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IN THE COURT OF APPEAL

CRIMINAL DIVISION

NEUTRAL CITATION NO: [2021] EWCA Crim 175

CASE NO 202002863/A3

Royal Courts of Justice

Strand

London

WC2A 2LL

Friday 5 February 2021

LORD JUSTICE DAVIS

MR JUSTICE WILLIAM DAVIS

HIS HONOUR JUDGE LODDER QC

(Sitting as a Judge of the CACD)

REGINA

V

PATRICK ALBERT JESSEMEY

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MR L FRENCH appeared on behalf of the Applicant.

MR P JARVIS appeared on behalf of the Crown.

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

1. MR JUSTICE WILLIAM DAVIS: Patrick Jessemey is 76 years old. Until the matters with which we are concerned, he was of good character.
2. On 21 October 2020 he appeared for sentence in the Crown Court at Oxford. For an offence of attempting to incite a child under the age of 13 to engage in non-penetrative sexual activity a term of 3 years' imprisonment was imposed. A sexual harm prevention order ("SHPO") was made. This order was indefinite in its duration.
3. His application for leave to appeal against sentence has been referred to the Full Court by the Registrar. We give leave.
4. This case initially had been identified as one suitable for consideration by this Court with a view to resolving an apparent conflict between the principles expounded in R v Privett [2020] 4 WLR 111 and the decision of this Court in R v Russell [2020] EWCA Crim 956. About that apparent conflict we need say no more. This case cannot, and will not, be a vehicle for addressing such conflict as there may be.
5. That is because of the procedural minefield through which the parties in the courts below attempted to negotiate. Their lack of success in that endeavour means that no general principle of sentencing in relation to sexual offences arises. Rather, this is a cautionary tale of the consequences of errors of procedure in the Magistrates' Court and the Crown Court. The problems with which we must grapple were first identified by Rebecca Sallet, a lawyer in the Criminal Appeal Office. We pay tribute to the assistance she has given us in finding our way through the issues which have arisen. We have also been given very considerable assistance by Mr Paul Jarvis instructed on behalf of the respondent prosecutor. He did not appear in the court below but he has made valuable submissions to us.
6. What the appellant did can be stated very shortly. On eight occasions in August 2019 he participated in online chatroom text conversations with someone who called herself "Leon". Leon supposedly was a 12-year-old girl. That is how the person advertised herself online. In fact, Leon was an adult police officer. The appellant did not know that. He believed that he was engaging with a 12-year-old girl. His conversations with Leon were overtly sexual. He asked to kiss her and to touch her. He incited her to masturbate herself to orgasm and to engage in telephone sex with him. The appellant was arrested in December 2019. He told the police that he would not have done anything. He said that it was just talk, that he did not know how old Leon was and that he was just messing about.
7. In June 2020 the appellant was sent a postal requisition. It contained a single charge of attempting to engage in sexual communication with a child. The substantive offence is set out in section 15A of the Sexual Offences Act 2003. It is an either way offence with a maximum sentence of 2 years' imprisonment.
8. On 11 August 2020 the appellant appeared at the Oxford Magistrates' Court. This was his first appearance in answer to the postal requisition. At court the prosecution preferred a second charge, namely the charge in respect of which the appellant eventually was sentenced. The underlying substantive offence in relation to that charge (namely section 8 of the Sexual Offences Act 2003) also is an either way offence. Where the activity alleged is non-penetrative the maximum sentence is 14 years' imprisonment. Although particularised as an *attempt* to commit the offence - as it had to be since there was no child to incite - the offence was described on the court record as being *contrary to section 8 of the Sexual Offences Act 2003* rather than section 1 of the Criminal Attempts

Act 1981.

9. This is the first procedural issue which we must address. Rebecca Sallet was concerned that the statement of the offence being in those terms might have affected the lawfulness or validity of the charge. We are satisfied that it did not. Anyone charged with a substantive offence can be convicted in the alternative on an attempt to commit the offence. It must follow that a misdescription of the statutory basis of the charge of the kind that occurred in this case will be of no substantive consequence.
10. At the Magistrates' Court, when the plea before venue procedure took place, the appellant gave no indication of plea in relation to the offence charged in the postal requisition. He did indicate a plea of guilty to the offence charged on the day of his appearance before the Magistrates' Court.
11. The Magistrates determined that the charge of attempting to engage in sexual communication with a child should be sent for trial. The charge of attempting to commit an offence contrary to section 8 of the 2003 Act was committed for sentence. The committal was pursuant to section 4 of the Powers of Criminal Courts (Sentencing) Act 2000.

