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NCN: [2021] EWCA Crim 1483

CASE NO: 2021 02640 A4

IN THE COURT OF APPEAL

CRIMINAL DIVISION



Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 7 October 2021

**LORD JUSTICE HOLROYDE**

**MR JUSTICE HOLGATE**

**MRS JUSTICE COCKERILL**

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

**REGINA**

**v**

**THOMAS PATRICK MULLIGAN**

Computer Aided Transcript of Epiq Europe Ltd,  
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**MR B LLOYD** appeared on behalf of the Solicitor General

**MR S ESPRIT** appeared on behalf of the Offender

**J U D G M E N T**

1. LORD JUSTICE HOLROYDE: We make clear at the outset that reporting restrictions apply in this case. The victims of the various offences to which we shall be referring are entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes, no matter 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 any of these offences.
2. Mr Thomas Mulligan admitted numerous sexual offences involving children. On 21 July 2021, in the Crown Court at Inner London, he was sentenced by His Honour Judge Seed QC to a total term of 18 months' imprisonment suspended for 2 years. It was subsequently appreciated by the prosecution that, most unfortunately, incorrect submissions had been made to the judge about his sentencing powers in respect of the most serious offences. At a "slip rule" hearing on 31 August, the judge varied the sentences which he had imposed for those offences, but only to the extent that the total was increased to 2 years' imprisonment suspended for 2 years, coupled with certain programme requirements.
3. Her Majesty's Solicitor General believes that total sentence remains 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.
4. Mr Mulligan is now aged 62. He had no previous convictions. At the time of these offences in 2018 and 2019, he was living with and caring for his wife, who unfortunately was in poor health.
5. In June 2018 the police arrested Mr Mulligan in relation to the uploading of indecent images of children. They seized his laptop. Investigations revealed a large number of sexual images. Mr Mulligan had used two Tumblr accounts in false names. He was released on police bail whilst the computer was examined.
6. Much later, in May 2021, Mr Mulligan was charged with four offences relating to the images which had by then been found on his laptop:

Charge 1, making indecent photographs of a child - this relating to 213 still and 51 moving images in category A;

Charge 2, making indecent photographs of a child - this relating to 196 still and 239 moving images in category B;

Charge 3, making indecent photographs of a child - this relating to 102 still and 1,660 moving images in category C;

Charge 4, possessing 2 moving images of extreme pornography.

7. We shall refer to these four charges collectively as "the indecent imagery offences". It should be noted that the imagery had been stored by Mr Mulligan on his computer in folders to which he had given descriptive titles. Without going into unnecessary detail, the imagery included oral and anal penetrative sex with very young children, including in the presence of other children; a man masturbating and ejaculating on to the genitalia of a baby aged no more than 6 months, who was in visible distress; and the manipulation of the genitals of a toddler in order to film them. The category C imagery depicted children aged between 6 and 13 with their genitals exposed, including in the presence of other children. The extreme pornography comprised graphic videos of sexual intercourse with dogs.
8. Before Mr Mulligan was charged with the indecent imagery offences, and – importantly – whilst he was on police bail in respect of them, he went on to commit numerous offences in 2019, which became the subject of a 28-count indictment. In summary, the counts in the indictment comprised 21 offences of sexual communication with a child, contrary to section 15A of the Sexual Offences Act 2003 ("the Act"); two offences of causing a child to watch a sexual act, contrary to section 12 of the Act; two offences of causing a child to engage in

sexual activity, contrary to section 10 of the Act; and three offences of making indecent images of children, contrary to section 1 of the Protection of Children Act 1978.

