

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

Neutral Citation No. [2022] EWCA Crim 1656

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/03110/A4



Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 6th December 2022

B e f o r e:

LORD JUSTICE DINGEMANS

MRS JUSTICE McGOWAN DBE

HIS HONOUR JUDGE PICTON

(Sitting as a Judge of the Court of Appeal Criminal Division)

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E X

- v -

NICHOLAS GREAVES

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr J Polnay appeared on behalf of the Attorney General

Miss R C Smith appeared on behalf of the Offender

J U D G M E N T

LORD JUSTICE DINGEMANS:

1. This is an application by His Majesty's Attorney General, under section 36 of the Criminal Justice Act 1988, for leave to refer to this court for review a sentence which she considers to be unduly lenient.

2. The offender is 60 years of age. He was of previous good character. On 16th August 2022 at the Kirklees Magistrates' Court, at the first opportunity, he pleaded guilty to three offences of making indecent photographs of children, covering categories A, B and C materials, contrary to section 1(1)(a) of the Protection of Children Act 1978; one offence of possession of an extreme pornographic image; and two offences of voyeurism. He was committed for sentence to the Crown Court.

3. On 27th September 2022, in the Crown Court at Leeds, the offender was sentenced by His Honour Judge Singh to a suspended sentence order comprising 12 months' imprisonment, suspended for 24 months, with a Rehabilitation Activity Requirement for 35 days. No separate penalty was imposed for the other six offences. A victim surcharge was imposed. The record shows that this was in the sum of £140, but the seventh offence was committed before 1st October 2012, and it is pointed out by the Registrar that the previous lower sum should have applied. There is no challenge to this. A sexual harm prevention order was imposed for ten years. Notification requirements were applied.

The Factual Background

4. West Yorkshire Police attached to Kirklees Child Safeguarding Unit received information relating to an indecent image of a child and an email account associated with the offender.

5. On 4th February 2021, police officers attended the offender's home address in Huddersfield. The offender lived there with his wife and two children. A mobile phone, a laptop and a small

digital camera were taken from his house, and a work laptop was taken from his workplace, where he was employed as a mechanic. He was arrested and taken to Huddersfield Police Station to be interviewed.

6. In interview the offender admitted that he had a sexual interest in children and would go on websites including "Telegram" to access links to illegal images of children. He said that all of the videos on his laptop related to female children performing acts alone. He said that females aged 14 to 15 were "absolute perfection" and that their bodies only get worse after that. He said that he accessed the images to prevent him doing anything else. He said that he used a VPN to stop spam and to prevent him from being caught. He also admitted using the small digital camera to spy on persons in changing rooms, which resulted in the charge of voyeurism.

7. Digital examination showed that there were 142 category A still and moving images. One image showed a naked 5 to 7 year old female child with wrists and ankles taped together, her bottom in the air, and an adult rubbing her vagina and anus. Other images showed girls aged 9 to 11 and 13 to 15 years penetrating their vaginas with hairbrushes. There was an extreme pornographic image. No images were captured of the offender's filming in changing rooms. His conviction for that offence was based on his admission in interview. However, images were recovered showing two unknown females using the lavatory and showering at the offender's home. In a further interview, the offender admitted that these were friends from Zambia who were unaware that they were being filmed.

8. Examination of the devices also showed that the offender was an active participant of a group that used an application called "Telegram" to facilitate the sharing of indecent images of children. Messages from unknown users within the group included: "Anyone got any girls 8-13?" and "Anyone have like 13-16 year old spandex, sports bra, leggings?". Messages showed that the offender requested indecent images of children and offered to send "some videos" to

another. There was no evidence to show that the offender had sent images to anyone else.

9. After his arrest, and as a result of an intervention by a social worker, the offender attended and completed a Safer Lives Programme. A report from the Safer Lives Programme referred to his pornography addiction.

10. A pre-sentence report was prepared which addressed risks of re-offending.

11. During the prosecution opening of facts, prosecuting counsel had referred to the fact that the offender had possessed the images with a view potentially to distributing them. The judge specifically asked prosecuting counsel about that submission. He said:

"The flavour that there has been distribution ongoing, but the Crown cannot be sure of that?"

It was then clarified that the offender was charged with simple possession. The judge asked about the number of illegal images of children on the devices, to which prosecuting counsel stated that the court should only rely on the recovered numbers of illegal files presented in the table provided.

