Neutral Citation Number: [2021] EWCA Crim 10

Case No: 201803109 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WARWICK
HIS HONOUR JUDGE COOKE
T20177189

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/01/2021

Before:

LADY JUSTICE THIRWALL DBE

MR JUSTICE GARNHAM
and
MRS JUSTICE LAMBERT DBE

- -

Between:

REYNOLDS	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Ms Sophie Murray (instructed by **Forest Williams**) for the **Appellant**
Mr John Hallissey (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 17th November 2020

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Approved Judgment

Reserved Judgment Protocol: This judgment will be handed down by the Judge remotely, by circulation to the parties' representatives by email and, if appropriate, by publishing on www.judiciary.uk and/or release to Bailii. The date and time for hand down will be deemed to be 09:30 on 08 January 2021.

Mr Justice Garnham:

1. On 10 November 2017 in the Crown Court at Warwick, the Appellant, Benjamin Reynolds, pleaded guilty to 13 sexual offences. On 2 July 2018, before HHJ Cooke at the same court, he was sentenced to a total of 15 years imprisonment and made subject to hospital and limitation directions under s.45A of the Mental Health Act 1983 ("the MHA"), restrictions under s.41 and a Sexual Harm Prevention Order which was to apply until further order. He appeals against sentence with leave of the single judge.

2. The term of imprisonment was made up as follows:

    - On count 10, causing a person to engage in sexual activity without consent contrary to s.4(1) the Sexual Offences Act 2003, he was sentenced to 9 years imprisonment.
    - On count 9, causing or inciting a child to engage in sexual activity, contrary to s.10 of the 2003 Act, he was sentenced to 3 years concurrent.
    - On counts 1 and 3, making indecent photographs of a child, contrary to s.1(1)(a) of the Protection of Children Act (PCA) 1978, 1 year on each, concurrent to each other but consecutive to the other sentences.
    - On count 2, a further s1(1)(a) offence, 3 months concurrent.
    - On count 4, a further s.10 offence, 18 months consecutive.
    - On count 5, blackmail, contrary to s.21(1) of the Theft Act 1968, 18 months concurrent.
    - On counts 6 and 7, causing or inciting a child to engage in sexual activity, contrary to s.10, 2 years on each concurrent but consecutive to the other sentences.
    - On count 8, a further s10 offence, 18 months concurrent.
    - On counts 11 and 12, blackmail, 18 months consecutive.
    - On count 13, blackmail, 18 months concurrent.

3. Having been convicted of an offence listed in Schedule 3 of the Sexual Offences Act 2003, the Appellant was required to comply with the provisions of Part 2 of the Act (notification to the police) for an indefinite period. Having been convicted of an offence specified in the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (SI 2009 no 37) the Appellant is to be included in the relevant list by the Independent Safeguarding Authority.

4. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Accordingly, no matter relating to victims of Mr Reynold's offending may be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

The Offending

5. The Appellant lived at home with his mother. His criminal modus operandi was as follows: using fake social media accounts, he pretended to be a young girl or boy and approached other young people online. Using his invented profile, he persuaded his victims, all of whom were residents of the United States, to disclose intimate photographs and videos of themselves to him. He then threatened that he would release

the indecent images he had obtained unless they performed indecent acts or produced more indecent images for him.

6. Regrettably, it is necessary to provide a little more detail of each set of offences.

Counts 1-3 – Indecent images

7. On 5 May 2016, police officers executed a search warrant at his address following complaints from overseas. On searching the address, the officers discovered a number of computers and hard-drives. It appeared as if someone had attempted to destroy them with a hammer, but evidence was obtained from them all. From these devices, officers obtained 3 category A accessible and 3 category A inaccessible still images, 6 category B accessible and 7 category B inaccessible still images, 23,399 category C accessible and 126 inaccessible category C images. Officers also found moving images, 73 accessible and 2 inaccessible category A movies, 75 accessible and 3 inaccessible category B movies and 194 accessible and 5 inaccessible category C movies.

8. There were a further 390,000 images on the computer and on the hard-drive that had not been analysed or categorised, but dip-sampling revealed a large quantity of indecent material amongst those 390,000 images. The dates apparent on those images and films ranged between December 2007 and May 2016. The latest date, 3 May, was about 48 hours before the police executed the warrant. The most graphic of the moving images, included an image of a girl estimated to be between 2 and 4 years of age, being anally penetrated by an adult male in the bath while she demonstrated distress. The distress got louder and louder as she tried to struggle free.

Counts 4 and 5 – Complainant Boy T

9. On the Appellant's laptop computer was a folder and subfolder created on 3 April 2016. The subfolder contained a large number of images that appeared to have originated from a Facebook account of a boy, T who appeared to live in America. The images were innocuous images of everyday, holiday and sporting life. The Appellant had used those images to create a fake profile of his own to which he attributed the name "Jesse Manford". He used those photographs, with the name Jesse Manford, to interact with others, pretending to be T. Whilst pretending to be T, the Appellant could not allow those with whom he was communicating to see him via a webcam. Accordingly, he had taken video clips from the real T's Facebook profile and used software to edit them to make them appear as though they had come from a damaged webcam. He drafted instructions to himself as to how best to lure in those to whom he was talking.

