

STATE OF TASMANIA v AIDAN JACK BINNIE
COMMENTS ON PASSING SENTENCE

ESTCOURT J
15 JUNE 2020

The defendant, Aidan Jack Binnie, now aged 20 years' old has pleaded guilty to 12 Commonwealth and State charges relating to child abuse and child pornography material.

I have also agreed, pursuant to s 385A of the Tasmanian *Criminal Code*, to deal with 2 counts of possessing a bestiality product, contrary to s 74 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas), and two summary complaints charging 4 offences of breach of bail.

The defendant is charged with committing these offences between 3 September 2018 and 19 December 2019.

Apart from the summary offences, the charges comprise, 3 counts of using a carriage service to transmit child pornography material contrary to ss 474.19(1)(a)(i) and (iii) of the Commonwealth *Criminal Code Act*; 3 counts of using a carriage service to access child pornography or child abuse material contrary to ss 474.19(1)(a)(i) and 474.22(1)(a)(i) of the *Code* (Cth); 3 counts of possessing child exploitation material contrary to s 130C of the *Code* (Tas) and 3 counts of possessing or controlling child abuse material accessed using a carriage service contrary to s 474.22A of the *Code* (Cth).

Over the course of a year and three months the defendant accessed, possessed and transmitted a large amount of child pornography material, the vast majority of the images being of female babies and infants.

A significant percentage of the material possessed by the defendant is of an extreme nature. Images and videos sought out from others, accessed and possessed by the defendant depict babies and young infants being subjected to horrific abuse and in physical and emotional distress. They include bondage and adult male penile penetration. The material possessed depicts a large amount of sexual activity including penetration and sadism between adults and children and babies.

All of the files examined from the defendant's various devices and sampled from his MEGA cloud storage have been identified as containing child exploitation material in accordance with the categorisation model for child exploitation material of the Australian National Victim Image Library (ANVIL). This categorization model is detailed below:

Category	Guide
1. No sexual activity	Depictions of Children with No Sexual Activity – however must be sexually suggestive or sexual in nature. Can include nudity, surreptitious images showing underwear (upskirt), sexually suggestive posing, explicit emphasis on genital areas, solo urination by a child.

2. Solo/sex acts between children	Solo masturbation by a child or sexual acts between children only in which penetration of any orifice does not occur. Includes the penetrative use of sex toys by the victim only.
3. Non-penetrative adult/child	Non-penetrative sexual activity, between child and adult(s). May include mutual masturbation and other non-penetrative sexual activity.
4. Penetrative – child/child – adult/child	Penetrative sexual activity between children only or adult(s) and children – may include, but is not limited to, vaginal/anal intercourse, cunnilingus and fellatio. Penetrative use of sex toys and/or foreign objects.
5. Sadism, bestiality, child abuse	Sadism, bestiality or humiliation (urination, defecation, vomit, bondage etc.), torture or child abuse.
6. Animated or virtual	Anime, cartoons, comics, computer generated graphics, drawings, audio and text depicting/describing children engaged in sexual poses or activity.

Thorough and detailed descriptions of sample images are annexed to the Commonwealth amended statement of facts and I have reviewed them. I have also viewed sample images and screen shots of chat messages in the Sample Book tendered on the sentencing hearing. A summary of the image files categorised as child pornography on the three devices seized by police on the first search of the defendants premises on 7 February 2019 will suffice as representative for the purposes of these comments. They are described as follows:

- i Category 1 images depict female victims who appear to be infant to prepubescent age who are predominately in sexualised poses. The images depict the victims in a range of settings and include both partially clothed posing to full nudity;
- ii Category 2 images depict female victims who appear to be infant to prepubescent age engaged in solo masturbation or non-penetrative sexual acts with other children;
- iii Category 3 images depict female victims who appear to be infant to prepubescent age with male and female adults. The images predominately depict victims who appear to be in the act of performing non-penetrative fellatio on an adult penis or in an act that resembles non-penetrative sexual activity between the victim and the adult;
- iv Category 4 images depict all female victims who appear to be infant to prepubescent age with male adults engaged in anal and vaginal sexual intercourse or victims performing penetrative fellatio on an adult penis;
- v Category 5 images depict female victims who appear to be prepubescent age and are being urinated on or have their mouth covered by tape while posing in a sexual nature; and

- vi The bestiality images depict an adult penis inserted into the mouth or sexual organs of a canine and close up of canine genitals.

The defendant disseminated some of the material to others, in one case to an unsuspecting user of a dating service, distributing a photo without any prior contact with the victim who immediately made a report to police. The defendant also disseminated material on publicly accessible sites such as Instagram and Twitter.

The defendant continued to offend despite being arrested and charged on three occasions for his offending. His actions exhibit no remorse or contrition for the offending. In all, four search warrants were executed during the period of the offending.

