NCN: [2023] EWCA Crim 1124

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202300246/A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 19 September 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE JACOBS
MR JUSTICE GRIFFITHS

REX
V
SIMON TIMOTHY MALLEN

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MISS D BREEN-LAWTON appeared on behalf of the Applicant
MISS A RICHARDSON appeared on behalf of the Crown

J U D G M E N T

MR JUSTICE JACOBS:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, no matter relating to a person, against whom a sexual offence has been committed shall, during that person's lifetime, 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 section 3 of the Act. Accordingly, to some extent in this judgment we will anonymise the names of certain parties.

2. On 23 November 2021, before His Honour Judge Prince, the applicant, who was then aged 38, was convicted of three sexual offences. Counts 1 and 2 were sexual assaults, contrary to section 7(1) of the Sexual Offences Act 2003, on two children aged under 13. These occurred at the same time in 2018. The victims were two sisters aged six and seven at the time, and we shall refer to them as C1 and C2. Their mother, who we will call M, was also prosecuted in relation to the incident which comprised the sexual assaults. In relation to counts 1 and 2 the applicant was sentenced on 23 January 2023 by the trial judge to concurrent extended sentences of 13 years, comprising a custodial term of nine years and an extended licence period of four years.

3. Count 3 was an offence of arranging or facilitating the commission of a child sex offence, contrary to section 14(1) of the Sexual Offences Act. This offence involved steps which were taken by the applicant between July and August 2019 to arrange for penetrative sexual activity of other children at a party specially arranged for that purpose. The applicant had made preparations for this party involving discussion with a number of individuals. Two of those individuals were, unbeknownst to the applicant, undercover police officers. Two other individuals were adult women who we will call N and O with whom the applicant had been in a sexual relationship. For that offence the applicant was sentenced, also on 23 January 2023, to an extended sentence of 13 years, comprising a custodial term of nine years and an extended licence period of four years. That term was ordered to run consecutively to the sentences on counts 1 and 2, so that the total sentence was 26 years, comprising a custodial term of 18 years and an extension period in total of eight years.

4. The applicant was also sentenced on that occasion for two other offences to which he had previously pleaded guilty and which were ordered to run concurrently with the sentences on counts 1 to 3. Those sentences, which are not the subject of the proposed appeal, were one month for possession of an extreme pornographic image and six months for conspiracy to arrange or facilitate sexual intercourse with an animal, which was in fact his pet dog. The latter offence also concerned the woman that we have called O.

5. In addition, the judge imposed a Sexual Harm Prevention Order under section 345 of the Sentencing Act 2020 and this was ordered to run until further order. A forfeiture order in respect of a number of laptops and mobile phones was also made.

6. Prior to the sentences imposed on the applicant in January 2023, three women, M, N and

O, had previously been sentenced for their involvement in the applicant's actual or intended activities. M, the mother of C1 and C2, had pleaded guilty to arranging or facilitating the commission of a non-penetrative child sex offence and was sentenced in June 2022 to 38 months' imprisonment. N, who was involved in the arrangements of the proposed party which was the subject of count 3, was convicted of conspiracy to arrange or facilitate the commission of a penetrative child sex offence and was sentenced in May 2022 to seven-and-a-half years' imprisonment. O pleaded guilty to arranging or facilitating the commission of a child sex offence, namely engaging in sexual activity in the presence of a child, and to conspiracy to arrange or facilitate sexual intercourse with an animal and to taking and distributing indecent photographs of a child. She was sentenced to a total of 43 months' imprisonment. The applicant's proposed appeal includes an argument based upon the disparity between those sentences and those which he received.

7. The Registrar has referred the application for leave to appeal against sentence to the full court and we have heard submissions from Miss Breen-Lawton on behalf of the applicant and Miss Richardson for the prosecution. We grant leave to appeal and this judgment therefore deals with the substance of the appeal which has been argued out today.

The facts

8. The applicant was a well-educated man from a respectable family who was in a position of authority within his employment. He lived in Northumberland. For many years before the offences occurred the applicant was in contact with various females, befriending them online and swiftly progressing to sexualised messaging. Some sexual relationships with those women followed and those often involved consensual violence but this was not the subject of any charge on the indictment.

9. Counts 1 to 3 all concerned the applicant's apparent desire to find women who could provide him with children to sexually abuse, whether that was through an introduction to children in their own family or charge, or intending to get those women pregnant to have his own child in order to sexually abuse.

10. Counts 1 and 2 involved a woman, M, with whom the applicant had formed a relationship in 2018. She had separated from the father of her two children and there was evidence at trial that the applicant had come to be liked by those two children, C1 and C2. He would play games with them, for example allowing them to use him as a human trampoline.