10. In 2011, the Appellant adopted a fake identity as a teenage girl, and contacted the real T. He persuaded the real T to send the Appellant a picture of T's penis. He later used that picture to blackmail T into sending further images. He then used those images to persuade others that he was T. By way of example, during his contacts with her, a girl called E appeared to doubt that she was in fact talking to the man in the photograph. She asked, "Well, if it's really you, send me a photograph of you holding a pair of green socks". The Appellant went back to the real T and required him to take a photograph of himself holding up a pair of green socks under threat of exposure because the Appellant held a picture of T with his penis exposed. There was found on the Appellant's computer a picture of the real T, naked from the waist upwards, holding a pair of green socks and

another of the real T holding up a sign that read "Hi E, I love you". That image was then used by the Appellant to persuade E that the Appellant was in fact T.

11. The Appellant also had movies and an image of T masturbating himself. On one occasion T asked him, "What else must I do? How long must this go on?" The Appellant replied, "I get off on the power". In respect of T, the Appellant had 2 category B images, a category C image and 14 category B videos, including the video of T masturbating. At the time T was 14 years old.

Counts 6 and 7 – Complaint Girl E

12. Another folder on the Appellant's hard drive was entitled "E". There were a number of images and video clips of E. It was she he had contacted using the fake profile which relied upon T's pictures. E was then 14 years of age as was T. During the period March 2015 to April 2016, the A encouraged E to masturbate, and to perform sex acts with dogs. She videoed herself doing it. He captured the video as it was sent to him and stored it on his computer. There was no doubt that he knew how old she was and that was why he was using the profile pictures and images of the 14-year-old T.

13. It is apparent that the Appellant was keen not to get too involved with E and he kept a list of reasons not to get attached to her. Those included assertions that she had skyped with other men. The Appellant noted that E would do anything for "Jessie" and that "She's your fucking slave now". There was evidence, amounting to stalking behaviour, that he had been trying to discover the password to some of her accounts and that he had a fake Instagram account that he used to monitor her. He had maps saved on his computer for her address, her grandparents' address and photographs of those addresses from Google. He recorded and saved various images of E performing acts of a penetrative nature, penetrating herself anally and vaginally, and acts of bestiality involving a dog.

14. In respect of E, there were 193 category A images, 46 category B, 101 category C movies, 32 category C indecent images, 500 pages of chat passed between them.

Count 8 – Girl M

15. The Appellant used software that allowed him to play a video clip to M instead of playing live feed from his webcam. He told her that there were lines over his webcam which was why she could not see him properly. He complimented her eyes and told her he was from London. She asked him if he was 15 years old and he said he was. She told him that she was 14 years old There were then explicit conversations about what he would like to do to her. He sent her pictures of T with his penis exposed. Count 8 reflected an occasion where she was required to, and did, touch her vagina on screen for him. In respect of her, there was a single category A movie, a single category B image and 2 category C images.

Counts 9 and 10 – Girl K

16. The Appellant had an organised folder saved on his hard drive called 'K'. On this occasion, the Appellant was holding himself out to be a girl, using the profile 'Bella Johnson'. There was a screen recording of a Skype call between the Appellant and K.

Officers estimated that K was between 12 and 13 years of age. The Appellant obtained indecent images of K and used those images to require her to film herself for him.

17. In one video entitled "K begging to delete pics", K was seen in her bathroom. The Appellant is heard to ask her to put her fingers in her anus. She did so and asked "Is that enough? Are you happy now?" She is also seen to masturbate with a toothbrush at his behest. She was filmed slapping and punching her buttocks. She got into the shower and pressed herself against the shower screen. At the end of the video the Appellant required her to insert the battery end of an electric toothbrush into her anus. She did so whilst plainly in pain. She told him that it was too big to fit, and asked, "If I do this, will you be happy now? Will you delete the images?" Rather than deleting the images, the Appellant saved that video.

18. In respect of K, there were 7 category A images, 4 category B movies, a category C image reflected in Counts 9 and 10.

Counts 11 and 12 - Girl B

19. Also stored on the Appellant's computer was a video of a girl, aged 15 to 16. She was using Omegle and is seen committing a penetrative sexual act on herself. Also, in this folder was a video of the same female who told the Appellant that she was now 17 years of age. She was in communication with the Appellant via Skype. The Appellant was using the fake profile "Bella". The Appellant asked her if she wanted him to keep it secret and she nodded her head. He then typed a series of instructions about what she needed to do in order that he would keep her secret. He instructed her to do several penetrative acts on herself.

20. B told him that she shared her bedroom with her 12-year-old sister. The prosecution had obtained a recording of her side of a conversation between B and the Appellant. It was plain that he was requiring her to take photographs of her sleeping 12-year-old sister. She said, "Can I just send one of her arse with pants? She'll wake up". "Sorry, I can't get her bra. She's all snuggled up. That's as much as I can get, sorry, I can't". It is plain that the Appellant was using the images he had of B to require her to take images of her 12-year-old sister.

Count 13 - Girl, L

21. There was evidence of a Skype chat between girl L and the Appellant, in the course of which the Appellant said this:

> "By the time they've found me, and got in touch with my country, by the way who hate America and gotten them to do anything, the video will already be everywhere: Your school, church, everywhere else on the internet. And then you're hoping that my country will extradite me to America which they've never done in history, so good luck".

22. He said he wanted pictures with no face, told her that the phone would alert him if she tried to screenshot an image that was not an image of her. She sent him images of her breasts and vagina.

