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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Neutral Citation No:

[2021] EWCA Crim 1513



Case No. 202102523 A3

Royal Courts of Justice

Tuesday, 28 September 2021

Before:

LADY JUSTICE NICOLA DAVIES

MR JUSTICE DOVE

MRS JUSTICE LAMBERT

REGINA

V

THOMAS GEORGE THOMPSON

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MR P. JARVIS appeared on behalf of the Appellant.

MR J. SMITH appeared on behalf of the Respondent.

J U D G M E N T

(Approved)

LADY JUSTICE NICOLA DAVIES:

- 1 This is an application by Her Majesty's Attorney General pursuant to s.36 of the Criminal Justice Act 1988 for leave to refer the sentences imposed upon the offender for review by this court as she regards the same as unduly lenient.
- 2 On 17 May 2021, having pleaded guilty before magistrates, the offender was committed for sentence in respect of two offences; namely:
 - (1) arranging or facilitating the commission of a child sex offence contrary to s.14 of the Sexual Offences Act 2003;
 - (2) attempting to meet a child following sexual grooming contrary to s.15 of the Sexual Offences Act 2003 and s.1(1) of the Criminal Attempts Act 1981.
- 3 On 8 July 2020, having pleaded guilty before the magistrates, the offender was committed for sentence in respect of the offences of:
 - (3) making indecent photographs of a child (Category B) contrary to s.1(1)(a) of the Protection of Children Act 1978;
 - (4) making indecent photographs of a child (Category 3) contrary to s.1(1)(a) of the Protection of Children Act 1978.
- 4 On 16 July 2012, in the Crown Court at Carlisle, Miss Recorder Bex QC sentenced the offender for the offences 1 to 4 as follows:
 - (1) Two years' imprisonment suspended for two years;
 - (2) Six months' imprisonment suspended for two years;
 - (3) 17 weeks' imprisonment suspended for two years;
 - (4) 28 days' imprisonment suspended for two years.

A total sentence of two years' imprisonment suspended for two years with a 200 hours' unpaid work requirement and 30 days' rehabilitation activity requirement. The offender was made subject to a Sexual Harm Prevention Order for a period of ten years.

The facts

- 5 For a period of around six months prior to his arrest the offender was a regular user of online chat rooms. There he made contact with a number of girls around the age of 13. From other users he received indecent images of children at categories E and C.
- 6 In April 2021 a police investigation commenced. A police decoy posed as a 13-year-old child (Lilly). The offender began chatting online with Lilly on 27 April 2021. At the outset Lilly stated that she was 13. The offender replied that he was 58: his correct age. The chat became sexual in nature. The offender suggested buying underwear for Lilly to try on and model for him. He would take her to a hotel for her to model for him. He wrote that he wanted to kiss her all over and do everything with her. He said he could "teach her things" such as how to "hold my club". He would instruct her "how to have fun with a boy" and added that would "be able to handle a golf club when I've finished with you".

- 7 The offender arranged to meet Lilly near Derby on 15 May 2021 and booked a hotel room. He travelled from his home in Penrith for the meeting. On arrival, he was arrested, the police found a packet of condoms and a Viagra tablet on his person. A search of the offender's home address produced a laptop on which were found 30 Category C images. On his mobile phone two deleted Category B images were found. The majority of the images were of female children aged between ten and 16 years.
- 8 The offender declined an offer of legal representation at the police interview and voluntarily made full and frank admissions to the police. He told them that his reference to a "golf club" was to his own penis and that he had planned on having sexual intercourse with Lilly if that is what she wanted. He also stated that he was due to meet a 17-year-old for sex on the way back to Cumbria, having previously so arranged. Prior to these matters, the offender had no previous convictions or cautions and he was in regular employment.
- 9 A Pre-Sentence Report was before the court. The author records that, as in his police interview, the offender presented as open, honest and frank in his admissions. He accepted that he had planned to have sex with Lilly in full knowledge that "I wouldn't have done anything she didn't want to". He also stated that he hoped that if he saw a 13-year-old in the flesh he would not go through with the sexual activity. The offender attributed pressure at work as being a factor which led to the offending. He had been married for 32 years with two adult sons. As a result of the offending, he has moved out of the marital home. His sons have terminated contact with their father.
- 10 The author of the report notes that since his arrest the offender has sought support from his GP. He has engaged with First Steps and has made contact with "Stop It Now". As to the likelihood of further offending, the offender was categorised as low risk in respect of all of the offences before the court. He was assessed as presenting a high risk of serious harm to children until strong internal controls were developed and stringent external controls were put in place. It is recorded that the offender presented a risk to himself should his mental health deteriorate and concern was expressed as to the effect of a custodial sentence upon his ability to self-harm.
- 11 An update from the National Probation Service dated 23 September 2021 has been provided to this court. The offender and his wife have separated, but they remain in contact. He presently resides with his brother in a different area. He has attended six out of seven unpaid work appointments, he is completing some of his hours online. He has attended all probation appointments and engaged well. The court was told that he has found employment as a HGV driver, a fact of which the police are aware.
- 12 In sentencing the offender, the judge took the lead offence as being offence (1), the s.14 offence. She had regard to the authorities of *R v Privett* [2020] 2 Crim App R (S) 45; *R v Manning* [2020] 2 Crim App R (S) 46 and *R v Reed* [2021] EWCA 572. The judge also had regard to the provisions of s.63 of the Sentencing Act 2020 ("the 2020 Act") which states:

