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**SECRETARY FOR JUSTICE v. MAN KWONG CHOI [2008] HKCA 271; [2008] 5 HKLRD 519; [2008] 4 HKC 565; CAAR8/2007 (16 July 2008)**

CAAR 8/2007 & CAAR 9/2007

CAAR 8/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

APPLICATION FOR REVIEW NO. 8 OF 2007

(ON APPEAL FROM FLCC NO. 1699 OF 2007)

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|  |  |  |
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| BETWEEN |  |  |
|  | SECRETARY FOR JUSTICE | Applicant |
|  | and |  |
|  | MAN KWONG CHOI (萬廣財) | Respondent |

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CAAR 9/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

APPLICATION FOR REVIEW NO. 9 OF 2007

(ON APPEAL FROM STCC NO. 4972 OF 2007)

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|  |  |  |
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| BETWEEN |  |  |
|  | SECRETARY FOR JUSTICE | Applicant |
|  | and |  |
|  | HO YAN KIU (何恩橋) | Respondent |

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Before : Hon Ma CJHC, Stuart-Moore VP & Stock JA in Court

Date of Hearing : 18 March 2008

Date of Handing Down Judgment : 16 July 2008

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J U D G M E N T

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**Hon Ma CJHC** (giving the judgment of the Court) :

**Introduction**

1. The [Prevention of Child Pornography Ordinance](http://www.hklii.hk/eng/hk/legis/ord/579), [Cap.579](http://www.hklii.hk/eng/hk/legis/ord/579) (“the PCPO”) was enacted to deal with the problems associated with child pornography. We are in these applications for review concerned with the appropriate sentences for the offence of possession of child pornography. [Section 3(3)](http://www.hklii.hk/eng/hk/legis/ord/579/s3.html) of the PCPO states : -

“**3. Offences relating to child pornography**

……

(3) Any person who has in his possession any child pornography (unless he is the only person pornographically depicted in the child pornography) commits an offence and is liable —

(a) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 5 years; or

(b) on summary conviction to a fine of $500,000 and to imprisonment for 2 years.”

2. Hitherto, the courts have not been consistent in sentencing for this offence. Sentences have varied between terms of imprisonment, suspended sentences, fines, probation and commonly, community service orders.

3. The two cases that have led to the reviews of sentence provide fairly typical examples : the Respondent in CAAR 8/2007 was sentenced to 6 months’ imprisonment suspended for 2 years and a fine of $20,000; the Respondent in CAAR 9/2007 was sentenced to 200 hours of community service. Both cases were dealt with in the Magistrates Court. We shall go into their cases in more detail later. It suffices for now merely to record that at the conclusion of the hearing before us, we indicated that in any event, we would not be disturbing the sentences the Respondents received, in view of the fact that they appeared to have been sentenced under what might loosely be called the prevailing sentencing practice.

**Classification of child pornography**

4. The PCPO (in [section 2)](http://www.hklii.hk/eng/hk/legis/ord/579/s2.html) defines child pornography and pornographic depiction in the following way : -

“ ‘child pornography’ (兒童色情物品) means -

(a) a photograph, film, computer-generated image or other visual depiction that is a pornographic depiction of a person who is or is depicted as being a child, whether it is made or generated by electronic or any other means, whether or not it is a depiction of a real person and whether or not it has been modified; or

(b) anything that incorporates a photograph, film, image or depiction referred to in paragraph (a),

and includes data stored in a form that is capable of conversion into a photograph, film, image or depiction referred to in paragraph (a) and anything containing such data;

….

‘pornographic depiction’ (色情描劃) means -

(a) a visual depiction that depicts a person as being engaged in explicit sexual conduct, whether or not the person is in fact engaged in such conduct; or

(b) a visual depiction that depicts, in a sexual manner or context, the genitals or anal region of a person or the breast of a female person,

but, for the avoidance of doubt, a depiction for a genuine family purpose does not, merely because it depicts any part of the body referred to in paragraph (b), fall within that paragraph;”

A child is a person under the age of 16.

5. The pornographic depiction of children covers a fairly broad spectrum. We have found useful the following classification levels adopted in England for the purposes of sentencing (see *R v Mark David Oliver and Others* [[2003] 2 Cr App R 64)](http://www.hklii.hk/cgi-bin/LawCite?cit=%5b2003%5d%202%20Cr%20App%20R%2064) : -

“(1) images depicting erotic posing with no sexual activity;

(2) sexual activity between children or solo masturbation by a child;

(3) non-penetrative sexual activity between adults and children;

(4) penetrative sexual activity between children and adults;

(5) sadism or bestiality.”