9. These offences all came to light as a result of disclosures by Mr Mulligan's adult children, who had grown suspicious of his activities.
10. On 21 November 2019 the police went to Mr Mulligan's home and there arrested him. His phone was at that very time running the Kik messenger app, through which Mr Mulligan had conducted many exchanges of sexualised messages with 21 different teenaged girls in this country and in the USA. For the purposes of these exchanges, Mr Mulligan had used a variety of aliases and had posed as either a male or a female teenager, on occasions seeking to bolster his credibility by posting pictures which he claimed were of himself but were in truth of teenagers and not him. He had conducted numerous exchanges relating to sexual activity and roleplay and had exchanged sexual images.
11. It is unnecessary for present purposes to go into the details of all of these exchanges of messages. It is clear that in respect of each of his correspondents, Mr Mulligan knew full well that he was communicating with an adolescent. He told them (often in graphic terms) what he would like to do with them and to them. Some of the exchanges continued over the course of several weeks. We mention only a few examples.
12. On at least ten occasions over a period of some four months, Mr Mulligan exchanged messages with "Nella", a schoolgirl whose messages plainly showed her to be particularly vulnerable. She spoke in her messages of committing suicide and said that no one cared for her. Mr Mulligan, using an alias, initially sent comforting messages but these quickly progressed to highly sexualised comments.
13. On at least sixteen occasions over about two months he exchanged messages with "Cookie", who also spoke of having problems at school and who was led to believe that Mr Mulligan (or his teenaged persona) was her boyfriend.
14. On at least six occasions over several weeks he sent messages to "Julie" in the USA, in which he posed as a girl, and spoke of penetrative sex and a threesome with "Julie's" friend.
15. The section 15A offences also included Mr Mulligan exchanging messages on at least seven occasions with a 14-year-old boy, who, at Mr Mulligan's prompting, sent a video of himself masturbating. It could be seen that the boy bore scars of apparent self-harm.
16. It should be noted that the majority of the section 15A offences had the aggravating features that the exchanges related to penetrative sex. They all had the aggravating feature of a significant disparity in age and some of the victims were, as we have indicated, vulnerable for reasons additional to their youth.
17. The first offence of causing a child to watch sexual activity (count 5) was committed in the course of Mr Mulligan's ongoing exchange of messages with "Nella". He sent her a video of himself masturbating. The second such offence (count 17) involved his sending a video of himself ejaculating to a 13-year-old girl, "Louise".
18. The two most serious offences evidenced by what was found on Mr Mulligan's phone were those of causing a child to engage in sexual activity, contrary to section 10 of the Act. Count 6 involved his causing "Nella" to masturbate. She did so, using a large hairbrush to penetrate herself. In the course of their messages Nella said, "I masturbated and now it's bleeding like hell ... I think I pushed it in wrongly." Count 14 involved Mr Mulligan causing "Julie" (an American girl of about 14) to record and send him videos of her fingering her vagina.
19. In addition to the exchange of messages the police, as we have said, found indecent imagery on Mr Mulligan's phone. Count 26 related to 25 still and 13 moving images in category A and one extreme pornographic image. Count 27 related to three still and nine moving images in category B. Count 28 related to one still and 362 moving images in category C.
20. The category A videos included a 14-year-old girl masturbating with a hairbrush; a 10-year-old boy having sex with a donkey; girls and boys aged 13 to 15 masturbating; and naked girls aged 13 or 14. The extreme pornographic image was a video of an adult male causing a horse to have anal intercourse with him.

21. In relation to the many offences charged on the indictment, Mr Mulligan first appeared in a magistrates' court on 14 February 2020. He gave no indication of his plea. He was remanded in custody and sent to the Crown Court, where on 12 May 2020 he pleaded guilty to all 28 counts at a plea and trial preparation hearing. He was entitled to 25 per cent credit for those guilty pleas. He was again remanded in custody.
22. Proceedings were then delayed for many months by a combination of circumstances into which it is unnecessary to go.
23. It was on 21 May 2021 that Mr Mulligan appeared before a magistrates' court in relation to the earlier indecent imagery offences. He indicated his guilt of those offences and was committed for sentence. He was entitled to full credit of one-third for those admissions.
24. At the sentencing hearing on 21 July 2021, the judge had victim personal statements from two of the girls who had been victims of section 15A offences. He also had a pre-sentence report and a psychiatric report relating to Mr Mulligan. Those reports referred to the repeated sexual and physical abuse which Mr Mulligan had suffered as a very young child whilst in the care system in Ireland. Both authors assessed Mr Mulligan as showing genuine remorse and shame. The author of the psychiatric report assessed him as suffering from clinical depression and being vulnerable to self-harm. It should be noted that by the time of the preparation of these reports Mr Mulligan's relationship with his children had broken down completely. He was still in contact with his wife, but she had become seriously ill.
25. Prosecuting counsel had prepared a sentencing note to which he referred during the hearing. Regrettably, both the note and the oral submissions contained serious errors in relation to counts 6 and 14 (the section 10 offences), which counsel stated carried a maximum sentence of 5 years' imprisonment. Counsel said that under the relevant guideline the offences fell into either category 1A, for which the guideline gave a starting point of 18 months' custody and a category range of 1 to 2 years, or category 2A, with a starting point of 12 months and a range of 26 weeks to 19 months. That was completely wrong. The statutory maximum is 14 years, and the sentencing guideline indicates for category 1A a starting point of 5 years' custody with a range of 4 to 10 years, and for category 2A a starting point of 3 years with a range of 2 to 6 years.
26. Counsel also misstated the maximum sentence for the offences in counts 26 to 28, saying that it was 5 years' imprisonment when in fact it is 10 years.
27. Unfortunately, these errors were not noted at the time. We appreciate the pressures on busy practitioners and judges, and we recognise how easy it can be for slips to be made. We are bound to say, however, that the particular errors relating to counts 6 and 14 could, and in our view should, have rung immediate alarm bells. The effect of the inaccurate information given to the judge was that the offences of causing a child to view sexual activity were more serious than those of causing a child to engage in sexual activity. Moreover, the misstatement of the sentencing guidelines suggested that the appropriate range of sentencing for a category 1A offence of causing a child to engage in sexual activity was less than the appropriate range for a category 2A offence of causing a child to watch sexual activity. All this led, as will be seen, to the unhappy result that the judge treated Mr Mulligan's conduct in causing an adolescent girl to injure herself by masturbating with a hairbrush as less serious than his sending her a video of himself masturbating.
28. The judge in his sentencing remarks indicated that the offences were very serious, but he took into account the abuse which Mr Mulligan had suffered as a child. He accepted the view of the authors of the reports that the offences were a direct result of that abuse. He also accepted that Mr Mulligan was genuinely ashamed and remorseful. He took the view that the sexual activities discussed in the messages were all a fantasy in Mr Mulligan's mind, not something Mr Mulligan intended to carry out. He took into account that Mr Mulligan had spent by that time the equivalent of a 3-year sentence remanded in custody and had contracted Covid whilst on remand. For counts 5 and 17, the judge imposed suspended sentences of 18 months' imprisonment suspended for 2 years. For counts 6 and 14, concurrent suspended sentences of 12 months and 9 months respectively. For the all the