"(1) This section applies where-

- (a) a person aged 18 or over appears or is brought before a magistrates' court (the court') on an information charging him with an offence triable either way ('the offence');
- (b) he or his representative indicates that he would plead guilty if the offence were to proceed to trial; and
- (c) proceeding as if section 9(1) of the Magistrates' Courts Act 1980 were complied with and he pleaded guilty under it, the court convicts him of the offence.

(2) If the court has committed the offender to the Crown Court for trial for one or more related offences, that is to say, one or more offences which, in its opinion, are related to the offence, it may commit him in custody or on bail to the Crown Court to be dealt with in respect of the offence in accordance with section 5(1) below.

(3) If the power conferred by subsection (2) above is not exercisable but the court is still to inquire, as examining justices, into one or more related offences-

- (a) it shall adjourn the proceedings relating to the offence until after the conclusion of its inquiries; and
- (b) if it commits the offender to the Crown Court for trial for one or more related offences, it may then exercise that power.

(4) Where the court-

- (a) under subsection (2) above commits the offender to the Crown Court to be

dealt with in respect of the offence, and

(b) does not state that, in its opinion, it also has power so to commit him under section 3(2) above

- i. section 5(1) below shall not apply unless he is convicted before the Crown Court of one or more of the related offences.
- ii. (5) Where section 5(1) below does not apply, the Crown Court may deal with the offender in respect of the offence in any way in which the magistrates' court could deal with him if it had just convicted him of the offence."

12. Section 4(2) provides that a person committed under the section can be dealt with as if they had been convicted by the Crown Court. This flows from the reference to section 5(1) of the 2000 Act. There is an exception to this provision as set out in section 4(4). The Magistrates' Court can say that it also had power to commit the person under section 3(2) of the 2000 Act. If the court fails to do that and the person then is not convicted of the offence or offences for which they were sent for trial, the Crown Court's sentencing powers are restricted to those of the Magistrates' Court. In this case the Magistrates' Court did not state that, in its opinion, it had the power to commit the appellant under section 3(2) of the 2000 Act.
13. The first hearing in the Crown Court was on 10 September 2020. On 9 September 2020 the prosecution uploaded two indictments onto the DCS. The first indictment was uploaded at 3.10 pm on that day in the "Indictment" section of the DCS. It contained a single count reflecting the charge sent for trial. The second indictment was uploaded at 3.50 pm in the "Applications" section of the DCS. It contained two counts. One was in the same terms as the count on the single count indictment. The other reflected the charge committed for sentence. This was done because it was thought that the documentation received from the Magistrates' Court was ambiguous about the manner in which the charge relating to the section 8 offence had been sent to the Crown Court.
14. The existence of two indictments is the next procedural issue which we have to consider. Mr Jarvis submitted that an indictment is preferred when it is uploaded to the DCS. He further submitted that an indictment could only be preferred by such uploading if it was uploaded to the appropriate section of the DCS, ie the section designated as "Indictment". The two count indictment was of no effect because it had been uploaded to a different section. It was a mere draft.
15. The preferring of indictments is dealt with in Part 10 of the Criminal Procedure Rules. Part 10.2(5) is in these terms:

"(5) For the purposes of section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933-

- (a) a draft indictment constitutes a bill of indictment;
- (b) the draft, or bill, is preferred before the Crown Court and becomes the indictment-

(i) where rule 10.3 applies (Draft indictment generated electronically on sending for trial), immediately before the first count (or the only count, if there is only one) is read to or placed before the defendant to take the defendant's plea under rule 3.24(1)(d)

(ii) when the prosecutor serves the draft indictment on the Crown Court officer, where rule 10.4 (Draft indictment served by the prosecutor after sending for trial), rule 10.5 (Draft indictment served by the prosecutor with a High Court judge's permission), rule 10.7 (Draft indictment served by the prosecutor on re-instituting proceedings) or rule 10.8 (Draft indictment served by the prosecutor at the direction of the Court of Appeal) applies, or

(iii) when the Crown Court approves the proposed indictment, where rule 10.6 applies (Draft indictment approved by the Crown Court with deferred prosecution agreement)."

