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IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO: 2022 01093 A1
NCN: [2022] EWCA Crim 921

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 8 June 2022

Before:

THE VICE PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE HOLROYDE

MR JUSTICE GRIFFITHS

HIS HONOUR JUDGE DREW QC

REFERENCE BY THE ATTORNEY-GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988

REGINA
v
GAWAIN DAFYDD FALLOWS

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MS FIONA ROBERTSON appeared on behalf of the Solicitor-General
MS PAGE NYAME appeared on behalf of the Offender

J U D G M E N T
(Approved)

THE VICE PRESIDENT:

1. On 16 March 2022, in the Crown Court at Portsmouth, Gawain Fallows ("the offender") was sentenced to a total of 2 years 6 months' imprisonment for a number of offences arising out of his sexual communications on social media with children and correspondents he thought were children. Her Majesty's Solicitor General believes that total sentence to be unduly lenient. Application is accordingly made pursuant to section 36 of the Criminal Justice Act 1988 for leave to refer the case to this court so that the sentencing may be reviewed.
2. The real children who were the victims of some of the offences are entitled to the life-long protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes nothing may be included in any publication if it is likely to lead members of the public to identify any of them as a victim of these offences.
3. The offender was aged between 31 and 35 during the relevant 4-year period. We shall summarise his offending in chronological sequence.
4. Between January 2017 and May 2019 the offender made, and stored on two mobile phones, a significant number of indecent photos of children. Across the two phones a total of 20 category A photographs, 42 category B, and 266 category C were found.
5. Between November 2018 and May 2019 the offender communicated via WhatsApp with a girl then aged 14 or 15 ("C"). His correspondence with her covered 1,400 pages of messages stored on his phone, including many of a highly sexual nature. He asked C to send him photographs of herself, encouraging her to touch herself sexually. He called her the "love of his life" and discussed how they might meet and live together. He told her of various sexual activities he would like to engage in with her. C did in fact send him sexual images of herself: 1 of category A, 19 of category B, and 136 of category C. These included a video which C recorded in the shower in which she showed her breasts and vagina to the camera and masturbated.
6. It appears that C's family found out that she was communicating with a much older man, and brought it to an end, but did not report the matter to the police. The offender's reaction to the ending of his contact with C was to threaten to publish the indecent photographs of her which she had provided to him, saying, "You're just like every other basic slag. Watch, your pictures are going online and to your mother, nasty slag that you are".
7. These offences came to light later in 2019 when a former adult partner of the offender found some of the images on a phone which he had left at her home. She provided that phone to the police, who seized a second phone when they arrested the offender on 6 September 2019. When interviewed under caution the offender denied any wrongdoing, accusing his former partner of making false allegations against him and suggesting that his Facebook account had been hacked. He was released under investigation.
8. This offending between 2017 and 2019 became the subject of a committal for sentence from the Wigan Magistrates' Court ('S2022 0022') in relation to eight charges: six of making indecent photographs contrary to section 1 of the Protection of Children Act 1978; one of sexual communication with a child under 16, contrary to section 15A of the Sexual Offences Act 2003; and one of causing or inciting sexual activity by a child under 16, contrary to section 10 of the 2003 Act. For reasons which remain obscure, there is confusion as to the numbering of these various charges in different documents. We shall therefore simply refer to the latter two charges as the 'section 15A offence' and the 'section 10 offence'.
9. Whilst under investigation for the Wigan offences, however, the offender went on to commit further sexual offences. Over a 7-week period in March and April 2021 he conducted a sexualised online correspondence with (as he thought) a 12-year-old girl called Kirsty. Kirsty was in fact an undercover police officer. The offender met her in an online chatroom and encouraged her to move to a different form of social media. He said he would pay for her to travel to London to meet him and would buy her things, including Disney underwear. He said he wanted her to be his girlfriend and said he wanted to make love to

her. He suggested she tell her father she was with a friend when she was meeting him. He asked if she had a sister with whom they could engage in a threesome. When Kirsty said that her sister was too young the offender replied, "Not if she's your age or a year younger". He repeatedly asked her to send naked photographs of herself. When she said she would not do so until he sent her a photograph of himself, he said he would not send anything because he was not going to go to jail. He called her a "fake", claimed it was a "set-up" and no longer wanted to meet her.

