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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 18 October 2016

B e f o r e:
LORD JUSTICE LLOYD JONES

MR JUSTICE HICKINBOTTOM

HER HONOUR ADELE JUDGE WILLIAMS QC
(Sitting as a Judge of the CACD)

R E G I N A

V

REECE BAKER
SAHIL RAFIQ

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Mr M Singh (Solicitor Advocate) appeared on behalf of **Baker**
Mr J Nijjar (Solicitor Advocate)appeared on behalf of **Rafiq**
The **Crown** did not appear and was not represented

J U D G M E N T
(Approved)

1. MR JUSTICE HICKINBOTTOM: On 17 December 2015 in the Crown Court at Wolverhampton, having earlier pleaded guilty, the Appellants Sahil Rafiq and Reece Daniel Baker were sentenced by His Honour Judge Webb to 54 months' and 50 months' imprisonment respectively, for conspiracy to defraud. On the same occasion for the same offence, their co-defendants Graeme Reid and Ben Cooper were each sentenced to 42 months, and Scott Hemming to 24 months. With leave of the single judge, the Appellants now appeal against their sentences.

2. The Appellants and their co-defendants were part of an underground community of internet users who produce and distribute unlawful pirate copies of recently released motion pictures; "unlawful" because the copies are in breach of the property rights of (usually) the producing studio under the Copyright Designs and Patents Act 1988. To produce and distribute copy films in breach of those rights is not only a civil wrong, but also a criminal offence. The rights are vitally important to the industry because the production costs of a film can be very high - often millions, or even hundreds of millions, of pounds - and costs have to be paid largely up front, studios and investors etc hoping to recover their costs by profits derived from distribution of the film to cinemas and then, after a typical period of 17 weeks, by way of lawfully produced DVDs and Blu-rays.

3. Although the loss of profits as a result of the generation of unlawful copies can be enormous, members of the internet community of which the Appellants are part often do not engage in these activities for financial gain, but rather for the kudos within their own world of being amongst the first to release illegal copies or of producing a particularly high quality copy. Although under cover of anonymised user names, on the illegal copy films themselves, the producers therefore often identify themselves, together with the techniques they have used to obtain and enhance the production.

4. There are several methods used for obtaining an unlawful version of a film. First, studios release promotional copies (or "screeners") pre-premier, to advertise and promote the film. Although these are closely monitored, they can be obtained by copiers; although, when copied, they usually retain security features such as a time clock in the corner of the screen and/or an image every few minutes with a warning that the copy is not for sale or distribution, which detract from optimal viewing. Second, after release a copy can be made at a cinema where the film is being shown, using high quality hand-held video equipment. This is known as "camming", and the resultant copy a "cam". Visual and audio recordings may be made separately, with the former being taken abroad where it may be easier to smuggle the necessary recording equipment into the cinema. Once the two recordings have been made, they can be synchronised. Third, once a film has been released on DVD and Blu-ray, although these have integral protection from copying, the content can be "ripped" or copied by using special software.

5. Once a copy has been obtained, it is improved. To aid processing by a number of people with different areas of expertise, the copy can be uploaded into a "seedbox",

which is simply a server with huge capacity which can be rented - and then that film can be accessed and worked on by anyone with the relevant password.

6. In terms of processing, the copy film is usually converted to a format that will play on a computer through conventional media player software. This conversion is known as "encoding". As films are typically getting on for 5GB, they are often compressed to, say, 2GB at the expense of quality to make transmission over the web easier. The quality (e.g. contrast, brightness and colour contrast) can be adjusted using specialist video equipment, and the visual and audio better synchronised to produce a better copy. Furthermore, the equipment used in cinemas inserts a secret code into the image displayed on the screen providing details of the cinema and time of projection; but this "watermark" can be removed by skilled encoders in a process known as "de-dotting".

7. Once a suitable copy has been obtained, encoded and enhanced, it is released on the internet. One potential drawback is the speed at which the still large files can be downloaded, and the potential for interruption to the internet service during downloads of big files. These limitations can be overcome by using what is known as "torrent file transfer" in association with peer-to-peer (or "P2P") networks, which are in effect a form of intranet which allows a selected group of users to communicate with one another. The file is split into many parts, typically 20,000, which are then sent individually over the internet to be reconstructed at the other end. The use of a P2P network increases the speed of transmission, because the parts can be sent to a single computer from a number of other computers within the closed network at the same time. All members of the P2P network have access to any and all films within that closed network. Other websites, known as "link aggregating websites" or "torrent sites", enable users to find and link to any P2P network where a particular film can be found. To identify and download an illegal copy film is therefore easy, and downloads of such films are very common. Some of the copies involved in these offences were downloaded hundreds of thousands of times.