16. We are concerned with the position governed by sub-paragraph (b)(ii). The relevant Criminal Practice Direction is CPD Part 10A.8:

"It requires the prosecutor to prepare a draft indictment and serve it on the Crown Court officer, who by CrimPR 10.2(7)(b) then must serve it on the defendant. In most instances service will be by electronic means, usually by making use of the Crown Court digital case system to which the prosecutor will upload the draft (which at once then becomes the indictment, under section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 and CrimPR 10.2(5)(b)(ii))."

17. The import of these provisions was summarised by this Court in R v W(P) [2016] 2 Cr App R 27 at [20]:

"An indictment is preferred within the meaning of s.2(1) of the 1933 Act, once it is electronically entered onto the Court digital system at the Crown Court. The consequence is, as s.2(1) provides, that 'it shall thereupon become an indictment and be proceeded with accordingly'."

18. Nowhere in the Criminal Procedure Rules or in the Criminal Practice Direction, is it said that the indictment must be uploaded to a particular part of the DCS. Mr Jarvis's submission was that the uploading must be to the "Indictment" section of the DCS. An indictment uploaded to another part of the DCS will not have been preferred. Were it otherwise confusion and error would be the likely result. If the indictment were not in the right section there would be no reason for anybody to look for it. In our judgment, although nothing is said whether in the rules or the Practice Direction as to the relevant section on the DCS onto which the indictment should be loaded, we agree with Mr Jarvis that in order for it to be preferred the indictment must be loaded into the "Indictment" section. For it to be otherwise would be a recipe for chaos.

19. There can of course be two or more indictments outstanding against a defendant at any one time in the course of proceedings in the Crown Court: see R v MJ [2019] 1 Cr App R

10 at [51]. If two indictments have been uploaded to the "Indictment" section (as will frequently occur in the course of proceedings) both will have been preferred. As was explained in MJ the prosecution will be required to elect the indictment in respect of which they intend to proceed. Here the prosecution uploaded to the indictment containing two counts to the wrong section of the DCS where no indictment belonged. It was a mere draft. No election was required because there was only one indictment which had been preferred.

20. In any event prosecution counsel explained the position at the first hearing. He said that the single count indictment had been uploaded because it charged the offence in respect of which the appellant had been sent for trial. This was the offence where the appellant had given no indication of plea at the Magistrates' Court. The two count indictment had been uploaded because there had been some confusion as to whether the other offence had been committed for sentence or sent for trial. Counsel explained that the confusion had been resolved. In so far as it was necessary, it was implicit in what counsel said that he elected to proceed on the single count indictment insofar as he was to proceed at all. No attempt was made to move the two count indictment to the appropriate section of the DCS. He informed the judge that the plea to the offence of attempting to incite a child to engage in sexual activity - the matter on which he had been committed for sentence - fully reflected the appellant's criminality. That was a perfectly sensible conclusion. It might be asked why this view had not been reached on 11 August 2020 at the Magistrates' Court.
21. For whatever reason it was not.
22. As Sir Brian Leveson P made clear, both in his review of criminal proceedings and elsewhere, the overriding requirement of criminal proceedings is to get it right first time. That did not occur here. Whatever the position, the end result was that the two count indictment had no purpose and no status. It was in existence only in case the offence committed for sentence in fact had been sent for trial.
23. Prosecution counsel then addressed the existence of the single count indictment charging the offence not committed for sentence. He said this:

"...Your Honour my application today should it find favour and I think I'm - I'm in a position to do this because - because we haven't served our case yet is to ask for that indictment simply to be discontinued under Section 23A and then that... if your Honour's with me, that just leaves us with the matter that's been committed for sentence..."

24. This so-called application came without any warning to the judge who observed that she had not had the opportunity to research whether this course was appropriate. Counsel reassured her by saying this:

"... as long as the case hasn't formally been served at stage 1, then we're in a position to discontinue and I don't think that there's any objection..."

25. There was no objection from defence counsel. The hearing continued on the assumption that the indictment had been discontinued. The judge at no point made any order.
26. The application made by the prosecution was misconceived. The relevant part of section

23A of the Prosecution of Offences Act 1985 is as follows:

"(1)This section applies where-

- (a)the Director of Public Prosecutions...has the conduct of proceedings for an offence; and
- (b)the accused has been sent for trial ... for the offence.