The defendant who I am satisfied is autistic, having what was formerly diagnosed under the DSM IV as Asperger's Syndrome, initially denied that he had a sexual interest in child pornography, however he had engaged in chat with other users indicating he derives a high level of sexual arousal from the material and in young infants and babies in particular.

The total child abuse material and bestiality files across all of the devices seized pursuant to the four warrants, and the defendant's MEGA cloud account is as follows:

	Image/Text Files	Video Files	Total files
Category 1	1457	200	1657
Category 2	106	163	269
Category 3	862	249	1111
Category 4	542	636	1178
Category 5	115	143	258
Category 6	848	54	902
Total	3930	1480	5410
Unclassified MEGA images			2560
Total incl unclassified MEGA images (extrapolation)			7970
Bestiality		27	

Of the 4,988 files contained in the MEGA account, classification has been completed to the extent of approximately 49%. 100% of the images viewed contained child abuse material and all images viewed were classified. None were duplicates. The defendant admitted to police in a record of conversation that only child exploitation material was located on the MEGA account.

To quantify the percentage of images on the MEGA account, there were 33% in category 1, 7% in category 2, 29% in category 3, 26% in category 4, 5% in category 5 and 0% in category 6.

In total, the defendant possessed 31% in category 1, 5% in category 2, 21% in category 3, 21% in category 4, 5% in category 5, and 17% in category 6.

As to the State offences there were a total of 27 bestiality videos seized on two occasions.

As to the summary offences of breach of bail, on 24 September 2019, bail conditions were imposed on the defendant which including the following:

- i He was not to use the internet unless for a purpose associated with completing his Certificate III in Retail Services;
- ii He was not to use social media applications;
- iii He was not to possess an internet capable mobile phone or device.

On four separate occasions he breached those bail conditions. His continued offending in breaching of bail is a significant aggravating feature of these crimes.

The defendant has no prior convictions for similar offending, however, as was pointed out by counsel for the Commonwealth, Mr Ringwaldt, it is well established that prior good character and lack of convictions are to be given less weight when sentencing for child pornography offences: *Mouscas v R* [2008] NSWCCA 181 at [37].

The defendant's counsel, Ms Abercrombie, points out that the defendant offended while he was aged between 18 and 19 years old and as such is to be sentenced as a youthful offender.

I instruct myself in this regard in the terms of Pearce J's observations in *Garcie v Lusted* [2014] TASSC 27 at [10] stated, namely, "There is a high public interest that young offenders be rehabilitated. It does not necessarily dominate all other relevant matters."

The defendant has no children or dependents. He enjoys significant support from his mother. He has limited contact with his father, who has spent time in custody for similar offending.

The defendant's parents separated when he was an infant. He spent time with his father infrequently. When he was aged approximately 8 years old, he was exposed to child exploitation material by his father, who showed it to him after he found it on his father's electronic device.

When he was approximately four years old, he was sexually assaulted by another individual, not his father. This has only recently been disclosed by the defendant to others, including his legal practitioner and his mother.

As a result of his plea of guilty, the defendant is entitled to a discount on an otherwise appropriate sentence, particularly in the context generally that a plea of guilty has pronounced utilitarian value.

Ms Abercrombie submits that the evidence given by forensic psychologist, Dr O'Donnell on 22 May 2020 was persuasive as to *Verdins* considerations, and that the defendant's diagnosed Autism has impacted on his ability to exercise appropriate judgment.

Mr Ringwaldt submits that, on Dr O'Donnell's evidence, there is no causal link between any impaired judgment making ability and the offending, and that limbs 1-4 of *Verdins* do not arise.

During the course of Dr O'Donnell's evidence I asked her about this in the following exchange:

"HIS HONOUR: But with someone who knows the difference between right and wrong [and the defendant does on her evidence] and somebody who understands the particular conduct is illegal [and the defendant did on her evidence], isn't it a bit of chicken and an egg argument, because anybody with paraphilia exercises poor judgment in the way that you've just described, don't they?

WITNESS: Yes, I would certainly agree with that, your Honour. The contribution of autism to that is the emotional impairment of being able (sic) to have the empathy for children in those pictures to the same way that a person with a straightforward paraphilia would have.

HIS HONOUR: It would be very difficult in the case of Mr Binnie to unravel, wouldn't it?

WITNESS: Yes it is, your Honour, it is very – it is very complex, I agree."

R v O'Neill 47 VR 395 requires that the offender establish that the mental impairment affects the ability to appreciate the wrongfulness of the conduct, or obscured the offender's intent to commit the offence, or impaired the offender's ability to make calm and rational choices or to think clearly at the time of the offence. There needs to be a realistic connection with the offending or have caused or contributed to the offending, or be causally linked to the offending.

In my view Dr O'Donnell's evidence explains the reason for a likely lack of empathy for the plight of the abused babies and infants and I take that into account in a general way. However, in my view her evidence does not engage any of the first four limbs of *Verdins*.

