on 3 February, and she had forgotten about it. She and her sister had met the following day at the gym but had not discussed the video.

21. Her evidence at trial was inconsistent with what she had told the police on 28 June 2018 and her defence statement. In summary, her account at that stage was that she had raised the topic of her message and the video with her sister when they spoke on the evening of 3 February; and the two of them had arranged to meet the next day and discuss the matter in private. In a late amendment to her defence statement however, Ms Hodge said she did not recall any conversation between them about the message and video on that occasion.

22. As for Mr Massivi, his case was that he sometimes received adult pornographic images on his mobile telephone which were sent as a joke, and not for sexual arousal. He did not always open them and sometimes they were ignored. He accepted the videos that were the subject of counts 1 and 2 were found on his mobile telephone but did not accept that he had seen or saved them. His case on those counts was he had

sent the videos on without viewing their contents and without knowing or having any cause to suspect that the files contained indecent images of children, or extreme pornographic images. He relied therefore upon the statutory defences contained in section 1(4)(b) of the Protection of Children Act 1978 and section 65(2) of the Criminal Justice and Immigration Act 2008. His case was that the only pornographic and indecent image that he saw was the video that was the subject of count 3; and he was so appalled by it that he forwarded it to Ms Hodge, having asked her to forward it to her sister. In his evidence he said that he had not reported the matter to the police himself because he thought Ms Hodges was going to report it through her sister and because he knew she was going to meet her sister on the Sunday in order to discuss the video. His case therefore was that he had a legitimate reason for forwarding it and for count 3, relied upon the defence in section 1(4)(a) of the Protection of Children Act 1978.

23. It followed that the issues at trial and for the jury to determine were relatively narrow ones. As the judge said to the jury, on counts 1 and 2 the central issue was whether Mr Massivi had seen the images; on counts 3 and 4, it was whether Mr Massivi and Ms Hodge had had a legitimate reason to distribute the images; on count 5 it was whether Ms Williams had known that the video she had received was indecent and on count 6, it whether Ms Williams should have taken action to report it.

Grounds of appeal against conviction: Ms Williams

24. In the written grounds of appeal, it is said on Ms Williams' behalf (a) that the conviction was against the weight of the evidence; (b) that the trial judge wrongly admitted in evidence a written description of the count 3 video and (c) that the trial judge wrongly admitted the evidence of the thumbnail image that would have been present on Ms Williams' telephone. These grounds, for which leave was refused, were supplemented by additional points made by Ms Weekes QC both in writing and orally. A further ground (Ground 2) which alleged that the verdicts (of guilty on count 5 and not guilty on count 6) were inconsistent, is no longer pursued.

25. Taking first the grounds put before the single judge, we agree with his succinct reasons for refusing leave which were these:

> "(a) As you were in law in possession of the video, the only issue on count 5 was whether you could satisfy the jury on the balance of probabilities that you had not watched the video and that you did not know or have any reason to suspect that it was indecent. Your grounds of appeal reargue evidential matters which you argued before the jury at trial and which the jury rejected. There was clearly evidence upon which the jury could convict you and I note at no stage was a submission made on your behalf that there was no case to answer or that the case should be withdrawn from the jury. You say that the credibility of your co-accused JH, was destroyed during the case and that there was other evidence which undermined her evidence and supported your case. These were all matters for the jury and were fairly and properly left to the jury for their consideration.

> (b) It was entirely appropriate for the jury to be aware of the content of the video which was central to the case they were trying involving three defendants, two of whom were advancing a legitimate reason for distributing it. The information was placed before the jury in the least prejudicial manner.
>
> (c) What you would have been able to see on the thumbnail was a central issue in the case. It was not possible to use your original phone to demonstrate what would have been visible to you, therefore, an image was produced on a computer screen for the jury to view which the experts agreed accurately replicated what would have appeared on the screen of your phone. This evidence was properly admitted."

26. A number of additional points are now raised. No amended grounds were prepared, nor was leave sought in advance of the hearing to introduce them. Nonetheless, we heard argument on these points *de bene esse*, and can state our views. Focussing on the matters advanced by Ms Weekes QC orally, it is said that the judge's directions on the law on count 5 contained important omissions. In particular, they did not contain any guidance as to whether the defence available to Ms Williams (that she "had not herself seen the image and did not know, … [it to be indecent]") had a subjective or objective element to it, or as to the meaning of the words: 'Nor had any cause to suspect' and whether they were to be applied subjectively or objectively.

27. In our view, there is no merit in the criticisms made of the judge's summing-up on count 5 (or indeed of his summing-up more generally). We note first, that the written directions were the subject of discussion with counsel in the usual way and were agreed. Secondly, there was no suggestion during the course of the summing-up that they needed any amendment or correction. Thirdly, those directions were rightly tailored to the issues the jury had to decide on the evidence that had been placed before them, and having regard to what each of the applicants had said in their defence.

28. In his directions to the jury on count 5, the judge said that the prosecution had to make the jury sure that Ms Williams had the count 3 video in her possession. For these purposes, possession was established if Ms Williams had knowledge of the relevant digital file, which she had capacity to access. The prosecution did not need to establish that she had scrutinised the material, nor that she had knowledge of the content of the video. There was no dispute that the thread containing the thumbnail of the video was opened on Ms Williams' telephone and therefore available to be viewed by her. Regardless of the view the jury took as to whether or not during that period she was focussing her attention on what was on the screen, the jury would be likely to conclude, as a matter of law, that she was in possession of the image. The defence, therefore, which it was for Ms Williams to prove on a balance of probabilities, was that she had not herself seen the image and did not know nor have any cause to suspect it to be indecent. Having reminded the jury of Ms Williams' evidence, the judge went on to say this. "So far as this offence is concerned, it is a defence for a defendant to prove on a balance of probability that she had not herself seen the image

and did not know, nor have any cause to suspect it to be indecent…It follows from the above that if Ms Williams establishes that it is more probable than not that the first time she became aware that her sister had sent her that video was when her sister telephoned her from Colindale police station on the morning of Monday, 5 February she would not be guilty of this offence. Conversely, if she knew about it on the Saturday or Sunday, she would be guilty."