Police Interview

23. After his arrest, the Appellant's house was searched, and he was interviewed. He said he was responsible for all of the indecent images and movies on the devices. He denied having any sexual interest in children and denied being sexually aroused by the images or the movies. He admitted creating the numerous fake Skype profiles and taking T's pictures and storing images to communicate with others.

Sentencing Remarks

24. In his sentencing remarks, HHJ Cooke said that the Appellant was still only a young man. He had no previous convictions, but he had been offending seriously for a good many years undetected. He had been diagnosed as suffering from an autism spectrum disorder, obsessive compulsive disorder, anxiety and depression, although the two latter matters were at least in good measure reactive to his having been apprehended and subjected to these criminal proceedings.

25. The Judge was quite satisfied that those factors, which were matters beyond his control, led to his being socially isolated and led to an overreliance on the internet as a means of communication with other people. They did not, however, begin to excuse the use to which he put the internet nor the deviousness, the callousness and the manipulation that he repeatedly showed to 6 young victims.

26. It had been prayed in aid on his behalf that he had himself suffered manipulative abuse over the internet as a child. In the judgement of the Court, autism spectrum disorder or not, that should have afforded him some insight into what he was subjecting them to.

27. The Court heard from Dr Jane Radley who was of the view that the Appellant met the criteria for a hospital order under s.37 of the MHA and a restriction order under s.41. She favoured orders under s.37 and s.41 rather than a s.45 order.

28. The Judge said that this was not a case of somebody just looking at images of abuse that had already taken place. This was a case of him commissioning and causing further abuse by the most cynical and cruel manipulation of a number of young people. Culpability here was very high. He was devious and manipulative; he was cruel and unbending in what he was demanding of these young people. The harm done to them was all too readily apparent. The Court took the view that the demand for penal sanction was very apparent and a matter of considerable public importance. So, there would be a custodial sentence. The Court was persuaded that it was just and proportionate that his case could be dealt with by a conventional determinate sentence.

29. The worst count was Count 10. The Court concluded that this offence sat on the cusp of category 1A and the lower bracket of category 2A. The point at which they met was 13 years. That was a starting point.

30. Some of the sentences would be served consecutively to reflect the need to have regard to totality. The Court was going to reduce each of the consecutive elements of the sentences from what they would have been as stand-alone offending. Accordingly, on count 10, 13 years was reduced 12 years. To that figure was then applied a one-third deduction, a deduction which applied across the board because he admitted his wrongdoing from the outset. So, said the judge, that produced a 9-year term on Count 10.

(We will return to this issue later, but we note in passing that the Judge made a mathematical error at this point, in that a deduction of one third on these counts should have produced a figure of 8, not 9, years). The victim of count 10 also featured in Count 9 and so a concurrent term of 3 years imprisonment was imposed.

31. For his internet downloading offences (Counts 1 and 3), which related to a collection of images built up over a long period, the Judge said there would be a total consecutive sentence of 1-year imprisonment arrived at having taken into account totality. Count 2 was a small number of category B images. For that, there was a 3-month sentence imposed to run concurrently.

32. For the offences against the boy T (Counts 4 and 5), which had "started the ball rolling" for the further offending, the sentence was 18 months concurrent. That figure was reached on the basis of a 27-month starting point. Those sentences were concurrent but consecutive to the other elements of the offending, making a total thus far of 11½ years imprisonment.

33. As regards Counts 6 and 7, the Judge observed that the Appellant had incited girl E to perform penetrative acts. Because the acts were penetrative, they were the more serious. Taking a 3-year starting point, the Court imposed a total sentence of 2 years imprisonment to run consecutively. This was heavily discounted from the 5-year starting point indicated in the guideline, making a total sentence of 13½ years imprisonment thus far.

34. Counts 11 and 12 concerned a young girl called B. She was not only blackmailed to perform sexual acts on herself and to send the Appellant the resulting images, but to photograph her little sister aged 12. The term for this offence was 18 months consecutive to the other sentences. That took the total custodial sentence to 15 years imprisonment.

35. The Court also made directions pursuant to s.45A of the MHA that in light of the psychiatric evidence, the criteria for a hospital order were met with restrictions as set out in s.41 without limit of time.

Grounds of Appeal

36. On behalf of the Appellant, Ms Murray had originally advanced two grounds of appeal.

    (i) In coming to the total sentence in the way he did, the Judge failed correctly to apply the totality principle. The sentence after trial would have been manifestly excessive.
    (ii) If the Judge was right in arriving at 15 years custody in the way that he did, he failed to take account of the appellant's mental health difficulties as a statutory mitigating factor. He should have reduced the sentence accordingly. The period of 15 years custody was in all the circumstances, manifestly excessive.

37. The Appellant was given leave to advance a third ground, namely that in the light of additional evidence now available, the order under s45A was wrong in principle and the Court ought to substitute orders under s37 and 41. In support of that third ground, we were taken to the medical reports provided to the Judge below and we permitted the Appellant to rely on additional psychiatric reports from Dr Radley. In addition, she was called to give oral evidence, by video link before us. It is convenient to deal with that medical evidence here.

Medical evidence before this Court

38. We were provided with eight psychiatric reports and heard evidence ourselves from one psychiatrist. We were also referred to the reports of Mr Peter Ford, the Appellant's treating psychologist.

39. First, we had a report of an Assessment for Asperger's Syndrome by Maxine Aston dated 13 December 2016. She concluded that the Appellant met the full criteria for an Autism Spectrum Condition and was affected by that condition at level one. It was important to note that having Autism Spectrum Condition, level one, did not rule out the possibility of the existence of another condition, such as depression, ADHD or a personality disorder for example.