6. These classification levels were used by the prosecution in both of the present cases : -

(1) The Respondent in CAAR 8/2007 was convicted of possession of the following : -

“

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Category** | **Quantity of still image files** | **Quantity of**  **video files** |
| **Level 1** | Images depicting erotic posing with no sexual activity | 554 | 21 |
| **Level 2** | Sexual activity between children, or solo masturbation by a child | 53 | 36 |
| **Level 3** | Non-penetrative sexual activity between adults and children | 363 | 119 |
| **Level 4** | Penetrative sexual activity between children and adults | 147 | 51 |
| **Level 5** | Sadism | 40 | 18 |
| **Total** |  | 1157 | 245 |

”

(2) The Respondent in CAAR 9/2007 was convicted of the possession of the following : -

“

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **Living Room Desktop** | | **Bedroom Desktop** | | **Total** | |
|  | **Video** | **Photo** | **Video** | **Photo** | **Video** | **Photo** |
| **Level 1** | 15 | 377 | 9 | 6895 | 24 | 7272 |
| **Level 2** | 19 | 11 | 86 | 449 | 105 | 460 |
| **Level 3** | 24 | 48 | 4 | 310 | 28 | 358 |
| **Level 4** | 32 | 19 | 14 | 172 | 46 | 191 |
| **Level 5** | 2 | 3 | 0 | 6 | 2 | 9 |
| **Total** | 92 | 458 | 113 | 7832 | 205 | 8290 |

7. While finding the *Oliver* classification useful, we would prefer to adopt the following four classification levels instead (the reason being that we see little difference between Levels 4 and 5 in the *Oliver* classification) : -

(1) Level 1 : images depicting erotic posing with no sexual activity.

(2) Level 2 : sexual activity between children or solo masturbation by a child.

(3) Level 3 : non-penetrative sexual activity between adults and children.

(4) Level 4 : penetrative sexual activity between children and adults, or sadism or bestiality.

**Relevant considerations in sentencing for offences under**[**section 3(3)**](http://www.hklii.hk/eng/hk/legis/ord/579/s3.html)**of the PCPO**

8. [Section 3](http://www.hklii.hk/eng/hk/legis/ord/579/s3.html) of the PCPO creates four categories of offences relating to child pornography : -

(1) The printing, making, production, reproduction, copying, import and export of it [(section 3(1))](http://www.hklii.hk/eng/hk/legis/ord/579/s3.html);

(2) The publication of it [(section 3(2))](http://www.hklii.hk/eng/hk/legis/ord/579/s3.html);

(3) Possession of child pornography [(section 3(3)).](http://www.hklii.hk/eng/hk/legis/ord/579/s3.html)

(4) The publication or causing to be published any advertisement that conveys or is likely to be understood as conveying the message that a person has published, publishes or intends to publish child pornography [(section 3(4)).](http://www.hklii.hk/eng/hk/legis/ord/579/s3.html)

We are concerned only with the offence of possession.

9. The aim of the PCPO is principally the protection of children from being exploited and abused for the purpose of pornography. The exploitation is of the worst kind : children, many of them are well under the age of 16, are made to pose or be filmed while exposing their genitals, anal region and other private parts; children are depicted in the most adult of sexual activity and conduct; children are depicted in states of distress; even sadism and bestiality are often shown.

10. We have been, in these reviews, provided with some of the images found in the possession of the Respondents. They are nothing short of disgusting and demonstrate a depravity that causes revulsion, and, within society, we are sure they would be regarded as simply and totally unacceptable. Words fail to describe the sense of revulsion, which is to be experienced from viewing these images. In this regard, we lay emphasis on the importance of the sentencer examining the images or, at the very least, a representative sample, so that their true nature and gravity is made apparent.

11. As can be seen from the debates in the Legislative Council preceding the introduction of the PCPO, its roots lie in Article 34 of the United Nations Convention on the Rights of the Child (which applies to Hong Kong) protecting children against all forms of sexual exploitation and abuse. Article 34 states : -

“**Article 34**

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.”

12. From the above, it can instantly be seen that the main aspect relevant to sentencing for offences under section 3 of the PCPO will be one of deterrence. This has two facets which have to be considered : first (and the more important), the protection of the victims of child pornography, namely the exploited children themselves; secondly, society generally.

