

STATE OF TASMANIA v NICHOLAS SMITH
COMMENTS ON PASSING SENTENCE

24 FEBRUARY 2022
JAGO J

Nicholas Smith, you have pleaded guilty to one count of possessing child exploitation material, contrary to s 130C of the *Criminal Code*. You have also pleaded guilty on complaint to one count of possessing a bestiality product. I will deal with that pursuant to s 385A of the Code.

On 6 August 2020 members of Tasmania Police attended your residence, where you lived with your landlord, who was also a family friend, in possession of a search warrant. This followed the receipt of information that child exploitation material was allegedly being uploaded to your Snapchat account. I note there is no evidence you in fact did this, and you deny it. It explains however why the investigation started. Police executed the search warrant. It resulted in the seizure of four electronic devices: an iPhone which was in your possession at the time of police attendance, a second white iPhone 5S located in your bedroom, a desktop computer, and a tablet. You admitted ownership of all items. When police initially tried to seize the iPhone in your possession, you switched it to emergency mode to prevent access. Within a short time however, you provided police with the relevant PIN and began to co-operate. When asked by police what may be on there, you replied "just have a look" and then told police to "get it over and done with".

An examination of each of the electronic devices was undertaken. The only device found to contain child exploitation material was the white iPhone 5S. It contained both photos and videos. The material was classified according to the Interpol Base Line categorisation system which categorises images according to their content and legal standing. This categorisation scheme is designed to provide an objective standard against which images can be classified in an endeavour to standardise the process of categorisation in a way which produces some degree of consistency in the assessment and determination of the objective seriousness of the offending. Category 1 of the Interpol Base Line categorisation system is the most serious. It depicts real prepubescent children under the age of 13 years where the child is involved in a sexual act, is witnessing a sexual act, or the material is focused or concentrated on the child's anal or genital region. Category 2 involves material that is not classified as base line but is still illegal and depicts children under 18 and involves images which might cause offence to a reasonable adult, but does not necessarily involve the child engaged in an overt sexual act. Category 3 depicts images that form part of a series of child exploitation material, but which is not, in its own right, illegal, although it may contain important clues or identify information in relation to Category 1 or 2 images. Category 4 does not involve any illegal material and is, for sentencing purposes, largely irrelevant.

A total of 570 images and 28 videos from the white iPhone were found to contain child exploitation material. Of that material, 388 images and 28 videos were Category 1. 182 images were classified as Category 2. There were a further 183 images on the white iPhone which were classified as Category 3, and there were a large number of Category 4 files which contained legal adult pornography. One video which depicted bestiality was also found.

The material was all found in the photos application on the iPhone. It had been saved in a rather random manner across 12 albums. Some albums contained many images and videos, whilst others contained only one image. All of the albums were saved into one folder titled "imported from Mac". The white iPhone was not protected with a PIN or passcode.

Following the search the defendant declined the opportunity to participate in a video recorded interview. He told police he had nothing to say. The defendant was proceeded against by way of summons and entered a plea of guilty in the Magistrates Court, whilst unrepresented, and at an early opportunity.

The defendant is now 32 years of age. He was 31 at the time of the offending. He has no relevant recorded criminal history in respect to child exploitation material or sexual offending. He predominantly has traffic matters on his record. In cases such as this, however, absence of relevant prior convictions is not uncommon and does not carry considerable weight in the sentencing exercise.