8. Thus, unlawful copies of recently released films can very quickly be obtained, processed and widely distributed.

9. However, such activities involve considerable risk. Although many people involved in processing and distribution of pirate films do not seek to make any financial gain, the potential loss to studios is enormous; and they take vigorous steps, including interrogation of the web, to protect their property rights. Consequently, those involved in unlawful film copying work go to great lengths to conceal their true identity, for example by being known only by online aliases and by using software to avoid detection. This means that detection and investigation of these activities is particularly difficult.

10. The activities are also labour intensive and require considerable expertise. As a result, those involved tend to form small groups, called "release groups", which compete with one another to produce a first or best copy of a particular film.

11. The activities that led to the prosecution of the Appellants came to light as a result of web monitoring by the Federation Against Copyright Theft ("FACT"), an association of

studios etc with the role of identifying, investigating and prosecuting breaches of property rights. In the summer of 2012, monitoring led to the identification of the Appellants and their co-defendants as being involved in unauthorised copies of films. Each of the defendants played a different role in these activities; but for the purposes of sentencing, each accepted that his unlawful activities caused a loss of at least £1 million to property right holders.

12. Rafiq is now 26. Before this offence, he had been a man of good character. He successfully completed a degree course in computer studies. His involvement in the conspiracy lasted from July 2010 until his arrest in February 2013, i.e. when he was aged between 19 and 22 years old. By 2012, having previously run one release group called "DTRG", he ran another called "26K". Rafiq was identified by FACT as 26K; and he accepted that, as the group's leader, he was responsible for all of its activities. The number of films released by the group will never be known; but, to give an idea of the size of the operation, a review of just four (out of hundreds) of torrent sites suggested that 26K had released 885 films; and Rafiq accepted being responsible for the release of that number of films, and having personally worked on half of them. Of those films, 3% were screeners, 33% cams and 64% derived from DVDs and Blu-rays, that breakdown showing 26K's particular specialisation. At one time or another, Rafiq had worked with each of his four co-defendants.

13. He was arrested, and his home was searched, on 1 February 2013. Two computers were seized, together with a USB stick and a mobile telephone. Analysis of the equipment revealed that he had used a number of user names, and that he had software necessary to rip from DVDs, edit video and audio, encode and torrent, as well as circumvent copy protection on DVDs. There was also evidence that he had been encoding and otherwise working on pirate films very shortly after their release date; and there was a folder on his computer named "Seedbox", which contained log in details and passwords for a number of seedboxes. Also on the computer were fragments of deleted messages between Rafiq and his co-defendants (particularly, Baker), in which the encoding and torrenting of films was discussed. For example, the messages revealed that Baker had provided Rafiq with audio; Baker explained how he had removed the security watermark by de-dotting a video; and Rafiq and Baker discussed working together, because of the large number of cams to which they had access. On other messages, under the user name "Soaxa", he referred to himself as the leader of 26K which he described as "a pirate group which upload new cams on the net"; and there were references to him issuing instructions to a "cammer". There can be no doubt that Rafiq was well aware of the nature and intent of the enterprise; and no doubt as to his role in it.

14. Rafiq was interviewed on two occasions. In these interviews, he was not truthful. He confirmed that he had a degree in computing, but he said he only downloaded films for his own use and had only upgraded and distributed films at the request of others. It was only later that he accepted his involvement in this offending, the author of his pre-sentence report saying that he (Rafiq) fully understood the severity of what he had done and the losses that had occurred to those involved in the film industry as a result.

15. Baker is now 24. He also began with the DTRG release group, which he left to form his own group called “Goon”, which he operated until he later took control of another group could Hope, later renamed Resistance. From time-to-time he worked with Rafiq, Cooper and Hemming.

16. Baker's release groups also specialised in releasing torrent of screeners and cams. It was clear that, on at least one occasion, his group had paid "cammers" to obtain first copies of various films: he paid US$150 for the movies “Skyfall” and “Argo” which were cammed abroad. Baker was an encoder of some skill, particularly in de-dotting. The four torrent sites examined by the prosecution suggested that he had been involved in the release of 310 movies (11.5% screeners, 54% "cammers" and the rest derived from DVDs and Blu-rays); and he accepted his involvement in those. Like Rafiq, he had no financial benefit from his activities; but there was some evidence that he intended to do so in the future.