"63 Assessing Seriousness

Where a court is considering the seriousness of any offence, it must consider—

- (a) the offender's culpability in committing the offence, and
- (b) any harm which the offence—
 - (i) caused
 - (ii) was intended to cause, or
 - (iii) might foreseeably have caused."

- 13 The judge noted that the assessment of harm had to be followed by a downward movement from the starting point to reflect the fact that the main offence was an attempt and that the

sexual act did not occur because there was no real child. She noted that the offences related to one child and that the period of time was relatively short; namely, between 27 April and 15 May 2021.

- 14 In sentencing the offender, the judge recognised the overlap between the s.14 and s.15 offences. The starting point for the s.14 offence is five years' custody with a range of four to ten years. The s.15 offence has a starting point of two years' custody with a range of one to four years. In respect of the s.14 offence the Sentencing Council Definitive Guideline states that the sentencing judge should have regard to the Guidelines relevant to the offence that the defendant arranged or facilitated the commission of. In this case that would be the offence of sexual activity with a child contrary to s.9 of the Sexual Offences Act 2003 ("the 2003 Act").
- 15 In addressing the issue of whether the offender was prevented from carrying out the offence only because the child victim did not exist, the judge took account of the following facts:
- i. when the offender spoke to the police he was, as she described it, unusually open: a reflection of what she described as his naivety and the fact that he is habitually an honest and law-abiding person of mature years;
 - ii. he told the police that when he saw Lilly he hoped that he would have come to his senses and backed out;
 - iii. in messages to Lilly the offender had repeatedly said that he would do no more than she was comfortable with.

By reason of (i) and (ii), the judge stated that she was not satisfied so that she was sure that "The only thing that stopped this happening, apart from the fact that the child was a fiction, was the intervention of the police."

- 16 One-third credit was given for the guilty pleas.
- 17 For the s.14 offence of attempting to arrange or facilitate the judge took a starting point of five years. She adjusted the figure to four years to reflect the fact that it was an attempt and did not involve a real child. A further downward adjustment of one year was made to reflect the positive good character of the offender, the fact that the judge was not satisfied that he would have gone through with the sexual intercourse and for the difficulties of serving a sentence of imprisonment during a global pandemic. This resulted in a sentence of three years prior to credit for plea. A reduction of one-third led to a sentence of two years' imprisonment.
- 18 On count (2) the judge identified a starting point of two years. The figure was adjusted down to 12 months to reflect the fact that Lilly was not a real child. A further adjustment downwards for good character and the difficulties of serving a sentence of imprisonment during a pandemic was made. This resulted in a sentence of nine months' imprisonment. Allowing one-third reduction for the plea of guilty gave a sentence of six months' imprisonment.
- 19 On count (3) a starting point of 26 weeks was taken. Reduced by one-third this resulted in a sentence of 17 weeks' imprisonment.
- 20 Upon count (4) the judge recognised the starting point would ordinarily be one of a Community Order, but by reason of the other sentences passed, and her view that no separate penalty would be appropriate, the sentence of 28 days' imprisonment suspended for 24 months was imposed.

21 As to the issue of suspension, the judge identified the age of the offender, his previous good character, the fact that he was not eligible for a programme in the community and was unlikely to be eligible for a treatment programme in prison because he represented a low risk of offending and because he had proactively sought to address his problem and identified suitable therapy for which he was paying privately, as factors which permitted the court to suspend the full sentences.

The submissions of the Attorney General

22 We observe that the submissions made by Mr Jarvis on behalf of the Attorney General today are not wholly reflected in the written Reference made to this court. That is a matter of concern. If submissions are to be made to the Court of Appeal, particularly in such a Reference, we would expect the entirety of those submissions and the particular points they seek to make to be made in the Final Reference. They were not.

23 The essence of the primary submission is directed to charge (1). The relevant Definitive Guideline being that of s.9 of the 2003 Act, the sentence should be approached upon the basis of the harm which the offender intended to carry out. It is contended that as the offender intended to penetrate Lilly's vagina with his penis the harm was Category 1. Culpability was A, because there was a significant disparity in age between the offender and Lilly and because he set about to groom her. The starting point is five years' imprisonment, the range is four to ten years.

