Neutral Citation Number: [2023] EWCA Crim 107

Case No: 202202853 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT STOKE ON TRENT
21SL2290521

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09.02.2023

Before :

LADY JUSTICE THIRLWALL
MR JUSTICE JAY
and
HIS HONOUR JUDGE FORSTER KC
Sitting as a Judge of the Court of Appeal

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Between :

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

REX — **Appellant**

- and -

ANDREW CLOUGH — **Respondent**

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- -

N Hearn appeared on behalf of the **Attorney General**
J Holt appeared on behalf of the **Offender**

Hearing date : 16.11.2022

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Approved Judgment

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LADY JUSTICE THIRLWALL:

1. On 8th July 2022 in the Crown Court at Stoke the respondent (45) pleaded guilty and on 25th August was sentenced in respect of the following offences:
Count 1: Attempting to cause a girl under the age of 13 to engage in sexual activity (involving penetration), s 1 (1) Criminal Attempts Act 1981 and s 8 (1) Sexual Offences Act 2003, 3 years' imprisonment.
Count 2: Attempting to cause a child to engage in sexual activity, s 1 (1) Criminal Attempts Act 1981 and s 10 (1) Sexual Offences Act 2003, 16 months' imprisonment.
Count 3: Attempted sexual communication with a child, s 1 (1) Criminal Attempts Act 1981 and s 15A (1) Sexual offences Act 2003, 8 months' imprisonment. The sentences on counts 2 and 3 were expressed to run concurrently with the sentence on count 1.
A wide ranging and detailed Sexual harm Prevention Order was imposed.

2. The Attorney General applies for leave to refer the sentence which he regards as unduly lenient. The application is directed to the prison sentences only.

FACTS

3. In counts 1 and 2 the respondent attempted online to incite people whom he thought were children to commit sexual acts. In count 3 he attempted sexual communication with a child. In fact, there was no child involved in any of the offences. He was unaware that he was communicating with individuals who put false profiles online to trap those who seek to contact children online.

4. We deal with the offences in chronological order.
Count 3
On 10 July 2021 the respondent began an online conversation with a person using the profile Isabella. He thought she was a child. "Isabella" told the respondent she was 12. They swapped phone numbers and the conversation moved to WhatsApp. The applicant conversed with "Isabella", asking whether she wanted a boyfriend. He asked whether she was wearing pyjamas. She said she wore a nighty to which he replied that it would "ride up and show her bum off". On 15 July he asked for a photograph. He was sent an ordinary nonsexual photograph of a young girl. The respondent sent a photograph of himself. He said he wanted to see her boobs, but she did not respond to that.

5. On 17 July "Isabella" said her mum was drunk with her boyfriend and she was trying not to listen. The respondent asked if they were having sex. "Isabella" asked what that was. He explained that where a man puts his willy in the woman. She asked if the boyfriend was hurting her mum. He said her mum was probably enjoying it. The respondent said having sex was fun. She asked what it meant. He said "kissing, cuddling, touching each other's bodies and the man's willy goes inside the woman's pussy".

6. Count 2
Count 2 concerns conduct also on 15 July. This time the contact began on a messaging app, Chat Hour. Again, there was an adult pretending to be a child. This time the name given was Abbey who was said to be 14. The respondent said he was 44 and then asked whether she was still cool talking to him. "She" asked why and he

replied, "sexting and sharing and stuff". Later, on WhatsApp he asked for photographs, but it appears none was sent. He asked if she wore knickers when she was wearing a nighty. On 23 July text messaging continued on a similar theme. He said he liked the thought of her with no knickers. He went on to ask if she trimmed between her legs. He asked if she had ever masturbated. "Abbey" replied that she did not really understand how to. The respondent asked if she wanted him to talk her though it. He told her to pull up her nightie and gave her a series of precise instructions on how to masturbate including to "put your finger tips over your pussy lips and press a little".

7. Count 1
There was then a gap. The respondent later told the police that he had stopped for a while. Count 1 occurred on 1 September. The respondent used "Chat Hour" again and initiated a conversation with, unknown to him, an adult signed in as Alicia. "She" told him "I'm 12 nearly 13 btw wau? [what about you]." The respondent said he was 42. The respondent said, "I do enjoy sex talk but we can avoid that if you're not comfortable". The adult user of the profile said "she" was at school. The respondent asked for a photograph and was sent a normal photograph of a 12 year old girl. He asked for a photo of her boobs. Nothing was sent. On 4 September the respondent asked her if she had ever masturbated. He told her it wasn't wrong and she should try it. "Alicia" said she didn't know what to do. He said he would take her through it, which he did. He gave specific instructions on how to masturbate and asked her if it felt nice. He told her to push her fingertip inside her wet slit. He said she was a good girl. He told her to move her fingers in and out. Later they discussed other matters. "Alicia" told him that her mother was dead and she lived with her grandparents. He said she was a brave girl. There was no communication after 25 September 2021.