12. When sentencing, so far as the issue of distribution was concerned, the judge said:

"... and it may well be, but of course I do not sentence you on this basis, that you intended to distribute these images through the peer sharing system of which you were a member, but of course there is no evidence of that. I must therefore give you the benefit in relation to that."

13. The judge took the offence of possession of the category A image as the lead offence, for

which the guideline provides a starting point of one year's custody and a range of 26 weeks to three years' custody.

14. The aggravating features identified by the judge were: the high number of images; the significant period over which they were collected (from 2017); the age and vulnerability of the children; and the potential of file sharing.

15. There were also mitigating factors: the offender's positive previous good character, and the fact that after his arrest he had actively engaged with the Safer Lives Programme.

16. Having balanced the aggravating and mitigating features, the judge increased the starting point to a sentence of 18 months' imprisonment. He then gave one-third credit for the plea of guilty, which led to a sentence of 12 months' imprisonment.

17. The judge then considered the suspended sentencing guidelines and decided to suspend the sentence.

18. In written submissions on behalf of the Attorney General it was argued that the judge had fallen into error in that he: (a) concluded that the adjusted starting point on count 1 fell within the range of sentences of up to two years, where the question of suspension became relevant. It was argued that the relevant guideline to be applied by the judge was the distribution of category A materials, for which the starting point was three years' custody, with a range of two to five years. The aggravating factors were said to be the age of the child and the high volume of images. It was acknowledged that the offender had not been charged with offences of distribution or with a view to distribution; (b) decided to suspend the sentence of imprisonment; and (c) imposed no separate penalty in respect of offences 6 and 7 (voyeurism), but said that they would have attracted six months' imprisonment on their own.

19. In his oral submissions on behalf of the Attorney General today, Mr Polnay submitted that the grounds could be summarised as: (a) the length of the sentence; and (b) the issue of totality, given that the judge had aggregated all of the offending in relation to the first offence.

20. Miss Smith, on behalf of the offender, submitted: that there was no charge of distribution, which the judge had clarified with prosecuting counsel; that the judge was entitled to suspend the sentence, because there was a low risk of the offender re-offending; that there was no requirement for immediate custody; that further work under the MAPS for Change Course had been identified for the offender; that the offender was willing to comply with court orders; that there was a realistic prospect of rehabilitation; that there was strong personal mitigation, which included the offender's full and frank admissions; and that sentencing the offender to immediate custody would affect others, being his family.

21. The relevant sentencing guideline for making an indecent image of a child includes separate starting points for possession of images, distribution and production of images. The sentencing guideline for distribution provides that distribution includes possession with a view to distributing or sharing images. This is more than just the potential to distribute images; it is possession with a view to distributing the images. The judge considered the evidence in this case. It is right to record that there was a comment by the offender offering to share some videos, but, as prosecuting counsel below accepted, there was no evidence that the offender had distributed images and he had had plenty of opportunity to distribute images if he had retained them with a view to distribution, given the length of time that the offending covered. Prosecuting counsel below expressly accepted that the respondent should be sentenced on the basis of simple possession. The judge considered the matter and found that he could not be sure that the respondent intended to distribute the images. This was a finding of fact based on the materials before the judge. The finding was consistent with the evidence, and it was a

reasonable finding to make. There is no basis on which this court could interfere with that finding of fact.

22. In these circumstances, the central basis on which the application to refer the sentence is made, namely that the judge should have used the guideline for distribution, falls away. This means that the sentence was of a length which could be suspended. That deals with the second written ground on which the application was made.

23. As to the third ground of the application to refer the sentence, we have considered the judge's decision to impose no separate penalty for the offences of voyeurism. The sentencing guidelines for voyeurism refer to raised harm. Submissions were made to us that there was raised harm in this case and that the judge's overall assessment of six months' imprisonment for the offences of voyeurism alone was a reasonable one. It was said that it was wrong, therefore, not to have increased the sentence that was imposed.

24. If one looks back at what the judge did, he did take the starting point of one year's custody. He increased it to reflect all of the criminality, the aggravating features and the mitigating features, before reaching a final sentence of 18 months' imprisonment, before then discounting that sentence for the guilty plea. It is true, as was submitted by Miss Smith on behalf of the offender, that that might have been a lenient approach to take, but it is not possible for us to say that it was unduly lenient.

25. In circumstances where it is not arguable that this is a sentence which is unduly lenient, we refuse the application to refer.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Funnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
