Neutral Citation Number: [2024] EWCA Crim 377

IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202303220/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 1 February 2024

Before:

LADY JUSTICE THIRLWALL

MR JUSTICE ANDREW BAKER

HIS HONOUR JUDGE PICTON
(Sitting as a Judge of the CACD)

REX

V

HAZRAT KHARUTTI

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MR S AHMED appeared on behalf of the Appellant.

J U D G M E N T

1. HIS HONOUR JUDGE PICTON: This appeal against sentence is brought with the leave of the single judge. On 17 August 2023, in the Crown Court at Wolverhampton, the appellant (then aged 35) was convicted of two counts of attempting to incite a child to engage in sexual activity, contrary to section 1(1) of the Criminal Appeals Act 1981 and one count of arranging or facilitating the commission of a child sexual offence, contrary to section 14(1) of the Sexual Offences Act 2003. On the same date, he was sentenced to 4 years' imprisonment in respect of the attempts to incite and 8 years for arranging or facilitating a child sexual offence. All the sentences were ordered to run concurrently. In addition to the sentence, he was also made the subject of a Sexual Harm Prevention Order for 15 years and the judge stated that a surcharge in the sum of £181 should be recorded. The correct surcharge is in fact £170, and we confirm the figure as has been entered on the court record as opposed to the one the judge announced. The appellant is represented today, as he was in the court below, by Mr Ahmed, for whose helpful submissions we are grateful.
2. Turning to the facts, in November 2018 a member of a group of self-styled "paedophile hunters" posed as a 13-year-old girl on the social media platform "Skout". The appellant made contact with the decoy on 24 November 2018. He stated that he was 29 years of age. The decoy told the appellant that she was 13 years of age. There subsequently followed some conversation on Skout, before mobile phone numbers were exchanged, and the chat moved on to WhatsApp. The message exchanges went on for several days between the 24 and 29 November 2018, and during those the appellant repeatedly asked the decoy for pictures of her "ass", "pussy", breasts, and body. The appellant repeatedly sent pictures of his erect penis to the decoy. The appellant also suggested multiple times that he would like to kiss the decoy on the lips and engage in anal and vaginal penetrative

sexual intercourse, and that she should "kiss his cock." The appellant made it clear that these were things he anticipated happening when they met up. The appellant asked multiple times to meet and asked for her postcode, stating that he could travel to see her in his car. At one point the decoy reminded the appellant that she was 13 years of age and the appellant confirmed that he was aware of that.

3. Ultimately a meeting was arranged for 29 November 2018 at 6.00 pm in a McDonald's car park. The appellant attended at the agreed date and location and waited for well over an hour before the "paedophile hunters" met him and contacted the police. Two mobile phones were seized from the appellant on arrest. One of those phones contained the entirety of the Skout and WhatsApp exchanges. In two subsequent police interviews, the appellant denied that he had been the person communicating with the decoy and blamed someone he named as "Ali Khan", whom he said had sent the appellant to the location of the meeting with a mobile phone that the appellant denied was, by that stage, his. The jury unsurprisingly rejected his defence and thus he was convicted.

4. The appellant has a single previous conviction for unrelated matters that had been dealt with by way of a fine. There was no pre-sentence report available, and we do not consider one to be necessary now. When sentencing the appellant, the judge made reference to the revised guideline for offences contrary to section 9 and section 10 of the Sexual Offences Act 2003. That guideline had been revised to reflect the decision in R v Reed & Ors [2021] EWCA Crim 572, in which the Court identified that, in cases where there was no actual child or the intended sexual activity did not take place, the assessment of harm should be based on what the offender intended. The revised guideline makes specific reference to offences contrary to section 14, stating that the court should apply the guideline for offences contrary to sections 9 and section 10 when dealing with such an

offence.

5. The judge identified that because of the appellant's intention to engage in penetrative sexual activity, the offence fell within category 1 for harm. With regard to culpability, the judge referred to the conduct forming the foundation for the incitement offences as operating so as to place this offence within culpability A. By that process of analysis, the judge identified the starting point as being one of 5 years and the category range as being 4 to 10 years.

6. The judge went on to state that:

> "This is plainly a case in category 1A for reasons I have spelt out. The starting point is five years' imprisonment, the range four to ten years, but the particular count, count 3, is aggravated here by the grooming conduct, as I have said reflected in the other counts, the youth of the supposed girl, the age disparity arising between her and the defendant, and the recording, sending and request for sexual images. So I have to factor all that into the range within the guidelines to which I have referred."

