IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2024] EWCA Crim 771

CASE NO 202401166/A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 14 May 2024

Before:

LORD JUSTICE EDIS
MR JUSTICE MURRAY
HIS HONOUR JUDGE DENNIS WATSON KC
(Sitting as a Judge of the CACD)

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

REX
V
TERRY JAMES POCOCK

MR B HOLT appeared on behalf of the Attorney General
MISS J DONOVAN appeared on behalf of the Offender

J U D G M E N T

1. LORD JUSTICE EDIS: Terry James Pocock is now just 39 years old. On 28 November 2023 he entered a guilty plea to one offence of attempting to incite a girl under 16 to engage in penetrative sexual activity, contrary to section 10(2) of the Sexual Offences Act 2003 and section 1(1) of the Criminal Attempts Act 1981. We shall say something later in this judgment about the timing of that plea and its significance.
2. He was sentenced on 1 March 2024 in the Crown Court at Ipswich by Her Honour Judge Talbot-Hadley to a term of 24 months' imprisonment which was suspended for 24 months. There was a requirement of 40 RAR days and 120 days of alcohol abstinence and monitoring. Other orders were made including a Sexual Harm Prevention Order on which nothing now turns.

   The facts

3. The offence reflects incitement which was sustained over a period of just over two weeks between 4 and 20 January 2022. The offender was using Facebook to converse with someone he believed was a 13-year-old girl called "Isabelle Cooper". In fact "Isabelle Cooper" did not exist. Her profile was being operated by an adult female who was searching the internet in an attempt to identify paedophile offenders.
4. The offender saw that profile on Facebook and contacted it. At the very start of what followed "Isabelle Cooper" told him that her age was 13. He told her how old he was. Some innocuous messages were exchanged between them over the next few days. However, that changed.
5. It is unnecessary to set out the conversations in detail in this judgment. What occurred was, as we have already said, a sustained attempt by the offender to incite "Isabelle Cooper" to have penetrative sex with him. It took place over a period of days or weeks. We have read the extracts from the Facebook conversation and summarise them only to

this extent. It is quite obvious that the offender was serious and that he fully intended, if he could, to succeed in meeting "Isabelle Cooper" and having sex with her.

6. He sent her a picture of his erect penis. He asked her to send him pictures of her naked. She said that her camera was broken. Eventually she told him that she had planned on not going to school on a particular day when her father was away on a business trip. The offender said: "We could meet up and have sexy fun". They did arrange to meet and the conversation from the offender is entirely explicit in making it quite clear that he intended that when they met he would have sexual intercourse with this person whom he believed to be 13 years old.
7. The conversations continued in a highly sexualised way with repeated acts of incitement along the same lines. They never in fact did meet.
8. Finally, on 20 January, the paedophile hunter, together with associates, went to the offender's address in order to confront him but he was not there. They therefore told the police what had happened, provided the texts of the communications and a witness statement about them.
9. Somehow the offender discovered that this had happened and that the police were looking for him. He contacted "Isabelle Cooper" again, asking her if she had told anyone about the messages. He said that he would be in a lot of trouble if any of the messages came to light. He asked her if she wanted to meet him on the following day, "before I get caught by the police; it could be the last time we meet for a while." He talked about leaving the area. Sexual conversation of this kind continued over the following day, with the offender asking "Isabelle Cooper" to meet with him for sexual purposes. There was no further contact between them after 25 January.
10. The offender was arrested on 11 February at home. His mobile phone was seized and

examined. He had by this time deleted the Facebook Messenger Application and associated videos from his mobile phone. The last exchange following the involvement of the police had not been deleted and was still visible.

11. In interview he denied any attraction to children. He accepted that he had been in communication with "Isabelle Cooper" after she had added him as a friend on Facebook. He denied engaging in any sexual messages with her.

12. He was charged on 25 May 2022. He attended the Magistrates' Court on 24 June without giving any indication as to plea. The case was sent to the Ipswich Crown Court for trial.

13. At the plea and trial preparation hearing on 22 July the offender was arraigned on an indictment which contained two counts, including the count to which we have already referred. He entered not guilty pleas to both counts. The second count was subsequently discontinued.

14. At that hearing he was invited to indicate what the issues were to be in the trial. It was said on his behalf that someone else had been using his profile to send the messages although he did not know who that was. The case was fixed for trial on 11 September 2023. That is a delay between PTPH and trial of over a year. This offender was on bail. In the current circumstances in the Crown Court in England and Wales such periods of time are not unusual for cases where there is no custody time limit to compel the court to prioritise the case over others.