11. Counts 1 and 2 concerned an occasion in the summer of 2018 when the applicant got into bed with C1, C2 and M (the mother) when the applicant, M and the girls were all naked under the bed covers, although one of the girls was wearing some underwear. The applicant cuddled the two children in what C1 described as a 'sandwich hug', cuddling the girls with his hands around their waists.

12. Count 3 arose from conversations which the applicant had with four people in which, in summary, he sought to arrange a children's party that he would attend with a number of adults whom he understood to be interested in sexually abusing young children, as well as children who were the intended victims of that abuse. One of those children was the

five-year old great niece of N. The applicant had agreed with N, who was his co-accused, that she would bring that child to his house one day in order that the applicant could perform penetrative sex on her. Some preparation for that event occurred, including the applicant meeting the child and buying her an ice cream.

13. In addition to the plan for N's great niece to attend, the applicant had various conversations with an undercover officer known as 'Jo', who posed as an adult female working as a nanny with access to young children, namely a seven-month-old baby and a five-year-old girl. It is not necessary to describe those conversations in detail. Transcripts of conversations and online messaging were available to the jury and were recounted in detail in the judge's sentencing remarks. The conversations included the applicant telling Jo that he knew a woman (in other words N) who would be happy to bring her five-year old niece along for a play date. The applicant also told Jo that he was trying to breed with O, who was herself working as a nanny, with a view to having a child that he or they could then abuse. In summary, as the judge said, during the course of these conversations the applicant made clear his perverted interest in engaging in sexual activity with young and indeed very young children. There was discussion with Jo of a children's party on the weekend of 7 September 2019, when N would be there with her niece and O would also be there, albeit without her charge. The applicant asked Jo to bring her two girls and he told her that he had already bought certain items for the party, including a paddling pool and bubble bath. The applicant then met Jo in person at a cafe and the conversation was recorded. The applicant had brought with him in his car devices which were to facilitate sexual penetration, and he gave these to Jo so that she could use them on her child in order to prepare her for the abuse that was planned.

14. At the same time as these conversations with Jo, the applicant was also in conversation with another undercover police officer who was known as Danny. Danny said that he had a baby daughter who was only a few weeks old and the applicant wanted both Danny and his daughter to come to the party in order to participate in abuse.

15. The original plan was for the party to take place in August but it was then re-arranged for 7 and 9 September; O had booked a flight so that she could be present. But before that happened, the applicant was arrested on 23 August 2019, shortly after one of the conversations with Danny. On a search of his home address the police found various items that he had bought for the party and these included children's toys and various sexual aids.

16. The applicant pleaded not guilty to counts 1 to 3 but was convicted after a trial lasting approximately five weeks.

The sentence

17. The applicant was a person of previous good character. The sentencing judge, who had been the trial judge, had available a number of pre-sentence and psychiatric reports on the applicant. The most recent were a pre-sentence report of Miss Elaine Capper and the psychiatric report of Dr Nadkarni. Those reports had been obtained by the judge after the applicant's counsel, Ms Breen-Lawton, had submitted that earlier reports were flawed and could not provide a basis for a finding of dangerousness for the purposes of the

imposition of a possible extended sentence. Both Miss Capper and Dr Nadkarni were firmly of the view that a dangerousness finding was appropriate and in due course the judge made that finding and there is no appeal against that aspect of his decision.

18. The judge's sentencing remarks were careful and thorough. On counts 1 and 2 he said that the consequence of the applicant's offending was that M's two daughters had been removed from their mother's care. There could, he said, only be conjecture as to the long term effect on those girls, knowing that they had been subject to sexual offending by somebody invited into a bed with them by their mother. The judge recognised that count 3 involved only one real child, in other words the great niece of N. The judge said that thankfully she was not touched by the applicant, but that was only because of the intervention of the police. However, it was the applicant's intention, as expressed to two different undercover police officers, that other children in addition to N's great niece would be brought to his house to be the victims of sexual abuse. The judge did not accept that the applicant, who continued to deny any offending in relation to C1 and C2, had shown any real remorse.

19. In relation to counts 1 and 2 the judge said the applicant was in a different position to M, who had received a 38-month sentence, reduced from four years because of her guilty plea. He referred to the fact that the applicant had groomed the children, that the offences occurred at his instigation, that she had exhibited genuine and extreme remorse and that M had been devastated by the events. He said the applicant was in a different and more serious position compared to her. The offences involved a significant degree of planning and the grooming of children and it was a significant feature that he had engaged in sexual offending against children jointly with their mother. He was also dealing with two offences, with two different children suffering the damage and harm that such offences bring about.