17. Baker's involvement ran from October 2011. Like Rafiq, he was arrested and his home address searched on 1 February 2013. His reply to caution on arrest was, "It's about movies. If they are on the internet, there’s no copyright"; a response which the sentencing judge described as "ready", because Baker had been tipped off that he was under investigation and he was expecting it. That was also probably why (the sentencing judge said) his computer had been wiped clean two weeks before. That computer, a camcorder, mobile phone and DVDs were seized, the computer having software upon it for encoding, editing, encrypting and securely deleting the computer's history. At the time of seizure, the computer was being used to encode a film released only 21 days before, which had been downloaded from a Chinese torrent site; and it had been used to upload 12 films to that same site in the previous fortnight. In recovered messages, he said that Resistance and 26K worked together, he referred to an individual as "his" cammer, and he spoke of paying for early copies.

18. Baker was interviewed and released on bail; but his arrest did not act to deter, or apparently even act as a break on, his offending. He obtained new equipment, including a computer and a tablet registered in his girlfriend's name, and uploaded encoding, editing and torrent software. He used a new seedbox. In his chat logs with his co-defendant Hemming, he said that he knew the other three men had been arrested. He also said that he was using the new tablet to do his encoding. He messaged widely, asking for additional films to encode.

19. FACT identified his new torrenting activity and, in early July just before he was due to answer to his bail, the police again searched Baker's property. They found evidence of re-offending, including one film that was downloaded only nine days after his first arrest, a date 12 days before its official release. He was re-arrested. The period of involvement in the conspiracy was therefore between October 2011 and July 2013.

20. In his first interview, after his first arrest, he confirmed what he told the police on arrest; that he believed that, if movies were already on the internet, there was no copyright to them. He said he knew it was a crime to put a video on the internet; but, once someone had done so, he believed anyone could do anything they wanted with it. He accepted that he downloaded films for his own use, and that he had occasionally

downloaded cams and enhanced their quality, which was, he said, a hobby of his. He denied he had uploaded any films to the internet.

21. In his second interview, after his second arrest, he made no comment, but rather relied upon a prepared statement in which he indicated he had nothing to add to what he had said in his first interview.

22. The author of his pre-sentence report recorded that Baker said he had not appreciated that what he had done was illegal - something about which the judge was sceptical – and it was only after he had pleaded guilty that the enormity of his actions dawned upon him, and he expressed remorse (apparently genuine) for them. We consider the judge's scepticism understandable, given that Baker continued offending after his arrest, by which time he must have understood that these activities were criminal.

23. The Appellant's co-defendant had various lesser roles in the conspiracy.

24. Judge Webb approached the sentencing exercise with patent care and diligence. He heard several hours of the prosecution opening and submissions on behalf of each defendant over two days, before sentencing on the third day, having considered all he had heard and all he had seen. His sentencing observations are comprehensive, and fully and clearly reasoned.

25. He properly started with the appropriate sentencing guideline for conspiracy to defraud, and considered harm and culpability under that guideline. He properly placed the offending in Category 1 for harm, a category which has starting points based on £1 million, the amount of the loss accepted by each defendant in this case. Having noted that loss, he remarked that none of the defendants was motivated by financial gain, subject to the modest caveat that there was evidence that Baker intended to make money out of the activities at some stage. The absence of financial gain, the judge noted, was a particularly important factor indicating lesser culpability, but he also took into account the fact that the offences took place several years earlier and the arrests were made nearly three years before sentence, although he considered this delay was largely explicable by the amount of paperwork and investigation necessary to bring the matter to trial. However, he also noted factors indicating higher culpability; that the two Appellants each played a leading role in the conspiracy, the activities involved a high degree of sophistication and significant planning, they took place over a lengthy period of time and there were a large number of potential and actual victims. On balance, he considered that the two Appellants fell within the highest level of culpability, and thus into Category 1A, which has a sentencing starting point of seven years, and a range of five to eight years. We pause to note that the maximum sentence for the substantive offence – and consequently the statutory conspiracy to commit it – is 10 years.

26. In respect of discount for plea, the judge took 25% at the appropriate level, a reduction from the full one-third because of the delay in the Appellants accepting the level of harm caused, which for some time was to be the subject of a Newton hearing until it was, with other matters, agreed between them and the prosecution. The Appellants accepted that 25% was an appropriate discount in the circumstances.

27. In respect of Rafiq, the judge expressly took into account that he was a young man of good character, who had had a difficult youth and that his remorse was eventually genuine, once he had been frank about his level of involvement in the activities. However, the number of films involved for him was high. Counsel for Rafiq submitted to the judge that the starting point could be as low as five years; the judge did not agree, although he accepted that it should be towards the bottom of the guideline range he had identified.

28. In the event, the judge considered that a starting point after trial would have been six years, with a 25% discount, giving a sentence of four-and-a-half years.