13. The same factors which point to the necessity of legislation to deal with child pornography are also relevant when considering the deterrence element we have identified above. Here, we have found of guidance the decision of the Supreme Court of Canada in *R v Sharpe* [(2001) 150 CCC (3d) 321](http://www.hklii.hk/cgi-bin/LawCite?cit=%282001%29%20150%20CCC%20%283d%29%20321), particularly the passages at paragraphs 28, 86-92, 158-165, 199-209. There, the court was faced with a challenge to legislation prohibiting the possession of child pornography on the basis of an unjustifiable restriction of the freedom of expression. The Supreme Court held that such legislation was constitutional.

14. The following considerations are relevant : -

(1) While mere possession of child pornography can be said on one view to be less serious than the production, distribution or publication of such material, its seriousness should nevertheless not be underestimated. But for the demand of persons wanting to possess child pornography, there would not be the production, distribution or publication of it. In other words, all these various facets make significant contributions to the exploitation of vulnerable children.

(2) The harm to children cannot be stressed enough. For the children depicted in child pornography, they are degraded, dehumanized, traumatized and lose all semblance of dignity. For other children, the prevalence of child pornography only encourages paedophiles and their activities. One of the many dangers is that vulnerable children may regard the type of sexual conduct seen in child pornography as being in some way normal or worse still, expected of them. Many of the victims grow up mentally scarred. There may sometimes even be evidence of physical injury to the private parts of children.

(3) Child pornography and the exploitation of vulnerable children is a worldwide problem, albeit the preponderance of this may be more readily found in some countries than others. Nevertheless, child pornography is a problem that requires a concerted approach from communities worldwide if children are to be protected.

(4) Child pornography has the potential (if it is not already so) of being widespread. The ready availability of child pornography through the internet (such as in the present cases) considerably facilitates the dissemination of child pornography worldwide.

15. It is with the above considerations in mind that we are of the view that the deterrence factor becomes particularly significant when sentencing for the offence of possession of child pornography.

16. In our view, possession of child pornography should generally attract an immediate custodial sentence unless special circumstances exist. One such circumstance may be that the quantity of pornographic material at Level 1 (for the classification levels see paragraph 7 above) may be so small as to make the amount in the possession of the accused *de minimis*. In sentencing, one starts by having regard to the appropriate level of the relevant depictions (this can be a photograph, film, computer-generated image or any other visual depiction). Also relevant would be whether the depictions were of real children or whether they were artificially created (see *Oliver* at paragraph 15). In the latter respect, obviously no real persons would be involved (unless they were based on real children) but it would be important to consider all the circumstances, such as whether the depictions might or would fall into the hands of other people. The sentencer will of course take into account all relevant factors. Some factors in mitigation or aggravation are set out below.

**Guidelines**

17. We have in mind the following guidelines appropriate, after trial, to a first time offender who is in possession of child pornography (involving real children) : -

(1) *Level 1*

The least serious level is Level 1 (“Images depicting erotic posing with no sexual activity”). There, the effect on the children in the depictions might be said to be much less harmful than in the case of Levels 2 to 4, which, it may be assumed, will be substantially more harmful. In the case of possession of Level 1 depictions, it may be that a community service order, probation or fine is appropriate where the number is small (say 20 or less). Where the numbers are large or the depictions are extremely suggestive, terms of imprisonment from 1 month to 6 months will be appropriate.

(2) *Level 2*

In the case of Level 2 (“sexual activity between children, or solo masturbation by a child”), this is already much more serious than mere posing. Here, depending on the number of depictions, an immediate custodial sentence of up to 9 months will be appropriate. Even the possession of a few depictions at this level will generally attract a custodial sentence.

(3) *Level 3*

For Level 3 cases (“non-penetrative sexual activity between adults and children”), the degree of seriousness is increased even further. Again, depending on the numbers involved, sentences of between 6 and 12 months will be appropriate.

(4) *Level 4*

We consider Level 4 cases (“penetrative sexual activity between children and adults” and “sadism or bestiality”) as meriting the most serious treatment. Here, at Level 4, the range of custodial sentences should generally be from 12 months (even for a few images) to 36 months.

18. The four levels of sentence set out in the previous paragraph provide starting points for sentence after trial. As in any other case, there may be mitigating or aggravating factors that will have to be taken into account.

19. The principal mitigating factor will be a timely plea of guilty but the usual principles of sentencing will otherwise apply.

20. Aggravating features would include the following : -

(1) A previous record involving a similar offence (or offences) against children.

