R v Wakeling, CA, 15 September 2010

When sentencing for possession of indecent images the court may have to consider the question of what amounts to a 'large quantity' of material.

The court made this observation:

There are also no guidelines as to what constitute a "large quantity" or a "small number". In the case of Oliver, to which we have referred, this court stated that was a matter for determination by the sentencing judge. Contrary to the way the prosecution initially put the matter in opening the case, when it said that the case was substantially about possession of a large number of Level 1 images, what is clear is that the category into which a case falls does not depend on the proportions of the images in the particular category. Nor does it depend (cf paragraph 25 of the advice) on the time over which they were downloaded.

We consider that a total of 55 Level 4 and 5 images or 92, if one includes the videos and extreme pornographic material, is a large quantity. It was a quantity which justified a starting point of 12 months. The presence of the extreme pornographic material, and what the judge described as a remarkable amount of bestiality of the most extreme nature, are serious aggravating factors.

http://www.bailii.org/ew/cases/EWCA/Crim/2010/2210.html

R v Qayum, CA, 16 September 2010

Yet another case in which the effects of magistrates' committal procedures were not understood at the time of sentence.

The court said this:

1. We feel we must emphasise and remind practitioners that it is the duty of advocates, both prosecution and defence, to check the court's sentencing powers and alert the court to traps for the unwary such as this: see the guidance in the third supplement of *Archbold 2010* at paragraph C-51. That guidance quotes the observations of Lawton LJ in R v Clarke (RWW) (1974) 59 Cr App R 298, who said as long ago as 1974:

    > i. "We adjudge that counsel as a matter of professional duty to the court, and in the case of defending counsel to their client, should always before starting a criminal case satisfy themselves as to what the maximum sentence is. There can be no excuse for counsel not doing this and they should remember that the performance of this duty is particularly important in a case where a man has been committed to the

Crown Court for sentencing pursuant to the provisions of sections 28 and 29 of the Magistrates' Courts Act 1952, and section 56 of the Criminal Justice Act 1967. Those statutory provisions are pregnant with dangers for court and for counsel and above all for accused persons..."

LORD JUSTICE HOOPER: I wish to add that this is another of a significant number of cases where an unlawful sentence is identified for the first time by a member of the staff of the Criminal Appeal Office. We would like to stress on behalf of the court the role played by the Criminal Appeal Office in this area in particular. But for that identification, it may well be that this appellant would have been serving and continue to be serving an unlawful sentence.

http://www.bailii.org/ew/cases/EWCA/Crim/2010/2237.html

R v Nuthoo, CA, 6 October 2010

In quashing a costs order (over £5,000) the court said this:

1. (1) By virtue of section 18(1) of the Prosecution of Offences Act 1985, to which we have already made reference, the learned Recorder undoubtedly had the power to make a costs order in favour of the London Borough of Enfield.

   (2) The question for us is whether the order that he made is wrong in principle or whether there is anything manifestly excessive about it: see R v Macatonia [2010] 2 Costs LJ 262.

   (3) On the material before us it appears that the learned Recorder made the order in the expectation that it would be enforced as a civil debt; that the appellant's means were limited to his net sickness benefit; that his means to pay would be judged in due course by the Department of Work and Pensions, as the prosecution had suggested; and that it would be many years before the costs order was met.

   (4) In contrast, the correct position in law is that such a costs order is to be enforced as if it had been adjudged to be paid on conviction in the magistrates' court (see section 41 of the Administration of Justice Act 1970); that it is the duty of the court to consider the defendant's means (see, for example Mountain (above)); that it is the court that has the power to allow an individual to pay by instalments (see section 141 of the Powers of Criminal Courts (Sentencing) Act 2000); that in default of payment, imprisonment will be imposed, in this case up to a maximum of six months (see Schedule 4 to the Magistrates' Courts Act 1980); and that therefore, in order to avoid sending an offender to prison by the back door, and to ensure that the length of time over which the order would be paid is not oppressive, the amount and length of time for payment must be just, albeit that a period of up to three years for payment in an appropriate case is not necessarily too long (see Olliver and Olliver (above)).

(5) Notwithstanding the written submissions made by the London Borough of Enfield, the only evidence of means before the learned Recorder was the appellant's sickness benefit which, after deduction of the ongoing repayment of the housing benefit unlawfully obtained, amounted to only about £260 per month.

Taking all these matters into account, we have concluded that the order that was made was both wrong in principle and manifestly excessive in both amount and length of time required for payment. Accordingly, we quash the order. To that extent this appeal is allowed.

http://www.bailii.org/ew/cases/EWCA/Crim/2010/2383.html

R (B) v Brent Youth Court, AC, 8 July 2010

This is an important decision and revisits the criteria for making more than 2 bail applications in the magistrates' court. The court noted that the legislative scheme does not require that there be 'exceptional' factors put forward, merely new ones. There is also discussion as to revisiting the strength of the prosecution case, and in relation to a child or young person – welfare considerations. In effect the door has been opened to unlimited bail applications. The court held:

16. In my judgment, however, the Bench did fall into error in failing to recognise that the offer of an address in a completely different part of London, as potentially meeting the objections to bail, did constitute an argument as to fact which it had not heard previously, given that the previous addresses suggested were within the territory within which the claimant moved and operated and therefore, within which, the concern about his future criminal activities had particular resonance. Furthermore, the reasoning put forward by the Bench was plainly erroneous. The mere fact that the address could have possibly been put forward before but had not been is not an argument for concluding that there was no statutory obligation to consider it. As Lord Justice Donaldson said, the question is a little wider than "Has there been a change?", it is "Are there any new considerations which were not before the court when the accused was last remanded in custody?"