20. The judge categorised the offences against C1 and C2, under counts 1 and 2, as culpability A and Category 2 under the relevant guidelines. There were four factors which caused this to be Category A: planning, acting with others, grooming and abuse of trust. There is no criticism of the judge's categorisation.

21. The starting point under the guideline is four years and the range is three to seven. The judge said that if the offence had involved just one child, the sentence would be six years after trial. Since there were two offences involving two children the appropriate sentence, bearing in mind totality, was nine years.

22. In relation to count 3, the offence under section 14 of the 2003 Act was charged on the basis that the planned offences would have been contrary to section 9(2) of the Sexual Offences Act 2003. The conviction therefore required reference to the sentencing guidelines for section 9 offences. The judge decided that this was a Category 1A offence under the relevant guideline. It was Category 1 because of intended penetration. It was culpability A because of a combination of six factors including a significant degree of planning, acting with others, grooming behaviour, abuse of trust, specific targeting of a vulnerable child and a significant disparity in age. The judge had no doubt that, if N had succeeded in bringing her great niece to the applicant's home, penetration would have

occurred. He referred to the time and effort invested in arranging for the child to be brought to his house for penetration. This was only prevented because of the intervention of the police in arresting the applicant. The category range for a 1A offence is four to 10 years, with a starting point of five years. The judge decided that the appropriate custodial term for count 3 was nine years. As we have said, he decided this would run consecutively with the nine-year sentence on counts 1 and 2. He also imposed an extended licence period of four years in relation to counts 1 and 2 concurrently, and four years in relation to count 3, again consecutive to the extended sentence on counts 1 and 2.

The arguments on appeal

23. On behalf of the applicant, Miss Breen-Lawton advances four grounds of appeal. First, she submits that the judge's starting points were too high. In relation to counts 1 and 2 she emphasises that this was one incident involving the two children at the same time. It was not a case of separate incidents for each child. She accepts that the offences were within Category 2A. Her central point was that nine years was manifestly excessive for one incident, when the applicant had only touched the children briefly on their waists and where factors such as touching naked genitalia or the breast area of the children were not present and other circumstances which may have aggravated the offending were also not present.

24. In relation to count 3, she does not criticise the judge's categorisation of the offence as 1A. However she says that the starting point was too high in circumstances where many factors which would indicate higher culpability were not present. Her principal point however was that this planned offence never happened and that in fact it could not have happened. That is because there were no real children of either Jo or Danny who were going to go to any party: those children were fictitious. And although N's five-year old great niece was real, there was evidence at the trial that she was not in fact going to be brought to the party because she was going to attend another ordinary children's party on the proposed date.

25. Secondly, Miss Breen-Lawton submits there is a disparity between the applicant's sentence and those imposed on the other defendants. N's sentence was seven-and-a-half years with no extension. O had received 21-months for the relevant offence, as part of the overall sentence of 43 months, having pleaded guilty on the second day of her trial. M, the mother of C1 and C2, had received 38 months on a single count, even though her abuse of trust was arguably higher than that of the applicant. She submitted that the disparity was not only in the custodial terms but she also emphasised the extended licence periods which were also imposed upon the applicant.

26. Thirdly, in relation to the extended sentence, she did not challenge the finding of dangerousness and she accepted that the imposition of an extended sentence in principle could have been imposed. However, she submitted that the sentence in this case involved a total extended licence period which went beyond the statutory maximum for a single offence, in other words eight years. In the circumstances of the present case this was oppressive. She said the effect of the judge's sentence was to take the overall sentence near to the maximum for each type of offence. But her main point was that an eight year

extended licence period on top of the 18-year determinate sentence was manifestly excessive considering the safeguards which had been put in place by the Sexual Harm Prevention Order which was made for life, and the fact that the applicant did very little in terms of the actual abuse of children.

27. Fourthly, she submitted that the overall sentence did not pay sufficient regard to totality, particularly bearing in mind what the applicant had actually done.

28. In her oral submissions this morning, which were concise and helpful, she essentially repeated the points which had been made in her written grounds of appeal, emphasising the points to which we have referred.

Discussion

29. We consider that there is force in the applicant's submissions that in two different respects the judge's approach has resulted in sentences which were manifestly excessive. We deal first with counts 1 and 2. It is not in dispute that the judge correctly categorised each offence as Category 2A under the applicable guideline, and that accordingly the starting point for each offence was four years and the range was three to seven. The judge considered that a six year sentence after trial would have been appropriate if there had been only one offence and one victim. We think that such a sentence, if imposed, would have been difficult to challenge as being manifestly excessive. However, in circumstances where there was a single relatively brief incident, albeit involving two children, with no touching of genitalia or breasts, we consider that the judge's uplift to nine years results in a sentence which is too high. We therefore consider that this sentence should be reduced to seven years.