10. The offender was arrested and interviewed on 29 April 2021. He denied sending any sexual messages to any child, referring to his own 13-year-old daughter and saying that the idea made him feel sick. He again suggested that his social media may have been hacked and that someone may have used his thumb to unlock his phone whilst he was sleeping. He was also questioned about his Wigan offences, which he again denied.
11. The exchange of messages with Kirsty resulted in an indictment before the Crown Court at Snaresbrook ("T2022 0019") which charged the offender with attempting to engage in sexual communication with a child contrary to section 1 of the Criminal Attempts Act 1981 and section 15A of the 2003 Act.
12. Before he was charged with that offence, and undaunted by the fact that he was now under investigation for both the Snaresbrook and the Wigan matters, the offender committed yet further offences. Between August and December 2021 he used a Facebook profile under an alias to contact (as he thought) a 13-year-old girl, Minnie, and later her 11-year-old sister, Georgia. Neither girl in fact existed. They were decoys set up by a group referred to as paedophile hunters. The offender sent messages about Minnie losing her virginity to him and moving in with him. He incited Georgia to masturbate, telling her what she should do. On several occasions he arranged to meet both girls, asking them to travel to the area where he lived and to stay with him for a year. In relation to the proposed meetings he took a number of precautions to avoid detection, telling the sisters to bring only limited clothing, to buy their train tickets with cash rather than a card, to deactivate geolocation services on their phone and to meet him outside the train station because "the less CCTV the better". However, the offender always cancelled at the last minute the meetings which he arranged.
13. The offender was arrested on 9 December 2021. When interviewed the following day he said he had only ever sent non-sexual messages to Georgia and denied sending any messages to Minnie, claiming once again that his profile had been hacked.
14. In relation to these matters the offender was charged on indictment T2021 0223 in the Crown Court at Portsmouth with five offences of attempting to commit crimes contrary to three provisions of the Sexual Offences Act 2003: count 1, attempting to cause a child aged 11 to engage in sexual activity contrary to section 10; counts 2 and 3, attempting to meet a child following grooming contrary to section 15; and counts 4 and 5, attempted sexual communication with a child contrary to section 15A.
15. The offender indicated guilty pleas to all eight offences before the Wigan Magistrates' Court and was committed for sentence. He indicated not guilty pleas to the various charges on the two indictments, but pleaded guilty at PTPH in relation to each indictment.
16. The offender had no previous convictions other than motoring matters long ago.
17. The judge had the assistance of a pre-sentence report, the author of which found that the offender had displayed little insight into his conduct and continued to deny any sexual attraction to children. The report indicated that the offender resisted attempts to hold him to account for his actions, tending to blame factors such as the PTSD and depression from which he had been diagnosed as suffering.
18. The judge was addressed about the relevant sentencing guidelines then in force. It should be noted that a guideline in relation to offences contrary to section 15A of the 2003 Act will soon come into effect, but it did not and does not apply in this case.
19. In his brief sentencing remarks the judge made clear that he had the principle of totality well in mind. He rightly allowed one-third credit for the early admission of the Wigan offences and one-quarter in relation to the other offences. He said that he regarded the Snaresbrook

and Portsmouth offences as aggravated by the fact that they were committed at a time when the offender was under investigation for the Wigan offences.

- For the Wigan offences he imposed a total of 2 years' imprisonment, comprising 2 years for the section 15A offence, 2 years concurrent for the section 10 offence (which he treated as the lead offence), and concurrent terms of 8 months, 4 months and 1 month for the indecent photographs offences.
- For the Portsmouth offences he imposed prison sentences, concurrent with each other and with the sentences for the Wigan offences, of 2 years on count 1 and 1 year on each of the other counts.
- For the Snaresbrook offence he imposed 6 months' imprisonment, consecutive to the other sentences.