40. Second, in his psychiatric report dated 15 June 2018, Dr Suja Sreedharan agreed that the Appellant had a diagnosis of Asperger's Syndrome. Asperger's Syndrome is a pervasive developmental disorder characterised by qualitative impairments in reciprocal interactions. It is a mental disorder within the meaning of MHA. He would benefit from treatment in a specialist unit for men with autism disorders. He recommended that the Appellant should remain in hospital for further treatment under s.37 MHA with a s.41 restriction order.

41. The third report was one dated 31 August 2018 from Dr Shergill who was of the opinion that the Appellant displayed active symptoms of obsessive-compulsive disorder ("OCD"), anxiety and depression in addition to his autistic spectrum condition which predated his charges but had been exacerbated since he was charged. His loneliness and his difficulties forming relationships were linked to his autistic spectrum condition and aetiologically related to the commission of the offences. There were important factors in mitigation, but, in Dr Shergill's opinion, did not absolve him of his criminal responsibility. A custodial sentence was viewed as being harmful and potentially counter-therapeutic as well as not serving any rehabilitative purpose.

42. The fourth report was an undated psychiatric report from Dr Thirulokachandran. He too was of the view that the Appellant satisfied the criteria for a diagnosis of OCD which was classified under the international classification of mental behavioural disorders. There was also the possibility that he had demonstrated depressive and anxiety symptoms and was anxious in social settings. However, given that he had had a psychological assessment indicating that he had an autism spectrum disorder, it was not felt that an additional diagnosis of depression or anxiety was warranted, as both could be attributed to his autism spectrum disorder and the challenges it presented to him in day to day interactions. Dr Thirulokachandran concurred with Dr Shergill's opinion that whilst he did suffer from mental health issues and there was evidence of autism spectrum disorder, this in itself was insufficient to mitigate his actions, as he had shown preplanning by concealing his identity and used measures to control and intimidate his victims.

43. We were also provided with a total of four psychiatric reports from Dr Jane Radley. In the first, dated 3 April 2018, Dr Radley said that the Appellant was a 30-year-old man (now aged 31) with an autism spectrum disorder charged with "engaging in an inappropriately sexual manner with minors over the internet". He had a history of problems with normal socialisation leading to him struggling to cope independently with adult relationships. His isolationism may had been triggered by abuse from a previous stepfather, but this had persisted and had been linked to increasing anxiety, depression and obsessive compulsive symptoms linked to his autism. She said that his offending

"may be directly linked" to his mental health conditions. As a result, she recommended that he was detained in hospital under s.38 so that a full assessment could be carried out.

44. The second was a report dated 15 June 2018. Dr Radley was now of the opinion that the Appellant's offending "was likely to be directly linked" to his mental health conditions, as well as to his early exposure to on-line sexual material. His account of the reasons for his offending required further exploration by a psychologist experienced in working with offenders with autism spectrum disorders to fully assess his risks and make detailed recommendation regarding treatment. This could best be done while he was an in-patient. He would benefit from an autism-adapted sex offender treatment programme. In addition, he would benefit from autism awareness, social skills training, relationships group, CBT for OCD and occupational skills development. It was therefore recommended that he was detained under s.37 in order for treatment to take place. In view of the serious nature of his offending, his lack of insight into his difficulties and risks, and his likely need for a long period of treatment and highly supported and supervised after care, a s.41restriction order was recommended.

45. Dr Radley's third report, dated 11 February 2019, post-dated the sentencing of the Appellant. The report referred to the opinion of the Appellant's treating psychologist, Mr Peter Ford:

> "Mr Reynolds disclosed that his first exposure to sex on the internet took place when he was a child and he had been using internet chat rooms. Ben does not see any link between his illegal behaviour and his childhood abuse through sexual exploitation via the internet. Ben is not aware of the extent of his own offending; it is likely that he is either deliberately or subconsciously in denial of the extent of that. It is highly likely that his actual motivation for these crimes is sexual. …A tentative hypothesis was suggested to him that his very different public and private behaviour styles might be linked to his sense of uncertainty about who he is. Mr Reynolds gave example that, when he was offending on the internet, he felt as though he was not in control, although he recognised that it was he who was doing the actions…"

46. Having referred to Mr Ford's view, Dr Radley concluded as follows:

> "…l remain strongly of the opinion that the appropriate disposal for Mr Reynolds would have been a Section 37/41 Hospital Order. In retrospect it may have been helpful to have requested a longer period of assessment under Section 38 as the nature of Mr Reynolds' mental illness has become more apparent in the time since the sentencing hearing in July 2018. I am of the view that Mr Reynolds' offences were committed <u>as a result of</u> his mental disorder ...
>
> In my opinion the deprivation of liberty resultant from a long period in hospital is punishment for Mr Reynolds as is the realisation of the harm he has done to the children and young people who were the victims of his offences. If Mr Reynolds

> were to go to prison, his mental health would be likely to deteriorate significantly requiring him to be returned to hospital for further treatment. …. I would have concerns about his ability to cope with the prison environment and I am concerned that the risk of him attempting suicide if faced with a long period in prison would be significant. The nature of his sentence will therefore prolong his treatment in hospital and make it more difficult for him to be successfully treated and rehabilitated.
>
> A Section 37/41 Hospital Order would enable him to be successfully treated more quickly and then rehabilitated to an appropriate supervised community setting. It would also enable him to be appropriately supervised and supported indefinitely if this is necessary. On discharge he is likely to require not only the supervision which would be provided to a prisoner released on licence but also the ongoing psychiatric and psychological treatment which would be provided on Conditional Discharge under section 117 of the MHA (1983). Conditional Discharge would require him to be reviewed by his Clinical Supervisor, a Consultant Psychiatrist, every 3 months. This would be an opportunity for his mental state to be assessed and his medication reviewed. This level of psychiatric supervision is unlikely be available to him following release from prison on licence."