As to the fifth limb, Dr O'Donnell gave evidence that the prison environment would be significantly more difficult for the defendant and that being imprisoned has a "significant risk ... of having a serious adverse effect on [his] mental health, and he has a history of attempted hanging in the community."

I accept that evidence, noting however, that the defendant has been in custody for almost 6 months now. And I also accept Mr Ringwaldt's submission that persons with autism may also adjust well to prison life, as the evidence of Dr O'Donnell states, because the structure of that life is easier.

I take into account that the defendant had no contact with any of the children in the images. He did not move beyond his voyeurism and it is not suggested that there was ever any risk of him behaving inappropriately towards children, or moving on to become a participant in the sort of abuse depicted in the images he accessed.

He did not create any of the child abuse material or pornography. There is no suggestion of financial benefit to him as a result of the offending. However, the absence of any benefit or profit obtained by the defendant does not mitigate the offending – it is simply the absence of an aggravating factor. He did of course share some of the material with others on the internet and in particular gratuitously, on Facebook and Twitter and on Grindr, which is of concern. He did store a large amount of material with over 25% of it being in the worst categories - categories 4 and 5. And his criminal conduct involved connecting in chat rooms with likeminded individuals.

As I have said, it is obvious from the material before me that the defendant has been of previous good character, however, in the case of child exploitation less weight is to be given to good character than is ordinarily the case because of the importance of general deterrence in order to prevent the abuse of children. The possession of child exploitation material is a very serious crime. I also give less weight to the defendant's youth because of the seriousness of the offending.

As has been noted by other judges of this Court, children suffer appallingly as a result of the production of these images. To be in possession of them, without more, contributes to a demand for them, and the demand perpetuates the abuse of children. Relevant to sentencing are the number and nature and the content of the images and whether they were shared. As I said, they were, in this case disseminated. There were a great many images and while many of them were in the less serious categories, the nature and number of them and, in particular, the level 4 and 5 material, is some of the worst kind and is extremely troubling. As is the defendant's continuing offending whilst on bail. It is very clear that such a case as the present requires an immediate and significant sentence of imprisonment.

The defendant is convicted on each of the Commonwealth counts. For those crimes, he is sentenced to 20 months' imprisonment, and I order that after he has served 10 months of that sentence he be released on giving security by way of a recognizance of \$5,000 to be of good behaviour for a period of two years. That sentence is backdated to 19 December 2019.

Leaving aside the summary offences, the acts arising out of the respective Commonwealth and State charges are different: *R v Mara* (2009) 196 A Crim R 506 at [20], per Wilson J at [18]. In relation to the charges under the *Criminal Code* (Cth), "The Commonwealth provision focuses on the use of the internet to access and transmit child exploitation images, while the State legislation is concerned with the possession, preservation and sharing of such images".

The criminality contained within the respective charges are succinctly different and directed at different purposes: *R v Fulop* (2009) 236 FLR 376 per Buchanan AJ at [11]-[12].

In respect of the State crimes and the summary offences, the defendant is convicted of the three counts of possessing child exploitation material and of the two summary offences of possessing a bestiality product and the four offences of breach of bail. I impose a single sentence of 20 months' imprisonment which is to be served concurrently – that is, at the same time as the Commonwealth sentence I have just imposed. I order that the defendant not be eligible for parole until he has served 10 months of that State sentence. That sentence is also backdated to 19 December 2019.

The effect of my orders is that the defendant is to be released after serving a period of 10 month's imprisonment from the Commonwealth sentence and is eligible to apply for parole after serving 10 months of the State sentence, both sentences calculated from 19 December 2019.

In determining the appropriate Commonwealth sentence, I have taken into account (in addition to any other relevant factors) the matters set out in s 16A(2) of the *Crimes Act* 1914 (Cth) that are relevant and known to me.

I order that the devices seized by the AFP be forfeited to the Commonwealth of Australia pursuant to s 23ZD of the *Crimes Act* (Cth). Those devices are as follow:

- 1 A Nokia brand mobile telephone bearing IMEI 356960090119269/17;
- 2 A ZTE brand mobile telephone bearing IMEI 869575020960531; and
- 3 An Apple iPad bearing serial number F7TLJ2QZFC84;
- 4 A Black Google Pixel 3 XL mobile phone device with IMEI 358326090321073;
- 5 A Telstra ZTE brand internet capable mobile phone, IMEI 863152034560743;
- 6 A Telstra ZTE brand internet capable mobile phone, 865419040088425 (Telstra ZTE phone);
- 7 A Telstra Lite mobile phone (IMEI 864581034222657).

Finally, I am not satisfied that I ought not to make an order under the *Community Protection (Offender Reporting) Act*, and I do. I order that the Registrar place the defendant's name on the register and that the defendant comply with the reporting obligations under the Act for a period of five years following his release from prison.

I do not make a community correction order.