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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA CRIM 266



No. 202100127 A4

Royal Courts of Justice

Friday, 5 February 2021

Before:

LADY JUSTICE ANDREWS
MR JUSTICE SPENCER
HIS HONOUR JUDGE AUBREY QC

REGINA
V
KEITH SECKER

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MR K. HECKLE appeared on behalf of the Appellant.

J U D G M E N T

- 1 This application for leave to appeal against sentence has been referred to the full court by the Registrar for an urgent hearing. We have found it a difficult case.
- 2 On 17 December 2020 in the Crown Court at Chester the applicant, who is now 43 years of age, was sentenced by HHJ Thompson to a total of 18 months' imprisonment. The applicant had pleaded guilty at a previous hearing to offences of possessing indecent photographs of a child, contrary to s.160(1) of the Criminal Justice Act 1988 (Count 1), making indecent photographs of a child, contrary to s.1(1)(a) of the Protection of Children Act 1978 (Counts 2, 3, 4) and possessing extreme pornographic images, contrary to s.63(1) of the Criminal Justice and Immigration Act 2008 (Count 5). On Counts 1 and 2 there were concurrent sentences of 18 months' imprisonment. On Counts 3 and 5 there were concurrent sentences of six months' imprisonment and on Count 4 a concurrent sentence of one month imprisonment. A Sexual Harm Prevention Order was made for a period of 10 years and there were other appropriate ancillary orders as to which no complaint is made.
- 3 The grounds of appeal are that the sentence of 18 months' imprisonment was manifestly excessive and that any sentence of imprisonment should have been suspended.
- 4 On 28 August 2019 the police executed a search warrant at the applicant's address where he lived with his partner and their three children. Various devices were seized and sent for forensic analysis. This revealed a large number of indecent images of children and extreme pornographic images.
- 5 In total, there were 581 indecent images of children. Count 1 charged the applicant with possession of all those images. Counts 2, 3 and 4 charged the applicant with making indecent images of children by downloading the images, breaking down the 581 images by category. Those counts related to images of Category A, B and C, respectively.
- 6 There were 240 Category A images and 15 Category A videos (Count 2). The judge was provided with a schedule giving descriptions of some of the images and videos. The most disturbing of the videos showed a young girl, approximately three to four years old, being tortured, gagged across the mouth and face, and with clamps or clips on her nipples. She was hanging upside down by her legs whilst her vaginal area was violently hit by an adult hand. It was one of the worst images the investigators had ever seen. Other Category A images depicted girls aged six to eight years made to take part in oral and vaginal penetrative sex with adults, including ejaculation. In one of the videos the girl was blindfolded, on her knees and crying, being forced to commit a sexual act.
- 7 Count 3 charged the downloading of 167 Category B images and four Category B videos. Count 4 charged the downloading of 155 Category C images. Count 5 charged the possession of 353 extreme pornography images, including an image of a naked adult female indulging in oral sex with a horse.
- 8 The downloading of all these images spanned a period of ten years.
- 9 The applicant was interviewed the day after his arrest. In a prepared statement he denied being involved in any sort of child sex offence or paedophilia and answered no comment when questioned about his computer use and whether any indecent images would be found. Following his arrest, the applicant moved out of the family home. He was charged with the offences in August 2020 and pleaded guilty on his first appearance at the Crown Court on 27 November 2020. The case was adjourned for a pre-sentence report.

- 10 The applicant had no previous convictions. He was in well-paid employment as a software engineer. He was very frank with the probation officer, admitting that he had gained sexual gratification from the images he was viewing. Since his arrest he had sought counselling with a sexual therapist at his own expense, although this had of necessity taken place online owing to the pandemic. He said he had gained a deeper understanding of his thoughts, feelings and behaviour. He believed he had been seeking out more extreme images for sexual gratification to the extent that he had become addicted. He had also been talking with adult females online. This was how he came to the attention of the police; the last female with whom he had contact had been arrested and information concerning the applicant was found on her computer.
- 11 He said he had now thought a great deal about how his own children would feel if put in the position of the children in these images. His two youngest children were both of a similar age to the children in the images. Despite the nature of the offending, the safeguarding authorities were and are satisfied that his own children were and are not at risk from the applicant and he had continued to have regular contact with them. His partner held a responsible teaching post. There was concern that if he were to lose his liberty and his employment, the mortgage on the family home could not be paid. The applicant's mother had died from cancer only weeks before he was sentenced. His father was elderly and infirm, living in Norfolk, and relied to an extent on the applicant as well as other family members.
- 12 The author of the pre-sentence report, who we note is a very senior probation officer with long experience in such cases, was confident that the current risk posed by the applicant could be managed in the community. Immediate imprisonment would mean the loss of the applicant's employment and income. His own accommodation would be put at risk. There would also be a serious impact on his partner and his children. The recommendation in the report was for a community order with a rehabilitation activity requirement and, if appropriate, an unpaid work requirement as well. The applicant was assessed as unsuitable for the accredited Horizon programme, apparently because he was assessed as being at low risk of future sexual offending behaviour.
- 13 In his sentencing remarks the judge began by saying that he had to deal with the applicant for possession of 1,081 indecent images. It seems that the judge must have thought, erroneously, that the 581 images charged in Count 1 were in addition to the images in Counts 2, 3, and 4, whereas, as we have explained, in fact they overlapped completely. Regrettably, this had not been made clear when the case was opened. The judge said that the Category A images we have described were some of the most heinous that the court had ever had to deal with. Under the relevant Sentencing Council Guideline, the starting point for downloading the Category A images was 12 months' custody with a range up to three years. The judge identified the following six aggravating factors set out in the Guideline: first, the age and vulnerability of the children depicted; second, discernible pain or distress suffered by a child was depicted; third, the period over which the images were possessed, in this case ten years; fourth, the high volume of images possessed; fifth, the fact that the collection included moving images; sixth, the large number of different victims. The judge acknowledged that the applicant had no previous convictions and had therefore never served a custodial sentence.
- 14 The judge said that in view of the extreme nature of the Category A images, aggravated by the other images for which concurrent sentences would be imposed, the starting point after a trial would be in the region of 27 months' imprisonment. He reduced that to 24 months having regard to the impact of the pandemic. He allowed credit of 25 per cent for the applicant's guilty pleas tendered at the first hearing in the Crown Court. The custodial term was therefore 18 months' imprisonment.