Thus the total sentence was, as we have said, 2 years and 6 months' imprisonment.

A Sexual Harm Prevention Order was made for 10 years.

20. On behalf of the Solicitor General, Ms Robertson submits that the total sentence was unduly lenient, in particular because the judge took too low a starting point for the most serious of the Wigan offences, namely the section 10 offence, then wrongly made all but one of the sentences concurrent and failed adequately to reflect the aggravating factors.
21. She reminds us of the approach to sentencing which this court laid down in R v Reed & Others [2021] EWCA Crim 572 in relation to section 10 offences and other offences of causing, inciting or attempting child sexual offences where no real child exists - an approach consistent with that adopted by the court in the earlier decision of R v Privett & Others [2020] EWCA Crim 557 in relation to section 14 offences where no real child exists.
22. Ms Robertson also reminds us that there were of course real child victims of the Wigan offences and that those offences were committed over a period of more than 2 years, with the Portsmouth and Snaresbrook offences following nearly 2 years later and whilst the offender was under investigation.
23. Ms Robertson submits that the total sentence of 2 years 6 months was no longer than might have been considered appropriate for the section 10 offence alone, after giving appropriate credit for the guilty plea. The sentence for that lead offence, she submits, needed a significant uplift to reflect the other offending if the judge was to deal with them by concurrent sentences.
24. Ms Nyame, who represents the offender in this court as she did below, submits that neither the individual sentences nor the total sentence falls below the range which was properly open to the judge. She reminds us that the offender has never before lost his liberty and that he is serving his sentence in prison conditions which are particularly difficult at the present time.
25. As to the submission made on behalf of the Solicitor General that the judge when considering the Wigan offences should have made an initial move upwards from the guideline starting point to reflect the presence of a number of high culpability factors, Ms Nyame submits that any such increase is discretionary and that the judge should not be criticised for deciding against making such an increase in the present case.
26. She also mentions difficulties faced by the offender which provided personal mitigation on his behalf, in particular his caring responsibilities in relation to older relatives and the background of some mental illness, albeit that she does not suggest that that illness was linked to the commission of the offences.
27. We are grateful to both counsel for their helpfully succinct and well-focused submissions.
28. In our judgment, each of the individual offences was a serious example of its kind. Moreover, notwithstanding Ms Nyame's careful submissions on the offender's behalf, the personal mitigation available to him was, in our view, limited. He had had an unhappy adolescence in what appears to have been an unhappy family home, and the pre-sentence report suggested emotional immaturity. We accept that he was to be treated for sentencing purposes as having suffered for some years from depression and PTSD. But as against that, he had had a number of sexual relationships with women of his own age and is himself the

father of a number of children, albeit that he seems to have played little, if any, part in their lives. His emotional and mental health problems could therefore only reduce his culpability to a very limited degree, if at all. The fact that he had no previous convictions has to be seen in the context of his committing these offences over a period of 4 years. Further, the relevant guidelines make clear that for offending of this kind previous good character should not normally be given any significant weight.