8. The people responsible for the profiles came to the appellant's home to confront him. The police were called. In due course the matter came before the Magistrates' Court, at which point there were no papers. These were produced before the Crown Court hearing at which the respondent pleaded guilty to all three offences.

9. The respondent had not previously been before the courts. He had been working as a theatre technician for many years but lost his job upon his arrest. He had been unhappily married for some years but was still living with his wife and two teenage children. His wife insisted he leave the family home when these offences came to light. He went to live with his sister. He also found other employment. He has had no contact with his children since these events.

10. We note that the respondent has haemophilia and is blind in one eye. The pre-sentence report paints a picture of a very lonely person with low self-esteem, even before the offending. He was assessed at low risk of reoffending. The probation officer recommended a community penalty with a Rehabilitation Activity Requirement and unpaid work.

11. The judge had seen the Pre-Sentence Report and a number of supportive letters from the respondent's brother-in-law, his sister and his parents. Each emphasised the fact, which the judge accepted, that the respondent was remorseful, that he had been a loving and devoted father to his children (who were now refusing to see him). His family felt that he had been isolated by his former wife. The PSR speaks of his

isolation. The family point to the fact that he has lost everything: home, employment and children.

Sentencing exercise

12. All three counts were considered to be category 2 in the relevant sentencing guideline for each count because of the nature of the activity. All were harm category A, on the basis of the harm intended: Count 3 because the respondent had asked for photographs, counts 1 and 2 because of the disparity in age. None of the other culpability factors applied.

13. Having considered submissions on the appropriate categories within the guidelines the judge said to counsel, "you've dealt with the prosecution's view of the guidelines quite properly. Because these are attempt offences because the reality is, unbeknownst to the defendant, that there was not an actual child of the age sited in the other end of the conversation there must be a reduction in sentence but recent authority [obviously a reference to the decision in *R v Reed and others [2021]* EWCA 572 and the updated sentencing guideline] has indicated that it should be a modest reduction. Of course, whatever or whoever was at the end of the conversation, it is the actions and intentions of the defendant that cases of this nature focus on."

14. During mitigation Mr Holt drew to her attention the individual case of *Reed* at [29] of the judgment. This was an appeal against sentence; the judge considered that the category of harm to be selected was determined by the harm intended by the defendant, not by the harm actually caused. This Court approved that approach. The judge was dealing with two offences under section 10 where there was no victim, the child being an undercover police officer, the judge placed the offending in category 1A with a starting point of 5 years before adjusting downwards "for two features, the fact that there was no actual harm caused and also the fact that there could not be harm caused because it was a police officer involved." As this court observed "His final sentence was 3 years concurrent before plea, reduced to 2 years after credit for plea." The court dismissed the appeal, observing that the "reduction of 2 years to reflect the lack of harm and the fact that the child was fictional was notably generous."

15. The judge rejected a submission that since the purported victim of count 1 had said she was 12 nearly 13 the judge should give the respondent the benefit of the doubt and start at the bottom of the sentencing range, effectively treating count 1 on a par with count 2. She also made plain precisely what she was dealing with the respondent for "This is an adult man communicating with what he believes to be one 14 year old and two 12 year olds in an explicit and sexual way; inviting them to behave in a sexual way, using sexually explicit language during their conversations, seemingly undeterred by their ages, seemingly undeterred by their express naivety as to never having done something or not being sure how to do that. Indicating to them that he himself was engaging in physical sexual activity on the other end of the line. We have to focus on that."

16. Later, in very detailed sentencing remarks the judge set out the facts and background, the mitigation and the fact that the respondent was entitled to full credit for his plea of guilty. Before turning to the guidelines, she said, "Those who do offend in this way must understand that just because, and I use those words advisedly, there is no

physical child to be harmed on the other end of his conversation, it somehow mitigates to a large extent the significance of this offending. It does not because the real crime and the real concern in offences of this nature is the person who does the talking… Whether it is a real child or in this case a decoy child on the internet, it is the exploitative attitude and nature of the usually adult male who commit this type of offence that must be the focus of any court."

17. She explained that given there were three offences against three purported individuals consecutive sentences would be justified but she considered that although the sentence would be severe it would be better to identify a headline sentence on count 1, aggravated by the offences at counts 2 and 3 and have regard to totality. She observed that as well as punishment the sentence must always be just.