other offences he imposed shorter concurrent suspended sentences.

29. The prosecution subsequently realised that inaccurate submissions had been made about the judge's sentencing powers. The court was invited to list the case for a slip rule hearing on the basis that a reference to Attorney General was contemplated.
30. By the time of that slip rule hearing on 31 August 2021, Mr Mulligan's wife had sadly died. He had not been able to attend her funeral.
31. The judge, having been apprised of the errors which had been made, remained of the view that a suspended sentence was appropriate having regard to Mr Mulligan's unhappy past and the realistic prospect of rehabilitation. He noted that he had been misinformed as to the maximum sentence on counts 6 and 14, which had led him to *"take a lower starting point than I would otherwise have done"*. He varied the sentences on those counts to terms of 2 years' imprisonment suspended for 2 years, and left all other sentences and ancillary orders as before, saying:

"There is little more I can do because I will not be prepared to pass a sentence that would involve him losing his liberty immediately."

32. On behalf of the Solicitor General, Mr Lloyd submits that the revised total sentence of 2 years' imprisonment suspended for 2 years remains unduly lenient. He submits that it was appropriate to treat counts 6 and 14 as the lead offences; to increase the sentences which would otherwise be appropriate for those offences to reflect the overall criminality; and to impose concurrent sentences on the other offences. He submits that for the count 6 offence (a category 1A offence) the appropriate starting point under the guideline was 5 years' imprisonment, whilst for count 14 (a category 2A offence) it was 3 years' imprisonment. He goes on to submit that those starting points had to be increased to reflect the significant further offences charged in counts 5 and 17, each of which fell into category 2A of the relevant guideline, with a starting point of 3 years' custody and a range from 2 to 6 years; the multiplicity of other offences listed on the indictment and the committal for sentence; the serious aggravating feature of the indictment offences being committed whilst on bail for the earlier matters; and the volume and nature of the indecent images.
33. Mr Lloyd further submits that the judge was wrong to give any significant weight to the proposition that the section 15A offences were matters of fantasy in Mr Mulligan's mind, for the simple reason that in some instances Mr Mulligan had caused his victims actually to engage in or to watch sexual activity. These, suggests Mr Lloyd, should not have been treated as mere matters of fantasy. The only mitigation to be taken into account, he submits, was the absence of previous convictions, the abuse which Mr Mulligan had suffered as a child and his genuine remorse. But even taking those matters into account, and even allowing the appropriate credit for guilty pleas to which we have referred, Mr Lloyd submits that the appropriate total sentence should have been very much greater than 2 years' imprisonment, so that no question of suspension should have arisen.
34. Those submissions are opposed by Mr Esprit, who appears for Mr Mulligan in this court as he did below. Mr Esprit accepts that the final sentence may be regarded as lenient, but submits that it was not unduly so having regard to the significant personal mitigation and to the time spent on remand by Mr Mulligan in the course of the proceedings. He suggests that the judge approached the matter on the basis that the period spent on remand in custody (roughly equivalent to a sentence of 3 years) was sufficient to enable the judge to focus in sentencing more on rehabilitation than on punishment. On that basis, Mr Esprit submits, it was entirely appropriate for the judge to treat the time spent on remand in custody as achieving the necessary punitive effect and to accept the evidence before him (in particular the contents of the two reports) as showing a clear and realistic prospect of rehabilitation.
35. Mr Esprit points out that until the commission of these offences Mr Mulligan had lived a law-abiding life. He had had a difficult time whilst caring for his wife during her