7. The judge stated that those factors merited an uplift to 9 years before what he termed "a modest reduction" by reference to the fact that there was no child, which then brought the sentence down to one of 8 years, as already mentioned.

8. The grounds of appeal in respect of which leave was granted seek to argue that (i) the criminality in this case did not warrant a sentence of this length; (ii) the judge's starting point was too high; (iii) the sentence passed was not proportionate in light of the nature of the appellant's offending and in particular the short duration over which the offending took place. In the course of submissions today, Mr Ahmed has sought to develop those points, placing emphasis on the shortness of the period during which the exchanges took place.

9. ***Discussion***

10. We consider there to be merit in the arguments advanced on behalf of the appellant. Whilst the judge's assessment of the starting point and category range for the section 14 offence was correct, it has to be kept in mind that the appellant's contact with the decoy took place over just a few days, and that it was this contact that amounted to the grooming that was one of the principal factors that placed the case in culpability A. It was in reality a single short course of conduct that had as its purpose a meeting that was arranged and which the appellant attended. Whilst the course of conduct preceding the attempted meeting might justify some upward movement from the starting point, that needed to be tempered by the degree to which that background operated so as to position the section 14 offence within the guideline.

11. In our judgment, the upward movement to 9 years, by reference to the overall circumstances, engaged a degree of double counting of factors which contributed to the characterisation within the guideline. Whilst there were some additional matters mentioned by the judge, over and above the nature of the messages during the 6 days that the appellant was in contact with the decoy, those could not, in our judgment, justify by themselves such a significant uplift.

12. We have regard to the particular decisions of the Court in Reed & Ors so far as the conjoined appeals are concerned. Those decisions indicate a level of sentence significantly below that which the judge settled upon here. We have also had regard to the Attorney-General's Reference in the case of R v Nicholson [2023] EWCA Crim 413, which involves a set of facts bearing some similarities to, but even more serious than those that pertain here. The Court adopted the approach to sentence as per Reed & Ors ,and as reflected in the guideline, and concluded that the least sentence, prior to

factoring in the absence of real children and the offender's personal mitigation, was one of 7 years 6 months. The Court determined that the absence of a real child, the offender's previous good character and other particular mitigating circumstances, required a reduction of 21 months resulting in a sentence of 5 years 9 months being substituted.

13. The sentence in this case would appear to be significantly out of line with those featured in Reed & Ors and also with that which the Court in Nicholson concluded to be correct, and where the offending was considerably more serious than here.

14. We consider that, in advance of factoring in mitigation, the upward movement from the starting point of 5 years should have been limited to 12 months. Thereafter, it was necessary to take account of the absence of there having been a real child involved, coupled with the necessary somewhat modest mitigation available to the appellant. One additional factor not mentioned by the judge, but which we consider has relevance, is that of delay. The chronology in this case is instructive in this regard. In November 2018, the appellant was arrested and interviewed. He was told he would be spoken to again, but for several reasons, including that the appellant was out of the country for 6 months, that did not happen for some time. In June 2019, the police conducted a second interview with appellant. He gave the account he was to maintain at trial and further work was undertaken on the phone that had been seized from him. In January 2020, the appellant was interviewed for a second time and at some unspecified point thereafter a decision was made that he should be charged. In March 2021, the appellant was sent a postal requisition. In April 2021, the appellant appeared at the Magistrates' Court and was sent for trial. In May 2021, the appellant made his first appearance in the Crown Court. In August 2021, the appellant appeared for a second time and entered pleas of not guilty. In July 2022, the case was for the first time listed for trial but was ineffective due to the Bar

action that was then being undertaken. In September 2022, the case was listed for trial a second time, but again could not proceed due to the continuing Bar action. In August 2023, the trial finally took place, and he was sentenced.

15. Accordingly, the appellant came to be sentenced 4 years and 9 months after he committed the offences. While some of the time proceedings took was due to him pleading not guilty, a not insignificant proportion of the delay was due to factors for which he was not responsible. We consider that some adjustment of sentence was called for in respect of that.

16. We have concluded that the level of downward movement from the term of 6 years referred to above should be by way of 18 months, reflective of the fact that the appellant was communicating with a decoy, his limited personal mitigation, and the delay in these proceedings for which he was not responsible. That produces a sentence of 4 years and 6 months. It is appropriate that there should also be some proportionate reduction made in respect of the concurrent sentences imposed on counts 1 and 2 as well.

17. Accordingly, this appeal will be allowed. We will quash the sentences imposed and replace them with one of 4 years 6 months on count 3, coupled with concurrent sentences of 3 years on counts 1 and 2. To that extent this appeal is allowed.

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

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