30. So far as concerns count 3, we consider that on that count alone a nine-year sentence would be severe but again perhaps not open to criticism on the basis of being manifestly excessive. However, the applicant is a person of good character and a total custodial term of 18 years for offending which had not involved any actual penetrative activity is again in our view too high. Having reduced the sentence on counts 1 and 2 to seven years, we consider that it is appropriate to reduce the sentence on count 3 to seven years to reflect totality. We see no reason to disagree with the judge's approach that the sentences should be consecutive.

31. As far as the length of the custodial term is concerned, we do not consider that there is any force in any of the other points which Miss Breen-Lawton has made. We do not consider that there was any double-counting of factors in relation to counts 1 and 2, although as we have said we take the view that the overall sentence was too high. Much emphasis was placed on the fact that, in relation to count 3, the planned event did not come to fruition. However there can be no doubt that it was an event which the applicant wanted to occur. The jury rejected the applicant's case that in substance his conversations were simply a reflection of bluster on his part. Whilst it may be that the particular party planned by the applicant would not in the event have been attended by N's great niece, we do not consider that this is a factor which should result in a material reduction in sentence. There is nothing to suggest that the applicant was aware of this when he was making his plans and in any event there is every reason to think that, as the judge clearly

thought, it was only the intervention of the police which saved the girl from penetration at some point by the applicant.

32. Nor do we consider that there is any force in the argument based on disparity. Such arguments are generally very difficult to advance and rarely succeed. It has been said that the question is whether right-thinking members of the public with full knowledge of all the relevant facts and circumstances learning of the sentence would consider that something had gone wrong with the administration of justice. We do not think that this test is anywhere near satisfied. On counts 1 and 2 the judge identified significant reasons, described above, as to why the sentence of the mother M was lower than that imposed on the applicant. We see no fault in his approach and no relevant disparity.

33. On count 3, there never was any significant disparity between the sentence for the applicant and the sentence for N on count 3, bearing in mind the applicant's greater role as the instigator of all that was planned to occur. In any event, the sentence on count 3 has now been reduced, albeit because of totality, and we do not consider that any disparity argument can arise.

34. So far as O is concerned, she was sentenced on the basis that any sexual activity would not directly involve children, albeit that they would be present when sexual activity between adults took place. This arose from an agreed basis of plea and was the basis on which the judge sentenced O. O's position was therefore very significantly different from the applicant's. The fact that M, N and O did not receive extended sentences, whereas the applicant did, is not a point of any weight. The extended sentence imposed on the applicant is a consequence of the finding of dangerousness. There was no such finding in relation to M, N or O.

35. This leaves the question of the extended sentence which in total was eight years. It is accepted that it was lawful for the judge to impose consecutive extended sentences. Miss Breen-Lawton referred in her written submissions to the decision in Thompson and Cummings [2018] EWCA Crim 639. We do not consider that case has any bearing on the present case. The issue there was whether consecutive sentences could result in an extension of the licence period beyond the eight year maximum specified in the relevant section of the Criminal Justice Act 2003. In the present case the extensions do not exceed that maximum.

36. We consider that the judge's decision to impose an extended sentence of the length that he did was fully in accordance with the wide discretion which was accorded to him, in the light of the very serious concerns which were expressed in the reports which had been prepared by Ms Capper of the Probation Service and Dr Nadkarni the psychiatrist, as well as earlier reports which came to more or less the same conclusion. It is quite common in cases of this kind for the courts to impose both an extended sentence and an ancillary order such as a Sexual Harm Prevention Order. In a sense they have a degree of overlap but they are dealing with different things. In particular the extended sentence will give rise to a liability to recall if licence conditions, which at the present stage are unknown, are not adhered to. An extended sentence is intended to protect the public from an offender who has been considered to be dangerous, as the applicant was. Recall can be

accomplished quickly, whereas proceedings based on an allegation of breach of an SHPO may be less straightforward. We do not consider that there is any basis for saying that, in any particular case, a choice needs to be made between an SHPO and an extended sentence. There is no difficulty in the two sitting alongside each other. We also do not consider that the length of the extended licence period imposed by the judge was excessive. As we have said, it was well within the scope of the judge's sentencing discretion.

37. Accordingly, we grant leave to appeal. We reduce the sentence on counts 1 and 2 to seven years. We reduce the sentence on count 3 to seven years, which will run consecutively, and the orders for extension will remain as per the judge's sentence.

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

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