- ill-health and was now estranged from his family and bereaved of his wife.
36. Furthermore, Mr Esprit submits that even if the court were persuaded that the sentence was unduly lenient, it would not be appropriate actually to increase the sentence, having regard to the risk that to send Mr Mulligan back to prison now would severely damage the rehabilitative process and would fail to reflect his personal circumstances.
  37. We are grateful to both counsel for their submissions.
  38. Counts 6 and 14 were the most serious offences. It is therefore very regrettable that the judge was misinformed about his sentencing powers in relation to those offences. The error which was made at that hearing has consequences for Mr Mulligan. But in addition we are bound to say, with all respect to the judge, that neither the seriousness of the offences in counts 6 and 14 nor the overall seriousness of the case was adequately reflected in the total sentence imposed, even after the modest variation at the hearing on 31 August.
  39. We accept Mr Lloyd's submissions as to the appropriate starting points for the offences in counts 6 and 14 and counts 5 and 17. We think it appropriate to focus upon those offences and do not think it necessary to review in detail the sentencing on the other counts and charges.
  40. We also accept Mr Lloyd's submissions as to the need to reflect in the sentences for the lead offences the seriousness of the large number of other offences, none of which could be regarded as a minor example of its kind. The commission of most of the offences whilst on bail for the initial indecent imagery offences is in our view a serious aggravating factor. It provides the context in which to assess the weight to be given to the previous good character of Mr Mulligan.
  41. We accept, of course, that there were mitigating factors to which weight must be given. Notwithstanding the context which we have just mentioned, the fact that a man who had reached Mr Mulligan's age had no previous convictions was a significant point in his favour. So too were his wretched childhood experiences of abuse, which no doubt help explain why he came to commit these offences. His remorse was accepted as genuine and is a significant factor in his favour. Mr Mulligan's estrangement from his surviving family was the consequence of his own actions, but we recognise of course the human realities of his situation, and we accept that it must have been a very heavy blow for him not only to lose his wife but also to be unable to attend her funeral. We also think it right to take into account that Mr Mulligan must have suffered considerable anxiety waiting to learn whether it will now be necessary for him to return to prison, particularly when, as we have indicated, that possibility arises in significant part because of the serious error made in the presentation of the prosecution case.
  42. All those are matters which we can and do take into account in Mr Mulligan's favour. We agree with Mr Lloyd's submissions as to the appropriate level of credit for the pleas. We bear very much in mind the principle of totality.
  43. Balancing those many factors as best we can, and conscious that our decision will be a difficult one for Mr Mulligan to receive, we have no doubt that the sentencing was unduly lenient and that there must be a substantial increase.
  44. We accordingly grant leave to refer. We quash the sentences imposed below on counts 6, 14, 5 and 17. We substitute for them concurrent sentences of imprisonment as follows: count 6, 6 years; count 14, 5 years; count 5, 3 years; count 17, 3 years.
  45. All other sentences and the ancillary orders made below remain as before.
  46. The effect of our decision is that Mr Mulligan's total sentence is increased to one of 6 years' imprisonment. He has, of course, spent time remanded in custody earlier in these proceedings which will count towards that sentence.
  47. Mr Esprit, Mr Mulligan must of course surrender to the nearest police station in order to commence that sentence. Are you able to tell us which is the appropriate police station please?

MR ESPRIT: Yes.

MR LLOYD: I am so sorry to rise; if it assists, I have been given a suggested station?

LORD JUSTICE HOLROYDE: Yes, of course.

MR LLOYD: The station I have been given is Walworth Police Station.

LORD JUSTICE HOLROYDE: Walworth?

MR LLOYD: W-A-L-W-O-R-T-H.

LORD JUSTICE HOLROYDE: Yes.

MR LLOYD: And that is at 12-28 Manor Place in SE17.

LORD JUSTICE HOLROYDE: And that is a 24-hour police station, is it?

MR LLOYD: Yes. And I think the order is usually drafted in the terms of having to surrender by a particular time today.

LORD JUSTICE HOLROYDE: Yes. We will deal with that, thank you.

MR LLOYD: I am grateful.

LORD JUSTICE HOLROYDE: Mr Esprit, do you have any contrary instructions?

MR ESPRIT: My Lord, no.

LORD JUSTICE HOLROYDE: And is there any reason you would want to put forward why Mr Mulligan should not surrender by 4 pm this afternoon?

MR ESPRIT: My Lord, no reason why not. I will make sure the message is conveyed to him as soon as possible.

LORD JUSTICE HOLROYDE: Yes, thank you.

Then we direct that Mr Mulligan must surrender at Walworth Police, 12-28 Manor Place, London SE17 by 4 pm today.

Mr Lloyd, thank you, and Mr Esprit, thank you also.

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

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