29. In respect of Baker, he noted the aggravating factor that he had continued to offend whilst on bail; and continued with some vigour, for example buying new equipment and concealing the true identity of the person to whom the equipment belonged. He also noted that Baker too was a young man - the youngest defendant - and effectively of good character, who had had a challenging childhood and problems with a personality development disorder, depression and alcohol abuse which he was trying to address. Baker had been involved in far fewer illegal films than Rafiq and was involved for a shorter period, although he did continue offending after arrest as we have described. As other aggravating factors, the judge noted that, in Baker's case, (i) there had been some cross-border activity, and (ii) he tried to conceal and destroy evidence before his first arrest.

30. After a trial, the judge considered a sentence of five-and-a-half years' imprisonment would have been appropriate, reduced by 25% to 50 months on his plea.

31. Before us, Mr Singh for Baker and Mr Nijjar for Rafiq rely upon essentially similar grounds of challenge to the sentences imposed. They each submit that Judge Webb erred in determining a sentencing starting point after trial as high as seven years; but, if that starting point was correctly taken, then the judge failed to give proper credit for the personal mitigation each had put forward.

32. As well as the submission was made, we are not persuaded that the judge erred in taking seven years as a starting point from the guidelines. The harm was agreed as at least £1 million for each Appellant, and that is the starting point figure for the top bracket in the guidelines. In respect of culpability, we accept that this was a more difficult case than most, because, in many frauds, the amount of financial loss to the victim is the same as (or at least in a similar bracket to) the financial gain by the perpetrators. Here, the financial loss for the victims was very large; but the Appellants did not gain financially at all. As the sentencing judge said, it was vanity and kudos which spurred them on.

33. However, the judge expressly had that point in mind. He cannot be faulted for balancing against that factor, in the way that he did, the considerable aggravating features of the case, which he identified and to which we have referred.

34. Offences such as this are difficult to detect and investigate, notably because those who are involved take considerable steps to avoid detection. They use web identities and

specialised software designed to avoid the disclosure of the true identity of its users. The Appellants were well aware of this. Indeed, to an extent both (but perhaps, particularly, Baker) appear to have considered that they were beyond detection. Furthermore, although from time-to-time they suggested that they were unaware that their activities were unlawful or that there were any financial victims, we do not accept that that was the case. From the manner in which they conducted themselves, we consider it is clear that they fully understood that they were engaged in doing something unlawful; and anyone with any passing acquaintance of the film industry is well aware that pirate films are popular because they mean viewers do not have to pay anything or as much to watch films, the cost to film makers and others involved in the industry being obvious. These crimes were also the opposite of opportunist: they involved very considerable planning of teams of experts, sophisticated software and considerable know-how, which is why the perpetrators boast (of course, using their hidden identities) of their technical achievements.

35. These factors, together with those identified by the judge, mean that the offending of each Appellant was, in our view, properly placed in the highest culpability Category 1A, with a starting point of seven years.

36. In respect of the personal mitigation relied upon to reduce the sentences from that starting point, again we consider the judge properly took these into account. We are unimpressed by the submission that there should have been a significant reduction because of the Appellants' respective ages. At the time of the offending, they were not young boys. They were 19 at the start, and about 22 at the end, of the offending. The judge expressly considered the submission that Baker was particularly immature, and that he had suffered from various mental health issues; but he did not consider that either had a great deal of weight on the evidence. We agree. In particular, we do not consider that the psychiatric report relied upon by Baker before the judge and this court assists him in any substantial way. Whilst it concludes that, for Baker, prison might be counter-productive - because he may talk himself into trouble, and he may "learn knew or more notorious crimes" - the report does not suggest that his mental problems played any significant part in his offending or that they would materially increase the burden of prison for him compared with other prisoners.

37. It is said on the Appellants' behalf, forcefully, that the judge failed properly to take into account the fact that these Appellants did not financially gain from these activities; and they did not set up, fund or maintain either seedboxes or public torrent websites. We understand that those who manage such websites can and do earn money, by (e.g.) advertisements put on those sites. However, in our view, the judge properly took into account those matters, which are the absence of aggravating factors rather than positive mitigation. Whilst we see some force in the submission made to us that heavier sentences within should be reserved for the architects and designers of the systems that give rise to these activities, in our view that does not assist the appellants. Each case is necessarily fact-specific. It is axiomatic that those whose role in activities mean that they are more culpable than the Appellants were here may be liable to longer sentences than those appropriate for these two men.

38. Therefore, we cannot agree that the judge erred in failing properly to take into account all of the mitigating factors relied upon by the Appellants. Indeed, we can only commend the way in which he approached the sentencing exercise, and his sentencing observations which make his analysis and his reasoning clear. Whilst we accept that the sentences he imposed on these two young men were stiff, we are unpersuaded that they are manifestly excessive or otherwise wrong in law.

39. Consequently, we dismiss these appeals.