24 In respect of the primary submission, Mr Jarvis has today made a number of points which in essence come to this: there were two questions for the judge. Firstly, what was the offender's intent? That was relevant to sentence. His intention was penetrative sex which is a grave offence. The second and separate question is: can the court be sure that the offender would have carried out that intent? The answer is not irrelevant to sentence, but it is to be given limited weight because there are many contingencies which may mean that the offence will not be completed. Intent is relevant to downward adjustment but the second question has only limited relevance to such adjustment. Reliance is placed upon [24] in *R v Reed* [2021] EWCA Crim 572 where it is stated that the extent of downward adjustment will depend on the facts of a case. Where an offender is only prevented from carrying out an 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 would be appropriate. Where relevant, no additional reduction should be made for the fact that the offending is an attempt.

25 It is the Attorney General's contention that the offender had taken all practical steps to commit the offence. He had arranged and gone to the meeting place. Had he not been arrested, whether in fact the offence would have taken place, will always bring with it a degree of uncertainty. Further, as this is not relevant to the primary issue of intent, it would have only limited relevance to any downward adjustment. It is accepted that in arriving at a starting point of five years the judge was entitled to downward adjust by reason of the fact that:

- i. a criminal decoy was used;
- ii. the personal mitigation of the offender;
- iii. considerations relevant to *R v Manning* and Covid restrictions; and
- iv. there could be a modest reduction for the fact that the offence was not completed.

26 The second submission is that the total sentence should reflect the fact that the offender was to be sentenced for three other offences. It is accepted that there was an overlap between

charges (1) and (2), but charges (3) and (4) were unrelated and should have resulted in an upward movement of the sentence on charge (1). Had this been done, the sentence after trial would not have been one of three years' imprisonment. Thus, even with the full discount for the plea, the final sentence would have been more than two year's custody and thus suspension was not possible.

Submissions on behalf of the offender

- 27 It is contended on behalf of the offender that the sentencing judge was able to take account of all the facts of the case and the circumstances of this offender, including what would have happened or could have happened had he not been arrested. In taking account of all of those circumstances, the judge was entitled to find that she could not be satisfied so that she was sure that the offence would have been committed but for the impossibility arising from the fact that Lilly was a fiction. Further, such a finding was relevant to the downward reduction, which went beyond the fact that Lilly was not a real child .

Discussion and conclusion

- 28 In addressing the issue of sentence on count (1) the judge had to consider the intention of the offender. This is relevant to s.63 of the 2020 Act and to any adjustment which is subsequently to be made. We accept that in practical terms the intention was made out in that the meeting had been arranged, a hotel room was booked and the offender had taken steps to attend the meeting. This was a question which, on the facts, could be answered by the judge.
- 29 As to the second question, namely could the court be satisfied that the offender would have carried out his intention, this appears to have been addressed by the judge when she stated:

“I am not satisfied so that I am sure that the only thing that stopped this happening, apart from the fact that the child was a fiction, was the intervention of the police.”

This finding by the judge is not directed to the primary question of intent. That being so, it can have only limited relevance to any downward adjustment. In our view, the adjustment made by the judge was too great to reflect this second point.

- 30 We accept that an appropriate starting point was one of five years. Taking account of the existence of a criminal decoy, the good personal mitigation of the offender, an issue relating to Covid and a modest reduction for a possibility that the offence would not be carried out would reduce the sentence to four years. Applying a one-third discount would result in a sentence of two years and eight months. Further, we allow another two months to reflect the fact that this offender has carried out part of the orders made by the court.
- 31 For the reasons given, we accept the referral and the submission made on behalf of the Attorney General that the sentence passed on count (1) was unduly lenient. We substitute for it an immediate term of imprisonment of two years' and six months. Accordingly, we quash the sentence of two years' imprisonment suspended for two years and substitute for it a sentence of two years and six months' imprisonment. As to count (2), we quash the sentence of six months' imprisonment suspended for two years and substitute for it a sentence of six months' imprisonment to run concurrently to count (1). As to count (3), we quash the sentence of 17 weeks' imprisonment suspended for two years and substitute for it a sentence of 17 weeks' imprisonment to run concurrently. On count (4), we quash the sentence of 28 days' imprisonment suspended for two years and substitute for it a sentence of 28 days' imprisonment to run concurrently. We see no reason to increase the sentence on count (1) to reflect the further counts (3) and (4) because we are satisfied that, in considering

the totality of this matter and the personal circumstances of this offender, the sentences passed are appropriate.

- 32 The offender will receive credit for half the time spent under curfew if the curfew qualified under the provisions of s.325 of the 2020 Act. On the information before the court, the total period is 31 days. If this figure is incorrect, this court will order an amendment of the record for the correct period to be recorded.
- 33 In practical terms this means that this offender must now surrender to a police station. We are informed by the administrative staff that the facilities of this court are not presently of the best and surrender cannot take place here today. That being so, it appears to us that the most practical way forward is to allow the offender 48 hours to surrender to a police station.
- 34 For the reasons given and to the extent identified, this reference is allowed.

CERTIFICATE

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