47. In her final report, dated 22 May 2019, Dr Radley describes how:

> "Since the sentencing, there has been some development in our understanding of the psychological processes that led to the offences. The current formulation supports my view that the offending was substantially attributable to Mr Reynolds' mental disorder".

48. She goes on to express her opinion that:

> "there has been sufficient change since the passing of the sentence to render that sentence now wrong in principle. My report of 7th February is more than a restatement of my original position. It provides evidence of a developing understanding of the role played by Mr Reynolds' own experience of childhood sexual abuse to his later offending behaviour."

49. She acknowledged that her:

> "primary concern is the rehabilitation and recovery of my patient and I felt it helpful to reiterate … that the best way to

> achieve that is via a Section 37/41… It is my contention that, given our increased knowledge of the patient/appellant, a Section 37/41 is the best way to achieve these aims. The consideration at the sentencing hearing was whether the offending was an indirect result of the appellant's mental disorder- i.e. his mental disorder led to over-reliance on the internet, which in turn facilitated the offending - or a direct result of his mental disorder — i.e. the mental disorder was directly causative. I would contend that Mr Reynolds' Autism contributed more to his offending than an over reliance on the internet."

50. She referred to Mr Ford's most recent assessment:

> "The childhood sexual abuse initiated a psychological process of introjection whereby the experience of sexual arousal at age 11 and 12 was internalised in his developing mind as both pleasurable and repugnant. The pleasure of biological sexual arousal … reinforced an association between sex and children… A psychological split of the pleasure and revulsion with respect to sex resulted in an increase in the aspects of autistic social withdrawal, mood disorder and a pervasive paranoid style. ... At the age of 14 he began to search the internet for the indecent images made of him when he was 11 years old. He never found any images of himself. He described feeling compelled to collect paedophilic pictures as an attempt to remove the picture from the internet into his collection…Each of the subsequent exposures to sexualised images of children added to the reinforcement of the association between sexual pleasure and children. …. In 2012 his criminal sexual behaviour developed into his use of the internet with false identities to make indecent images of children and then in 2015 to use those images to coerce those children and adults into further indecent acts. Also collecting as "acting-out" his abuse through the abuse of others engendering personal feelings of power and control".

51. She concluded:

> "As there is now additional information available to support the view that Mr Reynolds' offending was a direct result of his condition, and given the evidence that a Section 37/41 would better support his treatment and rehabilitation, and, in his particular case …would provide a regime better suited to protect the public than a post S45A licence."

52. In her oral evidence Dr Radley maintained these views. The Appellant's offending was "substantially attributable to his mental disorder". Disposal pursuant to ss38 and 41 was more appropriate because his condition will be lifelong and supervision pursuant to s45A

would end when his sentence ends. Although the risk he posed to the public would be reduced by his treatment in hospital, it would be better if he remained subject to s41.

53. In cross-examination, she agreed that HHJ Cooke's conclusions were not wrong on the basis of the information then available but, in the light of developments since, it was her opinion that the offending was substantially attributable to his mental disorder, primarily his autism but also his OCD. Neither of those conditions of themselves brought about the desire to abuse children but they lessened the ability to resist that latent desire. The cause or trigger of his offending was to be found in his background, including the abuse he had suffered as a child, but autism made it harder for him to resist that trigger. Accordingly, his mental health condition was not the cause of the offending, but it explained his inability to control that behaviour. When he was abusing the children, he appreciated that he was requiring them to do things they did not want to do but, because of his condition, he did not understand the effect on them.

54. As to his long-term treatment, Dr Radley was asked by a member of the Court whether there was a realistic prospect of Mr Reynolds returning to prison if subject to a s45A order. She said she thought there was not. She agreed that the SHPO would assuage her concerns to some extent. She agreed the specialist accommodation available after release under s41 was unlikely to be lifelong.

The Statutory Scheme, caselaw and the Guideline

55. Section 37 of the Mental Health Act 1983 provides:

> "(1) Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law… and the conditions mentioned in subsection (2) below are satisfied, the court may by order authorise his admission to and detention in such hospital as may be specified in the order ..."
>
> (2) The conditions referred to in subsection (1) above are that—
>
> > (a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from [mental disorder] and that either—
> >
> > > (i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and [appropriate medical treatment is available for him;… and
> >
> > (b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most

> suitable method of disposing of the case is by means of an order under this section…
>
> (4) An order for the admission of an offender to a hospital (in this Act referred to as *"a hospital order"*) shall not be made under this section unless the court is satisfied on the written or oral evidence of the approved clinician who would have overall responsibility for his case or of some other person representing the managers of the hospital that arrangements have been made for his admission to that hospital , and for his admission to it within the period of 28 days beginning with the date of the making of such an order; and the court may, pending his admission within that period, given such directions as it thinks fit for his conveyance to and detention in a place of safety…"

56. Section 41 provides:

> "(1) Where a hospital order is made in respect of an offender by the Crown Court, and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do, the court may, subject to the provisions of this section, further order that the offender shall be subject to the special restrictions set out in this section; and an order under this section shall be known as *"a restriction order"* .
>
> (2) A restriction order shall not be made in the case of any person unless at least one of the registered medical practitioners whose evidence is taken into account by the court under section 37(2)(a) above has given evidence orally before the court."