(2) The age of the children depicted. Where the depictions involve particularly young children, this would be an important consideration.

(3) The purpose for which the accused possesses the depictions will also be relevant. Where it is proved that the accused intends to disseminate the images for commercial (or even non-commercial) gain, or intends to publish, these will be significant aggravating factors.

(4) As mentioned earlier, the number of images is relevant.

21. It is important to stress that we are, in the two cases now before us, solely concerned with offences of possession of child pornography. Higher maximum sentences are provided under section 3(1) and (2) of the PCPO where more than mere possession is involved.

**The principles as applied to the facts in the present reviews**

22. We have earlier indicated that in any event we would not be disturbing the sentences passed against the two Respondents in the present reviews. It might, however, be useful to indicate what sentences we would have had in mind in cases like theirs if the above guidelines had been applicable.

23. In the case of the Respondent in CAAR 8/2007, aged 31 at the time of sentencing, we have set out the number of images and the applicable levels which formed the subject-matter of the charge against him (see paragraph 6(1) above). The following additional facts are also relevant : -

(1) The images (comprising both photographs and video files) were for his personal use.

(2) The images were all of real children, most of whose apparent ages were between 5 and 12. The images covered every level.

(3) The Respondent had one previous conviction in 1998 for an indecent assault involving a 12-year old girl.

(4) The number of images and video files in the Respondent’s possession, more than half of which showed children with adults.

24. The quantity of child pornography in CAAR 8/2007 was large. There were also many images in Levels 3 and 4. Given this and the other factors set out above, we would have thought that an immediate sentence of 3 years’ imprisonment would have been appropriate after trial in the District Court. We do not consider that a case of this gravity should have been tried in the Magistrates Court where the maximum sentence would have been 2 years, albeit there would of course have been a reduction by one-third on account of the guilty plea.

25. The following facts are relevant to the Respondent in CAAR 9/2007 aged 20 at the time he was sentenced (the images and their levels are set out in paragraph 6(2) above) : -

(1) The images (also photographs and video files) were for his personal use.

(2) Whilst the majority of the images in the Respondent’s possession were at Level 1, there were also significant amounts under Levels 2 to 4, only a few at Level 4. The children in these images ranged from about 0 to 15; and 634 of them involved children with adults.

26. In the case of the Respondent in CAAR 9/2007, we are of the view that as he was under 21 when he was convicted, and assuming that a Training Centre report had certified him to be a suitable candidate, a Training Centre order would have been appropriate. However, if he had attained the age of 21 when he was convicted, a sentence of 2 years’ imprisonment would have been appropriate.

**Postscript**

27. The facts in the two reviews were plainly not the worst that can come before the courts, although they were very serious. The downloaded images were, after all, only for the personal use of the Respondents. If the images had been intended for publication, distribution or sale, the sentences would have been significantly higher. Nevertheless, in our view the facts in the two reviews were extremely serious. In future, we would recommend, based on similar factual situations, that prosecutions of offences of this gravity should take place in the District Court, particularly where, as seen in CAAR 8/2007, there has been a previous conviction for an offence involving a child.

28. It is possible that some may regard the above guidelines as on the harsh side. However, given the nature of the offence, they need to be. While some may argue that in the end, the only people harmed are those who possess this sort of material in the privacy of their homes, this is much too narrow a view. The courts are obliged to take into account broader considerations, the main one here being the protection of vulnerable children.

29. For the reasons we have given, we shall allow both applications for a review. The sentences in each case were manifestly inadequate. However, the guidelines we have given, which will in future lead to considerably increased sentences for offences of this kind, can only apply to offences committed after this judgment has been given. We do not, therefore, as we have indicated, propose to increase the sentences imposed on the Respondents.

|  |  |  |
| --- | --- | --- |
| (Geoffrey Ma) | (Michael Stuart-Moore) | (Frank Stock) |
| Chief Judge, High Court | Vice-President | Justice of Appeal |

CAAR 8/2007

Mr I Grenville Cross, SC, DPP, Ms Chan Wing Han Agnes & Ms Lam Wing Sai Vinci of the Department of Justice for the Applicant

Mr C S Fu, instructed by Messrs Andrew Chan & Co for the Respondent

CAAR 9/2007

Mr I Grenville Cross, SC, DPP, Ms Chan Wing Han Agnes & Ms Lam Wing Sai Vinci of the Department of Justice for the Applicant

Mr John McNamara, instructed by Messrs Chan & Tsu for the Respondent

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