I have had the benefit of counsel's submissions and a home detention assessment report dated 15 February 2022. The defendant is single with no dependants. He was raised predominantly by his father, as his mother suffered from schizophrenia and was often absent during his childhood due to spending long periods of time in hospital. As a consequence, his childhood was a little chaotic. He did well at school, completing grade 12 before commencing University studies. He did not complete his degree, but took up employment in the IT field, working in video production, web design and marketing. He worked in that area for 15 years or so, up until 2020 when he was made redundant because of the pandemic. Following this he struggled to find any regular work, and became very socially isolated. He was living alone, did not have friends and became depressed and withdrawn. He began to consume excessive amounts of alcohol, reporting he would consume up to 20 alcoholic drinks a day. He was also using cannabis and prescription medications such as Valium, which were not prescribed for him. Against this background, the defendant started engaging in online chat groups – initially for the purpose of seeking company. Within those chat groups he was sent some links to adult pornography initially, but it evolved into being sent links to child exploitation and bestiality material. The defendant would open and view the links. He says he was often intoxicated when he did this. It would cause the material to download into the photo application on his phone. He says he did not re-visit the material once it was downloaded, and did not sort any of the material into specific folders or albums. The defendant says this behaviour only occurred over a short period of time. There is no evidence to contradict this and I will sentence on this basis. The defendant is deeply ashamed and embarrassed by his behaviour. He claims that when sober he recognises the material is "depraved and awful", and is pleased he was detected so it all came to an end.

In sentencing the defendant I have regard to the principles articulated by Porter J in *Director of Public Prosecutions v Latham* [2009] TASSC 101, 19 Tas R 281, and referred to in *Taylor v The Queen* [2015] TASCCA 7. In respect to each of those matters I note the following:

- **The age of the children and the gravity of the activity portrayed, in particular the degree of obvious physical harm or fear or distress in the victim**

I have had the misfortune of being obliged to look at samples of the images and videos tendered during the sentencing hearing. I do not intend to repeat in any detail what I observed. It is sufficient to say the images and videos depicted real children aged from what I suspect is only 2-3 years through to approximately 16 years engaging in oral, vaginal and anal sex with adult males. In two videos prepubescent males are depicted being forcefully restrained and engaged in anal sex with adult males. The acts were demeaning and humiliating for the child. The material can only be described as offensive and depraved.

- **The number of images or items of material**

A total of 570 images and 28 videos were located which contained child exploitation material. I acknowledge that this number is much less than that which is frequently encountered by courts sentencing for this type of offending. It is not, however, in my view an insignificant amount.

- **Whether possession was for the purpose of further distribution; whether there will be any profit or benefit from the activity to the offender**

That is not alleged in this case. There is no evidence there was any past or intended future distribution of the material.

- **The level of personal interest in the material**

I am not satisfied the defendant's personal interest could be said to be high. He did not trawl through various sites seeking the material out, but rather accessed it via links he was sent. He did not organise the material into albums or folders. Material was only found on one of the devices in his possession. There is no evidence he repeatedly accessed the material once it had downloaded. The defendant's possession of the material was short-lived. Nevertheless his interest was sufficient that he retained the material on the iPhone rather than deleting it.

- **Whether the possession or distribution involves a risk of accidental discovery by innocent computer users**

The iPhone was not protected by a PIN code or password. It was located in the defendant's bedroom within the house. He shared the house with his landlord. I do not know whether the landlord had reason to access the defendant's bedroom. There must be some risk that he or another may accidentally discover the material although, in my view, that risk was low.

In sentencing the defendant I have regard to the categorisation of the material generally, and note the lower quantity of material involved. There is no suggestion of payment for any of the material or that possession was for any purpose other than personal use.

I note the contents of the home detention assessment report. The defendant has been assessed as suitable for a period of home detention, suitable for community service; although a community based supervision order is not recommended as minimal criminogenic risks have been identified. The defendant has resumed living with his father who offers him on-going support and companionship; he has re-engaged with an employment provider and is hopeful of obtaining a position shortly; he has significantly reduced his alcohol consumption, now restricting his intake to one or two drinks with his father on a weekend; he has ceased all use of cannabis and non-prescribed medications and generally his mental health and mood have improved markedly. He is willing to re-engage with mental health professionals to solidify these improvements.

The evils of possessing child exploitation material have been stated many times by the courts. The production of such material involves the exploitation and abuse of children somewhere in the world. The damage done to those children is undoubtedly profound and often immeasurable. Possession and viewing exacerbates and extends the abuse and exploitation of children. Possessing the material creates a demand for its production. Clearly general deterrence and denunciation are most important sentencing considerations. Behaviour such as the defendant's must be condemned by the courts and a very clear message sent to others who might be minded to engage in similar behaviour that it is simply unacceptable.