18. She took the starting point on count 1 for a category 2A offence, 8 years and noted the range of between 5 and 10 years' imprisonment. She took account of the other two offences, the appellant's good character, his genuine remorse and his timely guilty plea. She went on, "Had there been a trial in this case, the sentence of the court would have been one of sixty months' imprisonment. I reduce that by one full third … to a sentence of forty months imprisonment. That would be a sentence of three years and four months. As a mercy to you and your position I reduce that further for the purposes of totality to thirty six months' imprisonment. She then imposed concurrent sentences on counts 2 and 3 of 16 and 8 months' imprisonment respectively.

19. In characteristically helpful and succinct submissions on behalf of the Attorney General Mr Hearn says that a total sentence of 3 years imprisonment did not properly reflect the overall criminality. It was unduly lenient.

20. Mr Hearn, rightly, does not criticise the way the judge structured the sentence, taking a headline offence and reflecting all the offending in the sentence for that offence. However, he submits that given that the starting point in the relevant sentencing guideline for the offence at count 1 is 8 years imprisonment, the judge must have made a serious error which led her to reach a sentence which was below the bottom of the range in category 2A and at the bottom of the range for category 2B. There were three offences involving three "victims". The judge should have moved up from 8 years to reflect the additional two offences before moving down to take account of the mitigating factors. As to the fact that there was no victim in any of the counts, he points to the observations of this court in *Reed* at paragraphs 23 and 24:

> "23. [..]when the defendant attempts to commit these offences or incites a child to engage in certain activity, but the activity does not take place. The harm should always be assessed in the first instance by reference to his or her intentions, followed by a downward movement from the starting point to reflect the fact that the sexual act did not occur, either because there was no real child or for any other reason.
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> 24. The extent of downward adjustment will depend on the facts of the case. Where an offender is only prevented from carrying out the offence at a late stage, or when the child victim did not exist and otherwise the offender would have carried out

> the offence, a small reduction within the category range will usually be appropriate. Where relevant, no additional reduction should be made for the fact that the offending is an attempt."

21. He points out that the sentencing guideline for the offence at Count 1 says the reduction should be very modest where there is no victim. He acknowledges that there was significant mitigation which he suggests would have justified a reduction of the sentence (before consideration of the guilty plea) of 18 months but, he submits, the final sentence should have been in the region of 6 years.

22. Mr Holt reminded us that the court in *Reed and others* observed that it is for the judge to determine the extent of the downward adjustment having considered the facts of the case. He also reminded us of the level of downward adjustment in the individual case of *Reed.* He pointed to the lengthy exchanges between counsel and the judge and to the careful sentencing remarks. There was, he submits, no error by the judge.

Discussion

23. It is plain from her remarks during the hearing that the judge had well in mind the appropriate guidelines and the decision in *Reed and others*. She did not explain in arithmetical terms how she had reached her sentence after a trial of 60 months (at the bottom of the range), but the thrust and detail of her sentencing remarks make it clear that she moved up significantly from the starting point of 8 years to take account of the other two offences. It was for her to determine the extent of the downward adjustment for the absence of any victims, having considered the facts of the case, as *Reed and others* and the sentencing guideline require, noting the reference to the adjustment being small, and then to make a further reduction for the substantial mitigation, some of which she referred to in the final passage of her sentencing remarks, before considering totality.

24. This was a lenient sentence. The question is whether it was unduly so. On Mr Hearn's submission that the appropriate sentence should have been one of 6 years, the sentence after trial would have been one of 9 years. We do not accept this; it would require the judge to have moved from 8 years to 12 years at the second stage of the sentencing process. This was not justified on the facts here. Had the judge moved from the starting point of 8 years to 9 ½ years to reflect the two other offences there could be no reasonable complaint. A reduction of 2 years in respect of the absence of any victims would have been relatively modest. A reduction for mitigation of 2 ½ years would have been notably generous but the overall reduction of 4 ½ years was not outside the reasonable range. There is no complaint about the reduction of one third in recognition of the guilty plea.

25. Whilst it would have been helpful had the judge spelt out what reduction she had made at each stage, it is clear that she had well in mind every relevant issue and described the sentence she was about to impose as "severe". In that observation she was no doubt reflecting on the consequences for the respondent of the criminal proceedings including the effect of an immediate prison sentence upon him. The judge correctly described her reduction for totality as an act of mercy. There is room for mercy in sentencing.

26. The test for undue leniency remains as set out by Lord Lane CJ in *Attorney General's Reference No 5 of 1989* 11 Cr. App. R. (S) 489. Does the sentence fall "outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate," subject to authority and the sentencing guidelines. We are satisfied that this sentence, while lenient, was not unduly so. It is not a sentence with which we should interfere.

Conclusion

27. We refuse leave and dismiss the application.