15. The offender caused a defence statement to be served which repeated his denials and the offence which he had advanced at the PTPH.

16. The September trial date, in the end, did not take place. It appears that the case was in a warned list and was not reached. A hearing took place on 23 October 2023 when a new trial date was fixed for 28 October 2024. There was a further case management hearing

on 28 November 2023 at which, finally, the offender entered his plea to count 1. He was thereafter sentenced in the way that we have described.

17. The judge, in sentencing, had a number of reports about the offender and she was aware of the offender's criminal record. This shows that he has appeared been sentenced on 40 occasions in the past for a very large number of different types of offending. The first occasion was as long ago as 2001. It is unnecessary for us to set that antecedent record out in detail. We will however observe at this stage that it contains very frequent convictions for offending of damage, of harassment, of assault and of other disruptive offences. It also contains a lot of convictions for failing to comply with the terms of various non-custodial sentences which have been imposed on him at various different times over the decades.

18. It is perhaps pertinent to start at conviction number 37 in October 2021 when another community order was imposed for an offence of criminal damage and an offence of racially or religiously aggravated intentional harassment, contrary to section 35(1)(b) of the Crime and Disorder Act 1988. That order was in force in January 2022 when the relevant offending took place.

19. Conviction number 38 is recorded in April 2022 and that was a conviction for failing to comply with the requirements of that community order. There was a further conviction in February 2023 for another offence of criminal damage and another offence of threatening behaviour. On that occasion a suspended sentence of imprisonment was imposed.

20. The judge in her sentencing remarks referred to that criminal record, saying:

> "You've got a number of previous convictions and offences. I note that they're all different types of matters, not sexual. This is the

first time you have been convicted of a sexual offence."

21. She then observed that the offender had "all sorts of things going on" in his life. She had read a Mental Health Report which diagnosed ADHD and an emotionally unstable personality disorder and notes also a long established history of alcohol and substance abuse. She concluded that the offender had managed to turn his life around a little bit and had accommodation.
22. She then moved to observe that the offences with which she was dealing, in truth one offence, occurred "nearly four years ago now, January 2022". Of course that was wrong. She was sentencing just over two years after the offences had been committed. That might easily be a slip of the tongue to which we would have no regard, except that when she came to sentence she referred again to the time that the proceedings had taken as being a reason for imposing a more lenient sentence than otherwise would have been appropriate.
23. She was required to address the relevant guideline. The relevant guideline is the guideline for sexual activity with a child. It includes and applies to offending both under section 10 of the Sexual Offences Act 2003 and under section 9 of the Sexual Offences Act 2003. The same guideline therefore applies to a very broad spectrum of offending as the wide category ranges make clear.
24. This was an offence of incitement, contrary to section 10 of the 2003 Act and not an offence where there had been any contact sexual offending (contrary to section 9) or where the acts causing or inciting the child to engage in sexual activity (contrary to section 10 of the 2003 Act) had actually resulted in any contact sexual offending.
25. The guideline requires the court to approach section 10 offences in the following way:

> "In section 10 cases where activity is incited but does not take place the court should identify the category of harm on the basis of the sexual activity the offender intended, and then apply a downward adjustment at step two to reflect the fact that no or lesser harm actually resulted.
>
> The extent of downward adjustment will be specific to the facts of the case. Where an offender is only prevented by the police or others from carrying out the offence at a late stage, or in attempts where a child victim does not exist and, but for this fact, the offender would have carried out the offence, only a very small reduction within the category range will usually be appropriate. No additional reduction should be made for the fact that the offending is an attempt."

26. The harm intended and incited by this offender involved penetrative sex involving vaginal sexual intercourse. That was harm category 1. There was one culpability A factor in play in this case, namely a significant disparity in age between the offender and the intended victim. Category 1A offences give rise in the guideline to a starting point of five years' custody and a category range of four to 10 years' custody.

27. The judge appeared to accept the analysis put forward on behalf of the Crown that this was a category 1A offence and said:

> "... the Crown are probably right to point to a starting point of five years with a range of four to 10."

28. She then referred to another guideline for another offence involving sexual communications offences and appeared to be influenced by that. She then said:

> "I will go out on a limb in relation to you, and I make it clear that I have considered everything in the round and I'm also partly reducing the sentence on the grounds of your mental ill health and the fact that you are undertaking a mental health treatment requirement at the moment."

29. She said that for this and some other reasons she intended to reduce the sentence from

what should have been "perhaps one of three years upwards to one of two years". She said that if she had been asked for a starting point she would have taken one "perhaps of around 30 months". She then said that that 30 months would be reduced because, first, this was an attempt, and secondly, because "the time that has passed since that offence took place". These factors, she said, reduced the sentence from 30 months to 24 months and then said that that sentence would be suspended over two years "to take account of your guilty plea and your personal circumstances".