I take into account the defendant's plea of guilty. I accept it is reflective of genuine remorse and shame for his behaviour. I am told the defendant pleaded guilty to these charges, despite appreciating their seriousness, at an early stage and before he received any legal advice, because he wanted to acknowledge his wrongdoing. Additionally, the guilty plea has a utilitarian benefit and facilitates the administration of justice. It is deserving of weight, and particularly so at present when the COVID-19 pandemic is still causing considerable disruption and delay within the courts. Taking into account the defendant's personal circumstances and the relevant sentencing considerations, I am satisfied it is appropriate to impose a home detention order. The defendant consents to such an order being made. Had the defendant not been suitable for such an order, I would have imposed a period of imprisonment, albeit with some, if not all of it, suspended. That is because of the serious nature of the crime and the predominance that must be given to general deterrence and denunciation in sentencing for matters of this nature. The extent of the offending, the circumstances that gave rise to the offending, and the changes the defendant has made since the offending warrant, in my view, a sentence that does not involve immediate and traditional incarceration. Home detention has a strong punitive and deterrent effect. It creates a substantial burden on the defendant and results in very real restrictions on his freedom. It is far from a lenient sentence, but it will allow the defendant to continue with the rehabilitative measures he has commenced, which is of benefit not only to him but the community at large.

Mr Smith you are convicted on both matters to which you have pleaded guilty. I will impose one sentence.

I impose a home detention order for an operational period of seven months from today's date. The order will include the following conditions which will apply for the whole of the operational period: You will be given a copy of these conditions in writing.

- You must not commit an offence punishable by imprisonment.
- You must reside at [address].
- You must be there at all times except when you are not there for a "relevant reason" as specified in s 42AB(4) of the *Sentencing Act* 1997. That includes going somewhere with your probation officer's permission.
- You must permit a police officer, probation officer or other prescribed officer to enter those premises.
- You must permit a police officer to conduct a search of the premises, conduct a frisk search of you, and take a sample of any substance found on the premises or on your person.
- You must submit to electronic monitoring, including the wearing of or carrying of an electronic monitoring device.
- You must not remove, tamper with, damage, disable or interfere with the proper functioning of any electronic device or equipment used for the purpose of electronic monitoring.
- You must not allow anyone else to remove, tamper with, damage, disable or interfere with the proper functioning of any electronic device or equipment used for the purpose of electronic monitoring.
- You must comply with all reasonable and lawful directions given to you in relation to the electronic monitoring device, including directions relating to the installation, attachment or operation of the device or system used for the purpose of electronic monitoring, if those directions are given to you by a police officer, a probation officer, another prescribed

officer or any other person whose functions involve the installation or operation of a device or system used for the purpose of electronic monitoring.

- You must maintain in operating condition an active mobile phone service, provide the contact details to Community Corrections, and be accessible for contact through that device at all times.
- You must not take any illicit or prohibited substances.
- You must not take any medication containing an opiate, benzodiazepine, bupropion hydrochloride or pseudoephedrine, unless you provide written evidence from your medical practitioner that you have been prescribed that medication.
- You must not consume alcohol and you must allow a police officer or community corrections officer to test you for the presence of alcohol.

I order that you must attend the Community Corrections office at Glenorchy by 10am tomorrow for the fitting an electronic monitoring device and induction in respect to this order.

This is a reportable offence under the *Community Protection (Offender Reporting) Act* 2005. Possession of child exploitation material is a Class 1 offences. I have regard to the matters identified in s 10 of that Act. I am not satisfied that you do not pose a risk of committing a reportable offence within the meaning of that term in the *Community Protection (Offender Reporting) Act* into the future. I therefore make an order directing that the Registrar cause your name to be placed on the register, and that you comply with the reporting obligations under that Act for a period of three years from today's date.

I make a forfeiture order pursuant to s 130F(4) of the *Criminal Code* that the white iPhone 5S recorded as item 6 on Tasmania Police property seizure record receipt 142697 be forfeited to the State.