29. The judge was right to take the view that simple aggregation of the appropriate sentences for each offence viewed in isolation would result in far too long a total sentence. It was therefore necessary for him to have regard to totality, both within a group of offences and overall. That was by no means a straightforward task. However, as both counsel have realistically acknowledged in their submissions, the concern of this court is with the total sentence rather than its precise structure.
30. With all respect to the judge, the criticisms of his approach made on behalf of the Solicitor General are, in our view, well-founded. The judge failed properly to reflect the seriousness of the offending. In the light of the guidance given in R v Reed, he appears to have given too much weight to the fact that some of the offences related to intended victims who were not real children.
31. The categorisation of the offences covered by relevant guidelines was not in dispute in the court below. In relation to the Wigan offences against C (a real child) the section 10 offence fell into category 2A of the relevant guideline, with a starting point of 3 years' custody and a range from 2 to 6 years. Four separate culpability A factors were present, namely grooming; a significant disparity in age; the soliciting and retention of sexual images of the victim; and the use of threats including blackmail. That multiplicity of factors merited an upwards adjustment above the starting point before consideration of aggravating and mitigating features. The aggravating feature of that offence was that the offending continued over 6 months, with more than 4,000 messages exchanged. The section 15A offence was within Category 1A, with a starting point of 18 months' custody and a range from 9 to 24 months. Again, it was aggravated by persistence. There was of course a significant degree of overlap between those two offences, and indeed an overlap with some of the indecent images offences, and care must be taken not to double count. The other indecent photograph offences, however, added significantly to the overall criminality in the Wigan group of offences.
32. In our view, and before consideration of overall totality, the sentence after trial for the offences against C could not properly have been less than 4 years' imprisonment, with a further 9 months for the indecent images offences. It follows that with credit of one-third for the guilty pleas the total could not be less than 3 years.
33. The Snaresbrook offence was committed whilst under investigation. It involved grooming, persistence, a significant disparity in age, and steps taken to avoid detection. There was no relevant guideline to assist the judge. The statutory maximum sentence was 2 years' imprisonment, and this was a bad example of its kind. The sentence had to be adjusted downwards to a limited extent to reflect the fact that there was no real child. On its own, it merited a sentence of at least 12 months after a trial, 9 months after giving credit of one-quarter for the guilty plea. In principle, and subject of course to considerations of totality, it merited a sentence consecutive to the total sentence for the Wigan offences.
34. As to the Portsmouth offences, the section 10 offence was category 2A, with a starting point of 3 years but with three culpability A factors present and a number of aggravating features. The offender was under investigation; he persisted in this offending over 4 months; he used a false persona and removed identifying photographs from his Facebook profile. The section 15 offence was category 2, with a starting point of 2 years and a range from 1 to 4 years' custody. Again, aggravating features were present; and there were two different victims, one believed by the offender to be only 11 years old. The section 15A offences likewise related to two victims and had aggravating features. The sentences for the individual offences had to be adjusted downwards to reflect the facts that there were no real

victims and the offender did not in fact attend any of the planned meetings. Even with that reduction, however, the total sentence for this group of offences could not, in our view, be less than 4 years after trial; 3 years with credit for the guilty pleas. Again in principle it was appropriate for the total sentence for these offences to be consecutive to the sentences for other offences.

35. It is then necessary to make a further downwards adjustment to reflect overall totality. In doing so we take into account the difficult circumstances in which the offender is serving his first custodial sentence and the other factors mentioned in his favour by Ms Nyame. Giving as much weight as we can to those factors, we are satisfied that the total sentence imposed below was much too low. Difficult though we recognise it will be for the offender, a substantially longer total sentence was and is unavoidably necessary.
36. We therefore grant leave to refer. We find that the total sentence imposed by the judge was unduly lenient. In our view the least total sentence appropriate in these circumstances was 5 years 6 months' imprisonment. We will reach that total in the following way.
Wigan Committal S2022 0022: we quash the sentences imposed below for the section 10 and section 15A offences and substitute for them sentences of 3 years' imprisonment and 12 months' imprisonment respectively. The other sentences remain as before. All the sentences in this group are concurrent, making a total of 3 years.
Snaresbrook Indictment 2022 0019: we quash the sentence and substitute 9 months' imprisonment concurrent with the Wigan sentences.
Portsmouth Indictment T2021 0223: we quash the sentence imposed on count 1 and substitute for it 2 years 6 months' imprisonment. The other sentences in this group remain as before. They are concurrent with one another but consecutive to the sentence for the Wigan offences.
37. The effect of our decision, Mr Fallows, is that your total sentence is increased from 2 years 6 months' imprisonment to 5 years 6 months, of which you must serve up to half in custody before being released on licence for the remainder. The Sexual Harm Prevention Order will remain in force as before. The notification requirements will now apply indefinitely. The surcharge remains as before.

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

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