57. The special restrictions applicable to a patient in respect of whom a restriction order is in force are set out in s3.

58. Section 45A provides:

> "(1) This section applies where, in the case of a person convicted before the Crown Court of an offence the sentence for which is not fixed by law—
>
> (a) the conditions mentioned in subsection (2) below are fulfilled; and

(b) [...] the court considers making a hospital order in respect of him before deciding to impose a sentence of imprisonment ("the relevant sentence") in respect of the offence.

(2) The conditions referred to in subsection (1) above are that the court is satisfied, on the written or oral evidence of two registered medical practitioners—

(a) that the offender is suffering from mental disorder;

(b) that the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment; and

(c) that appropriate medical treatment is available for him.

(3) The court may give both of the following directions, namely—

(a) a direction that, instead of being removed to and detained in a prison, the offender be removed to and detained in such hospital as may be specified in the direction (in this Act referred to as a *"hospital direction"*); and

(b) a direction that the offender be subject to the special restrictions set out in section 41 above (in this Act referred to as a *"limitation direction"*).

(4) A hospital direction and a limitation direction shall not be given in relation to an offender unless at least one of the medical practitioners whose evidence is taken into account by the court under subsection (2) above has given evidence orally before the court.

(5) A hospital direction and a limitation direction shall not be given in relation to an offender unless the court is satisfied on the written or oral evidence of the [approved clinician who would have overall responsibility for his case]5 , or of some other person representing the managers of the hospital that arrangements have been made—

(a) for his admission to that hospital; and

(b) for his admission to it within the period of 28 days beginning with the day of the giving of such directions;

and the court may, pending his admission within that period, give such directions as it thinks fit for his conveyance to and detention in a place of safety…"

59. Section 117 applies to persons who are detained, transferred, or admitted under s.3, 37, 45A, 47 or 48 of the MHA to a hospital and requires the responsible after-care bodies, in co-operation with relevant voluntary agencies, to provide after-care for patients who then cease to be detained. The duty to provide such services continues until such time as the person is no longer in need of such care.

60. In a number of cases considered by the CACD in *R v Vowles* [2015] EWCA Crim 45, psychiatric evidence was put before the sentencing judge with a view to him considering making a hospital order under s.37 of the MHA with a restriction under section 41 of the same Act. If such orders had been made, the decision as to when each offender would be released would have been made by the First-tier Tribunal. However, instead of making any order under the MHA, each sentencing judge imposed an indeterminate sentence (either imprisonment for public protection or a life sentence) with a minimum term specified.

61. The CACD provided guidance on the approach to be adopted at [51] to [54]:

> "51. It is important to emphasise that the judge must carefully consider all the evidence in each case and not, as some of the early cases have suggested, feel circumscribed by the psychiatric opinions. A judge must therefore consider, where the conditions in section 37(2)(a) are met, what is the appropriate disposal. In considering that wider question the matters to which a judge will invariably have to have regard to include (1) the extent to which the offender needs treatment for the mental disorder from which the offender suffers, (2) the extent to which the offending is attributable to the mental disorder, (3) the extent to which punishment is required and (4) the protection of the public including the regime for deciding release and the regime after release. There must always be sound reasons for departing from the usual course of imposing a penal sentence and the judge must set these out.
>
> 52. … a judge when sentencing must now pay very careful attention to the different effect in each case of the conditions applicable to and after release. … this consideration may be one matter leading to the imposition of a hospital order under section 37/41.
>
> 53 The fact that two psychiatrists are of the opinion that a hospital order with restrictions under section 37/41 is the right disposal is therefore never a reason on its own to make such an order. The judge must first consider all the relevant circumstances, including the four issues we have set out in the preceding paragraphs and then consider the alternatives in the order in which we set them out in the next paragraph.
>
> 54 Therefore, in the light of the arguments addressed to us and the matters to which we have referred, a court

> should, in a case where (1) the evidence of medical practitioners suggests that the offender is suffering from a mental disorder, (2) that the offending is wholly or in significant part attributable to that disorder, (3) treatment is available, and it considers in the light of all the circumstances to which we have referred, that a hospital order (with or without a restriction) may be an appropriate way of dealing with the case, consider the matters in the following order: (i) As the terms of section 45A(1) of the MHA require, before a hospital order is made under section 37/41, whether or not with a restriction order, a judge should consider whether the mental disorder can appropriately be dealt with by a hospital and limitation direction under section 45A. (ii) If it can, then the judge should make such a direction under section 45A(1). ... (iii) If such a direction is not appropriate the court must then consider, before going further, whether, if the medical evidence satisfies the condition in section 37(2)(a) (that the mental disorder is such that it would be appropriate for the offender to be detained in a hospital and treatment is available), the conditions set out in section 37(2)(b) would make that the most suitable method of disposal. It is essential that a judge gives detailed consideration to all the factors encompassed within section 37(2)(b)." (Emphasis added.)