(2)Where, at any time before the indictment is preferred, the Director or authority gives notice under this section to the Crown Court sitting at the place specified in the notice under section 51D(1) of the Crime and Disorder Act 1998 that he or it does not want the proceedings to continue, they shall be discontinued with effect from the giving of that notice."

- 27. The power to give notice of discontinuance of proceedings in the Crown Court is exercisable at any time before the indictment is preferred. It is not exercisable thereafter. In this case the indictment had been preferred. If it had not been, discontinuance of proceedings would not have been a matter for the court. Prosecution counsel's use of the term "my application...should it find favour" was inapposite. There could never have been any question of the judge making an order. She did not do so. She was simply a bystander albeit one who had correctly expressed concern at the course being taken.
- 28. The consequence is that the single count indictment on which the prosecution had elected to proceed - albeit simply with a view to discontinuing - remained extant. Much more significantly for our purposes there was no conviction on that indictment. No-one appreciated the significance of this. No-one recognised that the nature of the committal for sentence under section 4 of the Powers of Criminal Courts (Sentencing) Act 2000, unaccompanied by a statement that the court would have had power to commit under section 3 of the 2000 Act, restricted the powers of the Crown Court to those of the Magistrates' Court.
- 29. That is clear from the discussion which occupied the rest of the hearing on 10 September. Counsel and the judge spent some time discussing the applicability of the principles in Privett to the instant case and the potential categorisation of the offence. These issues were wholly irrelevant given the restriction on the Crown Court's powers at sentence.
- 30. The case returned for sentence on 21 October 2020 before a different judge. This judge proceeded on the understanding that his sentencing powers were those of the Crown Court. Doubtless it did not occur to him that the position might be otherwise. The issue litigated before the sentencing judge was whether the offence for which he had to sentence the appellant was one to which the principles in Privett applied. The judge decided that they did though he then reduced the starting point significantly. It is unnecessary for us to consider his approach beyond that. Unbeknownst to him his sentencing powers were limited to those of the Magistrates' Court. There was one offence. The maximum sentence he could impose was 6 months' imprisonment.
- 31. Had the judge realised the position, he would have taken a starting point of 6 months. That was significantly less than the appropriate sentence irrespective of which line of sentencing authority he might have applied. But the judge had no power to do otherwise.

32. The restriction on the judge's sentencing powers arose from a catalogue of unfortunate errors: the failure to take a proper view as to the acceptance of the appellant's plea in the Magistrates' Court; the consequent committal for sentence under section 4 of the 2000 Act; the failure to ensure that the court stated that it had the power to commit the appellant for sentence under section 3 of the 2000 Act; the failure to recognise the consequence of discontinuing the proceedings; the erroneous application of section 23A of the 1985 Act.
33. We are assured by Mr Jarvis that the Crown Prosecution Service at least will be addressing all of those errors as they occurred in this case in terms of their general application to cases of this kind.
34. We hope that the Justices' Clerks Society and others concerned with Magistrates' Court procedure will do likewise.
35. None of this was the appellant's fault. He had pleaded guilty to the offence for which he was to be sentenced at the first opportunity. The maximum sentence open to the Crown Court was 6 months' imprisonment. The appellant must be entitled to full discount for his plea. Therefore, the sentence which should have been imposed was 4 months' imprisonment.
36. We should say that Mr Jarvis on behalf of the prosecution entirely agrees with that analysis.
37. The appellant has already served that sentence. Therefore, issues relating to the effect of the current pandemic on those serving prison sentences and the prospect of suspending any prison sentence of that length are wholly academic.
38. We quash the sentence of 3 years' imprisonment and substitute a sentence of 4 months' imprisonment.
39. That reduction of the length of the sentence will reduce the duration of the notification requirements. They will now operate for 7 years. That follows administratively; it is not part of the order of the court. However, as is normal, the duration of the SHPO was directly related to the length of the sentence. It is conventional for the duration of notification requirements and any SHPO to be in step. In those circumstances and particularly taking into account the appellant's age, we shall reduce the operative period of the SHPO to 7 years.
40. To that extent therefore this appeal is allowed.
41. As we have observed the single count indictment remains extant. It is necessary to take some step to dispose of the indictment. We consider that the appropriate course is to order the indictment to lie on the file on the usual terms. One of us will sit as a judge of the Crown Court in order to achieve that end. We should say that we find it difficult to conceive of any circumstances in which any court would give leave for the prosecution to proceed with that indictment.

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



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