

Case Law update

Disclosure in “role play” attempted child sex offence cases: **R v BNE [2023] EWCA Crim 1242**



by Helen Longworth

In **R v BNE [2023] EWCA Crim 1242**, the Court of Appeal ruled that the disclosure requirements in decoy sexual offences cases where the decoy have sent pictures of “themselves” to the accused require the Crown to disclose the true age of the person photographed at the time that a photograph was taken where the image is unaltered or, if a sent image has been created or altered, to disclose that fact. The applicable facts should be included in the evidence and a judicial direction given.

The Trial

An undercover officer set up a chat site profile and said that she was 14. The officer sent photographs. The defendant’s case that he always believed that this was a role play fantasy and that he believed the person in the pictures sent to be a young woman aged 19 or over. The defence requested the age of the person in the images, arguing it was relevant to his reasonable belief that he was speaking to an adult and that it would be unfair if the jury were led to believe that the images showed a child when they showed an adult. The Crown refused and made a

public interest immunity (PII) application. The trial judge ruled it was disclosable but there was a public interest reason not to do so. The defendant was convicted.

The Appeal

The appellant argued the true age of the person photographed was relevant to his reasonable belief defence. The court considered how the age of the person photographed could be relevant to the issues that the Crown have to prove.

As set out in **R v Ishaqzai [2021] EWCA Crim 222**, the Crown have to prove either that the defendant did not believe that the decoy was 16 or over or that any belief that she was 16 or over was unreasonable. The court accepted that the age of the person photographed at the time of the photograph could be relevant and that a jury could assume that the person shown in any photographs they saw was under 16 without being set right by the evidence.

Criminal Law Developments

R v Moran [2023] EWCA Crim 1431 sets out the need for a careful approach to role and knowledge of an individual defendant in a drugs conspiracy case.

From 16th January 2024, under the **Criminal Justice Act 2003 (Removal of Prisoners for Deportation) Order 2023** the minimum period before deportation of non-UK national offenders in prison will be the later date of either half the custodial period or eighteen months before the end of the requisite custodial period.

9SJS in the news

Emma Clarke, David Bruce, Adam White and Hayley Bennett defended in [this cannabis dealing case](#).

Helen Longworth prosecuted [this perverting the course of justice case](#) with Andy Smith.

Isabelle Haddad prosecuted [this benefit fraud case](#).

Jaime Hamilton KC prosecuted [this murder](#).

The court considered two situations which may arise:

- First, when an unaltered image of a real person aged 16 or over was sent to the defendant, their true age at the time the photograph was taken should be disclosed to the defence.
- Second, when an image has been digitally created, altered or modified, then the age of the person in the original unaltered image is not relevant but the Crown do need to inform the defence that the images have been digitally created. The court was satisfied that, “to that very limited extent, it will be necessary in the interests of justice to disclose one aspect of the investigative techniques which must otherwise remain confidential.”

The court suggested agreed facts that would meet each situation and advised on an appropriate judicial direction. The appeal was allowed and a retrial was ordered.

Team News

9SJS has hosted two evenings for prospective pupils to meet the team and has launched a competition for our chambers' [Access Award](#). We will be seeking to recruit in the next pupillage application round. Our prospectus is on our [website pupillage pages](#).

The Impact

Parties must be alive to the need for specific disclosure about photographs sent by decoys, depending on the facts of the case. This is likely to be more important in cases that involve members of the public rather than undercover officers. Failure to comply with disclosure requirements, particularly when material to the case, could be fatal for the Crown's case.

[For the full article click here](#)

Advocacy tip:

“When preparing mitigation for a sentence where immediate imprisonment may be avoided, use the imposition of community and custodial sentences guidelines as the skeleton on which to put the flesh of your submissions. Taking the Judge on a path through the guidelines will help to lead them to the right result for your client”

– Robert Smith

Contact the Team

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