62. In *R v Edwards* [2018] EWCA Crim 595, this Court considered the release provisions relating to those subject to an order under ss37/41 and those, like the Appellant here, made subject to a s45A order and a determinate sentence. Hallett LJ said at [6] to [8]:

> "6. The First Tier Tribunal (Mental Health) decides when the offender should be released when an order is made under ss.37/41. However, for section 45A orders the release regime differs depending on whether an offender is serving a determinate or indeterminate sentence of imprisonment.
>
> *Determinate sentences*
>
> 7. If a s.45A patient's health improves so that his responsible clinician or the Tribunal notifies the Secretary of State ("SoS") that he no longer requires treatment in hospital under the MHA, the SoS will generally remit the patient to prison under section 50(1) of the MHA to serve the rest of his sentence. On arrival in prison, the s.45A order would cease to have effect and the offender would be released from prison in the usual way.
>
> 8. If there has been no improvement at the automatic release date, the limitation direction aspect of s.45A falls away. At that point, the patient remains in hospital but is treated as though they are subject to an unrestricted hospital order so

> that the point at which he is discharged from hospital is a matter for the clinicians, with no input from the SoS."

63. At [12] Hallett LJ said that a "level of misunderstanding of the guidance offered in *Vowles* appears to have arisen as to the order in which a sentencing judge should approach the making of a s.37 or a s.45A order and the precedence allegedly given in *Vowles* to a s.45A order". She continued:

> "Section 45A and the judgment in *Vowles* do not provide a 'default' setting of imprisonment, as some have assumed. The sentencing judge should first consider if a hospital order may be appropriate under section 37 (2) (a). If so, before making such an order, the court must consider all the powers at its disposal including a s.45A order. Consideration of a s.45A order must come before the making a hospital order. This is because a disposal under section 45A includes a penal element and the court must have 'sound reasons' for departing from the usual course of imposing a sentence with a penal element. Sound reasons may include the nature of the offence and the limited nature of any penal element (if imposed) and the fact that the offending was very substantially (albeit not wholly) attributable to the offender's illness. However, the graver the offence and the greater the risk to the public on release of the offender, the greater the emphasis the judge must place upon the protection of the public and the release regime."

64. At [14] she said:

> "It follows that, as important as the offender's personal circumstances may be, rehabilitation of offenders is but one of the purposes of sentencing. The punishment of offenders and the protection of the public are also at the heart of the sentencing process. In assessing the seriousness of the offence, s. 143 (1) of the Criminal Justice Act provides that the court must consider the offender's culpability in committing the offence and any harm caused, intended or foreseeable."

65. In *R v Nelson* [2020] EWCA Crim 1615, the Court considered the advantages and disadvantages of a hybrid order under s.45A combining imprisonment with a hospital direction and limitation direction, on the one hand, and a hospital and restriction order under s.37, with s.41, on the other. On the facts of that case, which concerned a violent offender who would always suffer from some form of mental disorder but who had responded well to treatment and supervision in hospital, the Court concluded that the order that would best protect the public and assist in his recovery was a hospital and restriction order. At [33] and following the Court said this:

> "33. …. The purposes of a hospital order are rehabilitation of the offender and protection of the public, it is not concerned with punishment.

> 34. Further matters for the court to consider are the release regimes which will apply to the offender on release. A restriction order under section 41 of the MHA gives the Secretary of State for Justice a role in the release and recall of offenders who have been sentenced under hospital orders. A restriction order under section 41 of the MHA should not be passed just to mark the seriousness of the offence, but only where it is required to protect the public from serious harm. …
> 35. Section 45A of the MHA permits, in effect, the combination of sentences of imprisonment with hospital and restrictions orders where the sentence is not fixed by law. The evidence before us showed that section 45A MHA orders were particularly appropriate in two situations: the first was where, notwithstanding the existence of the mental disorder, a penal element to the sentence was appropriate; and the second was where the offender had a mental disorder but there were real doubts that he would comply with any treatment requirements in hospital, meaning that the hospital would be looking after an offender (who might be dangerous) who was not being treated. Mr Barry properly pointed out that the expert evidence that we had was tailored to the particular circumstances of this case and that section 45A MHA hybrid orders might well be suitable in other circumstances. There is consideration in Archbold 2021 at 5A1196 of situations where a section 45A MHA hybrid order had been found to be appropriate…
> 37. Any court considering whether to impose a section 45A MHA hybrid order will need to make a careful assessment of the culpability of the offender, notwithstanding the presence of the mental disorder, in accordance with the guidance given in *Vowles* and *Edwards*. Practical guidance about how to do that is set out in the Guideline."

66. Sentencing offenders with mental disorders guideline ("the Guideline") came into effect on 1 October 2020. Section 2 gives guidance on assessing culpability and suggest the following questions should be addressed:

> - "At the time of the offence did the offender's impairment or disorder impair their ability:
>
> to exercise appropriate judgement,
>
> to make rational choices,
>
> to understand the nature and consequences of their actions?
>
> - At the time of the offence, did the offender's impairment or disorder cause them to behave in a disinhibited way?
>
> - Are there other factors related to the offender's impairment or disorder which reduce culpability?"

67. Annex C gives guidance on sentencing disposals. In respect of orders under s45A it notes that:

> "Once the order is made the release provision cannot be altered. There will be cases where the protection of the public via a restriction order will outweigh the importance of a penal element and other cases where greater public protection is provided by a hybrid order."