29. Further, after reminding the jury of the expert evidence in the case, and that the thumbnail would have been visible to Ms Williams for 12 seconds, the judge said he would remind the jury of Ms Williams' account of what she said she actually saw at the time "because of course what is visible and capable of being seen is not necessarily what a person actually saw: it depends obviously on the extent to which they were focussing their attention and their concentration on what was on the phone."

30. There was no dispute, but that Ms Williams was in possession of the indecent image or that it was accessible to her or that she knew that she had received an image. Thus, she was guilty unless she was able to establish the statutory defence on which she relied provided by section 160(2)(b) of the Criminal Justice Act 1988. In that connection, she had to prove that she had not seen the image and that she did not know it was an indecent image of a child nor had she cause to suspect that it was an indecent image.

31. There was no dispute either as to what the thumbnail image on Ms Williams' telephone would have shown or that the image would have been clear, rather than blurred. Ms Williams' case was that though the thumbnail on her telephone showed an indecent image "I did not know what I was seeing. The fact that the thumbnail was open on my screen does not mean that I had registered, understood or engaged with it." On one view, it might be said that as Ms Williams had admitted in evidence that she had seen the image, the statutory defence she relied on was not available to her at all: see *R v Collier* [2004] EWCA 1411 at para 22. See further, *Atkins v DPP* [2000] 1 WLR 1427 and *R v Land* [1999] QB 65. As it was, however, the judge's summing-up to the jury was conspicuously fair to Ms Williams and helpful to the jury.

32. The straightforward issue for the jury to determine was whether Ms Williams could satisfy the jury that she had not seen the image and did not know, nor had any cause to suspect, it to be indecent. The jury were entitled to reject Ms Williams' evidence on that issue. The prosecution case on count 5 was a strong one.. We are satisfied her conviction is safe.

Grounds of Appeal against conviction: Ms Hodge

33. It is said, in summary, that Ms Hodge had a legitimate reason for sending the video, her motivation was to ensure the perpetrator would be punished, this was a wholly exceptional case and that the judge misdirected the jury so that she was convicted for "mere distribution."

34. We agree with the reasons given by the single judge for refusing Ms Hodge's application for leave to appeal against conviction. He said:

> "You were not convicted for "mere distribution without consideration of the defence" that the distribution was for a legitimate reason. The judge directed the jury…as to the subjective and objective nature of the test for legitimate reason…the judge explained how the psychiatric evidence supported the genuineness of your reaction to the video (the subjective element of the test) and again emphasised the objective assessment the jury had to make. These were matters for the jury to consider and the judge gave them accurate and fair directions.
>
> The matters you raise do not cast doubt on the safety of your conviction."

Grounds of Appeal against conviction: Mr Massivi

35. On behalf of Mr Massivi, it is said that his only motivation for distributing the indecent material was to make the recipients aware of the unsavoury content, with no encouragement to distribute it. He was entitled to rely upon the defence that he had a legitimate reason for his actions. In this wholly exceptional case, the judge erred in failing to warn the jury that mere distribution was not sufficient. In sending it to his partner, Mr Massivi knew she would be horrified by what she saw. Her sister was a serving police officer of considerable experience and it was perfectly understandable that she be advised of its contents. The judge should have advised the jury to be reluctant to convict a defendant who sends an obscene video to his partner in the knowledge that she had a sister who may well be instrumental in preventing its future distribution.

36. In his case too we agree with what the single judge said when refusing leave:

> "Although your grounds of appeal focus in particular on count 3, you appear to be seeking to appeal your conviction on all three counts. "
>
> Count 1
>
> The issue on this count was whether you had proved on the balance of probabilities that you had not watched the video and did not know and had no reason to suspect it to be indecent. The video was sent on by you on five occasions on 29 January 2018. The judge properly explained to the jury the issue they had to decide. His direction was accurate and fair.
>
> Count 2
>
> The same issue arose for the jury's decision on this count and, again, the judge accurately and fairly explained the issue to the jury.
>
> Count 3

> The issue on this count was different. It was whether you had a legitimate reason for distributing the video in the way that you did, and it was for you to prove on the balance of probabilities that you had such a reason. Your grounds of appeal concentrate on the forwarding of the video to your partner so that it could be forwarded to her sister who was a police officer. However, the evidence showed that you distributed the video more widely … The judge gave the jury an accurate explanation of what is meant by a legitimate reason…and reminded the jury of your evidence about your reasons for forwarding it…It was a matter for the jury to decide, looking at all the evidence in the case and considering the subjective and objective elements of the test, whether you had a legitimate reason. The directions of law which the judge gave the jury were agreed by your counsel and were, again, accurate and fair.
>
> None of the matters you raise cast doubt on the safety of your convictions. ”

Conclusion

37. Had there been any merit in their grounds of appeal, we would have granted the extensions of time that each applicant asked for. In view of our conclusions on the merits however, there was no purpose in doing so and all applications before us were refused.