EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT PALMERSTON NORTH

CRI-2015-054-002682
[2016] NZDC 5111

THE QUEEN

v

KORE MALCOLM ROBINSON-JOHNSON

Hearing:	23 March 2016
Appearances:	M J R Blaschke for the Crown P J Drummond for the Defendant
Judgment:	23 March 2016

NOTES OF JUDGE D G SMITH ON SENTENCING

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[1] Mr Robinson-Johnson, you are appearing today for sentence on 28 charges of possessing for the purpose of distribution objectionable publication. These images and videos have been viewed by me and they depict a variety of situations, the worst in my view being the rape of a baby, through the whole range of contact which can take place between human beings.

[2] There has been categorisation of the types of images provided to the Courts which have been adopted from the UK Sentencing Advisory Board guidelines in a case of *R v Zhu* [2007] where the Court of Appeal adopted the English categorisation. Those levels of seriousness are as follows:

(a) Level 1 images depicting nudity or erotic posing with no sexual activity. I saw none of those.

(b) Level 2 sexual activity between children or solo masturbation by a child and there was one of those in my view.

(c) Level 3 non-penetrative sexual activity between adults and children and there was 11 such images in my view.

(d) Level 4 penetrative sexual activity between adults and children and there was 16 such images in my view.

(e) Level 5 which relates to sadism or bestiality is not applicable to the images that you held.

[3] The reason for those categorisations is to assist the Court in the way a starting point to these matters should be approached.

[4] On nine of the charges which you have pleaded guilty to the maximum penalty at the time of the offence was 10 years' imprisonment. On 19 of them the law having changed on 6 May last year the maximum penalty is now 14 years' imprisonment. That change in law is in my view important because it affects the starting point which I believe should be used in this matter.

[5] You need to understand that the purposes of sentencing are to hold you accountable for the harm done to the victim and the community. The victims in this matter are the children depicted in the images, that you were not personally there when they were taken is irrelevant. The fact that there is a market and an interest in these types of images means that this type of hurt to the children will continue unless there is a condemnation of that type of behaviour.

[6] That which leads to the second purpose of sentencing which is to promote a sense of responsibility in you for that harm. It is of concern to read in the pre-sentence report you do not seem to accept or understand that there is a harm caused to the children who are depicted in these images.

[7] The third purpose of sentencing is to denounce your conduct. It is to denounce your conduct to ensure that not only you are deterred but other people are deterred from committing the same or similar offences.

[8] I am required to take into account the gravity of the offending which is why I have categorised the images in the way in which I have. I need to take account the comparison of seriousness of the offending which leads into endeavouring to create a consistency of sentencing with similar cases. That is why there has been reference made to *P v Barnes*, a sentence of Clifford J which the Crown accepts is probably the closest to the offending to which you have committed here.

[9] I accept, and Mr Drummond has emphasised this on your behalf, that there is a need for me to impose the least restrictive outcome appropriate to the circumstances. But I have to say that the least restrictive outcome in my view no matter which starting point within the realms that has been put to me I use, lead to a period of imprisonment.

[10] It has been said by the Sentencing Advisory Panel Chairman in the UK that an offender sentence for possession of child pornography should be treated as being in some degree complicit in the original abuse which was involved in the making of the images. Sentences for possession should also reflect the continuing damage done to the victim or victims through copying and dissemination of the pornographic images. Those who make or distribute the images bear a more direct responsibility for their eventual use as well as encouraging further production and it has been picked up by the Courts here in New Zealand. Priestley J in *Waugh v P* has made it clear that the seriousness of the offending of this type must not be minimised and similar comments have been made by Katz J in *Stewart v Department of Internal Affairs.*

[11] The case of *Barnes v P* is, as I have said the closest in terms of your situation. There the starting point appears to have been three and a half years and that is at the upper level that the Crown are contending for as a starting point. Mr Drummond on your behalf has conceded that that is not an unreasonable starting point. What that starting point did not have before it though was that the level of the more serious

type of offences was approximately half the number of yours. Secondly there has been the increase in penalty by some 40 percent since 6 May and in my view that must have a direct effect on the starting point.

[12] If I take a direct mathematical analysis on the three and a half years and apply it to those of the 19 charges at the higher rate it increases the starting point to approximately four and a half years. Mathematical analyses are not the way in which sentencing is done. I am required to take into more accounts matters as a whole. In my view the starting point that is appropriate, noting the increase in penalty, should be four years.

[13] That then leads me to consider whether there is any additional aggravating matters and there are not. The most aggravating matters are the fact that you had these items and that is what is encompassed in the starting point.

[14] I move then to what can be said in mitigation. My first concern is to see that there has been no remorse expressed.

[15] This offending has taken place over a period of time. You are only 21 years of age now and the offending goes back for a year when you would have been 20. This is the first time you have appeared before the Court. It is difficult when you have a series of offences such as this as to what discount should be provided in terms of a first offence but I agree with Mr Drummond that there should be some discount made for that. At the end of the day the fact that it is your first offence and that you are a young person are to a certain extent interwoven.

[16] I have considered your situation and the way in which you have responded to the interview with report writer and the conclusion that I have come to is that a discount of eight months should be made to take account of all those matters. That brings the sentence down to three years and four months.

[17] You are entitled to a 25 percent discount for your early guilty plea which brings me to an end sentence of two years and four months. That sentence precludes any consideration of a community-based sentence. Even were that not so I am of the

view that given the level of seriousness of the images that the least restrictive sentence which could be imposed to be consistent with sentencing in other matters is one of imprisonment.

[18] On each of these matters you are sentenced concurrently to two years and four months. I am concerned that the type of release conditions suggested, which would apply if you were sentenced to under two years, are attended to while you are in the prison. I ask the Probation Service to take note of that as appropriate ways in to deal with these matters. Mr Blaschke in his submissions has suggested that the prison is the best way to ensure that they are done. I am not entirely certain that is correct but given the level of sentence that I have come to that is a matter I must leave within their hands.

D G Smith
District Court Judge