68. In describing the effect of a s45A order the Guideline note:

> "where the period of imprisonment is determinate, if the defendant's health improves so that his responsible clinician or the Tribunal notifies the Secretary of State (SoS) that he no longer requires treatment in hospital under the MHA, the SoS will generally remit the patient to prison under s. 50(1) of the MHA to serve the rest of his sentence. On arrival in prison, the s. 45A order would cease to have effect: the offender would continue to serve his prison sentence and his release from that sentence would be in accordance with the usual provisions. However, if there has been no improvement at the automatic release date, the limitation direction aspect of s. 45A falls away. At that point, the patient remains in hospital but is treated as though they are subject to an unrestricted hospital order so that the point at which he is discharged from hospital is a matter for the clinicians, with no input from the SoS.

Discussion

69. The starting point in this case has to be recognition that these were heinous offences, causing significant harm to the children affected.

70. The first question posed at paragraph 51 in *R v Vowles* is the extent to which the offender requires treatment for the mental disorder from which he suffers. All the expert evidence before the Judge, and before us, showed that the Appellant requires treatment and that it was necessary and appropriate to make some form of hospital order. The evidence shows that the appellant is likely to require treatment for a prolonged period.

71. The second question is the extent to which the offending is attributable to the mental disorder. Section 2 of the Guideline provides helpful factors to be considered. There was disagreement between the psychiatrists as to the precise causative significance of the Appellant's mental disorders, but it was common ground that, on the one hand, they played a part in his offending and, on the other, that they could not entirely excuse or explain his offending so as to provide a defence in law.

72. In her first report Dr Radley said that the Appellant's offending "may be directly linked" to his mental health conditions. In her third report she that Mr Reynolds' offences were committed "as a result of" his mental disorder. Dr Shergill said that whilst his loneliness and difficulties forming relationships were linked to his autistic spectrum condition and constituted significant mitigation, they did not absolve him of his criminal responsibility. It was Dr Thirulokachandran opinion that his mental health condition could not fully

mitigate his actions, "as he had shown preplanning by concealing his identity and used measures to control and intimidate his victims".

73. The most recent psychological report from the treating psychologist, Mr Ford, led Dr Radley, to reconsider her conclusions. She suggested that Mr Reynolds may have two, or even multiple, personalities. For the first time before us, she advanced the theory that the Appellant may have seen himself as participating in a video game. She said it was now her view that the offending was "substantially attributable" to his mental health conditions. We cannot accept that evidence. Dr Radley's inconsistencies about his level of culpability reduce the confidence we could place in her opinion on the issue.

74. There was some debate about whether Mr Reynolds was capable of empathising with his victims. Empathy and understanding are different concepts, and we have no doubt that he understood what he was doing to those victims. In our judgment, despite his mental health conditions, Mr Reynolds retained significant culpability for these offences, whether he was or not he was capable of empathy. It is clear from the evidence we have seen that, from an early-stage, Mr Reynolds minimised his offending, seeking to advance excuses for it rather than acknowledging it or the harm it caused. The Appellant knew what he was doing. He knew he was causing pain and distress; he could see it on the screen in front of him. His conduct was well thought through, complex, manipulative and highly effective. It went on for a prolonged period. As a minimum, as he said, he "got off on power".

75. The third question is the extent to which punishment is required. On the one hand, there was undoubtedly real harm to the victims of these offences; on the other, the need for punishment is reduced somewhat because culpability was affected, at least to some extent, by the Appellant's mental disorder. However, in our judgment, the dreadful nature of these offences and the degree of culpability for them which the Appellant retains means punishment is necessary

76. The fourth question to be addressed is which release regime will provide the most protection for the public. In this respect we have two concerns, similar in nature to those which motivated the court in *Nelson*. First, if the Appellant gets to a position where he could be considered for release from hospital he would be sent to prison. We accept that, were he to be returned to prison, there is a significant risk that his mental health would deteriorate requiring him to be returned to hospital for further treatment. However, as Dr Radley observed, there is here no realistic prospect of Mr Reynolds returning to prison if subject to a s45A order. The reality is that he is likely to remain in hospital for the whole period of his sentence.

77. The second concern here, as was the case in *Nelson,* is whether when finally released from prison the Appellant will have the benefit of the specialist after-care that would be afforded him under a s37/41 regime. However, by then, Mr Reynolds will have undergone many years of expert psychiatric care and treatment. He will be subject to a SHPO. Section 117 will apply to him so that the relevant after-care bodies will provide after-care for him. He will benefit from that provision until he is no longer in need of such care.

78. In our judgement, and consistent with the approach advocated in *Edwards and Vowles,* the sentencing judge here correctly considered if a s37 hospital order might be appropriate. Before making such an order, he considered whether a s.45A order would be appropriate. There were no 'sound reasons' for departing from the usual course of imposing a sentence with a penal element and he did so. Even taking into account the

new evidence, we cannot fault the sentencing judge's approach. In our judgment, a s45A order was the appropriate sentence.

79. As noted above (at [30]), however, the Judge made one mathematical error in his calculation of the appropriate term. He purported to give one third credit for plea on count 10 which, he said, took the sentence down from 12 years to 9. The final figure should have been 8 years. That error requires correction.

Conclusion

80. Accordingly, this appeal is allowed to the extent that the sentence of 15 years imposed by the Judge will be replaced by a sentence of **14 years**. That will be made subject to hospital and limitation directions under s.45A of the Mental Health Act 1983. The other orders made by the judge will remain in place.