30. The Solicitor General through Mr Holt criticises that approach as being unduly lenient, saying that the starting point was too low and that a proper application of the guideline might have resulted in a starting point at the bottom of the relevant category range, namely four years. In those circumstances no question of suspension could of course arise. The Solicitor General says, further, that even if it was possible to get to a sentence of two years or less in this case, the decision to suspend it would itself have been unduly lenient.

31. In response, Miss Donovan, who has advanced succinct and clear submissions, accepts the logic of most of what the Solicitor General submits but says that the judge was entitled to have regard to what she says is very substantial and compelling mitigation making this a very unusual case, such that the course taken by the judge was one which was properly open to her. The mitigation which she relies upon arises from the difficult upbringing of the offender which has resulted in him suffering from depression over the years and other mental illnesses and which has also resulted, as we have said, in a long history of alcohol and substance abuse. He has in the recent past made significant attempts to address that, says Miss Donovan, and it would be counterproductive to send him to prison, undoing all the good work that he has been able to do.

32. In the context of the personal mitigation, it is right to record at this stage that the judge had before her a pre-sentence report. This set out what is known about the offender and using standard tools assesses the risk that he poses. It contains this:

> "I have discussed Mr Pocock's case with Julie Patel, Senior Probation Officer and we are in agreement he presents a high risk of causing serious physical and psychological harm to children, known adults and members of the public."

33. It also concludes:

> "Mr Pocock has continued to commit offences whilst subject to Court Orders and in my assessment has not been truthful with his allocated Probation Practitioner in relation to the extent of his alcohol and drug misuse."

34. Having regard to the contents of the pre-sentence report and the previous convictions of this offender, we are unable to accept Miss Donovan's submission that the personal mitigation available to him is so compelling that the court should depart entirely from the guideline in his case and impose a sentence of the kind which the judge arrived at.
35. In our judgment the sentence imposed by the judge was unduly lenient and unduly lenient to a significant extent. Her approach to this serious case failed to reflect its gravity. We accept the submission of Mr Holt that the appropriate application of the guideline should have resulted in a starting point in relation to the offending itself of four years. That is the appropriate sentence in our judgment in this case for the persistent incitement of a 13-year-old child to engage in penetrative sexual intercourse with a much older man.
36. We consider that the fact that there was no victim and therefore no harm was actually caused should result in a discount from that sentence of four years and we would reduce it to a sentence of three-and-a-half years. We accept the submission of the Solicitor

General that the judge probably erred in the extent to which she gave the offender credit for his guilty plea. She did not in fact specify what level of credit she afforded but it might have been as much as 20 per cent. In these circumstances, as was established in R v Carter [2021] EWCA Crim 667 at paragraph 22, appropriate credit of around 10 per cent would have been in order. That is because this offender actually entered his guilty plea after the date fixed for his trial had passed.

37. Taking therefore that sentence which we have arrived at before credit for the guilty plea of 42 months, we consider that there should be a further reduction for that guilty plea which we will round up in favour of the offender to a discount of five months, resulting in a sentence of 37 months' imprisonment. In those circumstances, no question of suspension arises and it is unnecessary for us to analyse any further the judge's thought process in that regard. We merely observe that it did not apparently involve consideration of the imposition guideline on when sentences should and should not appropriately be suspended.

38. Accordingly, the sentence imposed by the judge is quashed and we substitute in its place an immediate prison sentence of 37 months. All the other orders made by the judge are unaffected by our decision in this case, except that the consequence of the sentence now being in excess of 30 months is that the notification period is indefinite rather than being limited to 10 years.

39. In relation to the Sexual Harm Prevention Order, we direct that it should be amended so that the prohibition on deletion should be restricted to social media messaging applications on internet capable devices and internet browser history.

40. So far as the duration of the Sexual Harm Prevention Order is concerned, we understand that it says on the Digital Case System that it is 10 years, although in our summary it says

it is five years. We will simply clarify that and say it is 10 years. It is a 10-year Sexual Harm Prevention Order and if an order is required to correct that then we will make one.

41. We also are informed that the victim surcharge sum of money is different because of the sentence that we have imposed from what it was with the judge's sentence and we order that the correct sum should be included in our order so that the Crown Court Record is corrected in the appropriate sum.
42. We direct that the offender surrender to custody at Bury St Edmunds Police Investigation Centre, River Lane, Bury St Edmunds, IP33 2SY by 4.00pm today.

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