17. Further, it does seem to me that an argument that the strength of the case against him may be significantly weaker than a first reading of the witness statements might suggest is capable of being an argument of law which has not been heard previously. Finally, even if the Bench had been entitled to form the view that each and every argument as to fact or law was an argument which it had heard previously, it manifestly failed to go on to consider whether, notwithstanding that, it should nonetheless consider substantively a bail application, given the provisions of Section 44, having regard to the welfare of a child or young person.

http://www.bailii.org/ew/cases/EWHC/Admin/2010/1893.html

Cooper v Wrexham Magistrates' Court, AC, 5 July 2010

An extraordinary case. Facts are these:

1. At trial submissions were made to the magistrates that this was an insufficient basis upon which to convict and that, for various reasons expressed forensically by Mr Finney who appeared on his behalf, the magistrates should acquit. At the conclusion of the case the magistrates retired. Shortly after that they requested the assistance of their clerk. What happened thereafter is set out principally in the affidavit filed by Mr Robinson, the clerk concerned. We pay tribute to him for what is a clear, full and frank affidavit. It is exactly as we would expect from a clerk acting in a fully professional manner. What he said was that, after the justices had retired for 20 minutes, they requested that he join them. I quote:

> "The Chairman advised that it was their intention to find [the defendant] not guilty on the basis that 'there was no evidence that he had actually taken the items'. I must have reacted with surprise because I was asked if I 'had concerns'. I reminded the Justices that [the defendant's] fingerprint had been found on the bag of mints which had been in the glove compartment from which the items specified in the charge had been stolen, he admitted being in the relevant immediate locality during the period when the items were taken, and there had been no evidence of any innocent association between Mr Cooper and the vehicle, or the bag of mints, save that, in his evidence, he stated that he 'has shopped at Marks and Spencers, and does eat sweets'."

I interpose to say his evidence, or the evidence of the loser, was that the sweets came from Marks and Spencer's. Returning to what Mr Robinson says:

> "I further reminded the Justices that Mr Cooper's evidence was that he could not remember the events of the night in question because of the amount he had had to drink, and they were entitled to assess his credibility in that regard. I also reminded them that Mr Cooper had not adduced any evidence in support of his version, for example, evidence from his uncle.
>
> I advised the Justices that matters of fact were generally their province, and their province only, but that I was entitled to advise them as to their decision if I felt they had come to a conclusion which was perverse, or unreasonable, in the light of the evidence. I advised the justices that their finding in this case, in my view, came very close to being perverse and unreasonable, and that they should exercise

caution. I told them they would have to give reasons for their decision in open court."

8. Held: A practice direction in respect of justices' clerks was issued on 2 October 2000 by Lord Woolf, Chief Justice (to be found at [2000] 1 WLR 1886). He, with the concurrence of the President of the Family Division, set out that it was the responsibility of the legal adviser to provide the justices with any advice they might require properly to perform their functions whether or not the justices had requested that advice, on questions of law; questions of mixed law and fact; matters of practice and procedure; the range of penalties available; any relevant decisions of the superior courts or other guidelines; other issues relevant to the matter before the court; and the appropriate decision-making structure to be applied in any given case. In addition to advising the justices it was his responsibility to assist the court, where appropriate, as to the formulation of reasons and the recording of those reasons. The Practice Direction then goes on to note (paragraph 4) that a justice's clerk or legal adviser must not play any part in making findings of fact. It adds that he may assist the bench by reminding him of the evidence, using any notes of the proceedings for this purpose. The practice direction is clear that if the justice's clerk gives any advice to a bench he should give the parties or advocates an opportunity of repeating any relevant submissions prior to that advice being given. If it is given in private he should report that advice to the parties, and the advice should be regarded as provisional and clearly stated to be so. The adviser should subsequently repeat the substance of that advice in open court and give the parties an opportunity to make any representations they wish on that provisional advice. The legal adviser should then state in open court whether the provisional advice is confirmed or, if it is varied, the nature of the variation.

9. That practice direction has support, if it needs support, in the speech of Lord Hoffman in a case relating to an appeal from Scotland under therefore different provisions relating to summary trials (see paragraphs 39 and 40 of Clark v Kelly [2004] 1 AC 681).

10. On the material before us what appears to have happened is that Mr Robinson went to see the justices at their request, as it was entirely proper for him to do. They told him, on the material before us, of the conclusion as to fact which they had reached: that was that the appellant should be acquitted of the offence. Something about his reaction plainly then led to a discussion. With the benefit of hindsight we have little doubt that Mr Robinson or someone in his position should have avoided being sucked in to the discussion which then followed in all too understandable a way. It amounted (though, we acknowledge, viewed in retrospect) to him having participated in decision-making, which it was not his function to do; that was entirely for the magistrates. This was not a case, as he himself acknowledged, in which it could be said that the decision to which the magistrates proposed to come was one which was necessarily perverse. It is a tribute to Mr Robinson's honesty and frankness that he acknowledges that to us and that he acknowledged that at the time to the defence advocate and prosecution representative.

11. Accordingly, what happened had every appearance (and probably the reality) that what the magistrates' court clerk had to say about facts changed the mind of the magistrates in other than open court, which is where a trial should be conducted, with

the result that the magistrates changed their decision which they had reached, which was theirs alone to come to.

http://www.bailii.org/ew/cases/EWHC/Admin/2010/2226.html