- 15 The judge then considered the question of suspending that sentence. He said:
- "I am afraid, bearing in mind the aggravating features I have outlined and particularly the nature of the images, it seems to me that appropriate punishment can only be achieved by immediate custody in this case. So, the sentence is one of 18 months' imprisonment."
- 16 On behalf of the applicant, Mr Heckle submits, first, that the judge's starting point of 27 months' imprisonment was simply too high. It failed to reflect the applicant's extensive personal mitigation which was detailed in the pre-sentence report. Second, Mr Heckle submits that the judge failed to give any or sufficient weight to the factors for as well as against imposing a suspended sentence, as he was required to do in accordance with the Sentencing Council Guideline on the imposition of community and custodial sentences.
- 17 Looking at the table of factors for and against suspension in that Guideline, Mr Heckle submits that all three factors in favour of suspension were made out: there was a realistic prospect of rehabilitation; there was strong personal mitigation; immediate custody would result in significant harmful impact on others. On the other side of the equation, Mr Heckle submits the applicant did not present a risk or danger to the public; there was no history of poor compliance with court orders. The only factor against suspension, and this was the basis of the judge's decision, was that appropriate punishment could in his view only be achieved by immediate custody.
- 18 Regrettably, the judge was not provided with as much information as we now have in relation to the impact of immediate custody on the applicant's partner and, in particular, upon their three children, two of whom are under the age of seven. Mr Heckle tells us that it was only after the applicant had been sentenced that his partner contacted his solicitors. Because of the nature of her employment and senior role in education, she had been unsure whether she could support the applicant publicly, but now bitterly regretted not doing so. In his oral submissions Mr Heckle explained that he had asked before the sentencing hearing whether the appellant's partner would be able to provide supportive testimony in writing. She, understandably in view of her position, had taken legal advice from a civil practitioner and, we think probably erroneously, had been advised that it was not appropriate for her to get involved in any way. The result was that through no fault of the applicant or his solicitor HHJ Thompson was deprived of the very important material which is now available to us.
- 19 That material is contained in an email from the applicant's partner to the court dated 10 January 2021 in which she explains compellingly and in harrowing detail the devastating impact of this custodial sentence on the family over the weeks the appellant has been in custody. She is naturally appalled by what the applicant has done, acknowledging that she has lost her life partner for ever and possibly the capacity ever to trust any man again. Her greatest concern though is for the emotional impact on the children of separation from their father, with whom they have a very good and close relationship, and the financial impact of his imprisonment on the family with the very real risk that they might lose their home when deprived of his financial contribution. She is concerned that whilst in prison he cannot access the support and therapy she believes he needs if he is to be the best father he can be in the longer term. Although he had been living apart from the children during the period of 15 months between his arrest and sentence, the children had continued to enjoy very regular contact with him, several times a week. The two younger children have been devastated by and are uncomprehending of the cessation of that contact.
- 20 It was this email from the applicant's partner that led the Registrar to refer the application for leave directly to the full court to consider this updated information in the light of the suspended sentence Guideline.

- 21 We have given the most anxious consideration to all these submissions. The judge was quite right to regard these as very serious offences of their kind in view of the appalling and extreme nature of some of the child images and the long period over which the offending continued. We think, however, that the judge gave insufficient weight to the applicant's personal mitigation in taking a starting point of 27 months. Looking at the Guideline for indecent images, there were three mitigating factors, only one of which the judge alluded to in his sentencing remarks: the applicant's good character. In addition, his genuine remorse was a mitigating factor demonstrated by how frank and open he had been with the probation officer. It was also a mitigating factor that he had already taken steps to address his offending behaviour by engaging voluntarily in appropriate counselling. It should be noted that the indecent images Guideline says in terms that where there is a sufficient prospect of rehabilitation a community order with a sex offender treatment programme requirement can be a proper alternative to a short or moderate length custodial sentence.
- 22 Turning to the Guideline on the imposition of custodial sentences, the judge did not identify and acknowledge in his sentencing remarks that all three of the factors indicating that suspension might be appropriate were present. There was a realistic prospect of rehabilitation. There was strong personal mitigation. Immediate custody would result in significant harmful impact upon others. The strength of these factors, and particularly the last, would not have been as apparent to the judge as it is now to this court with the benefit of the information we have from the applicant's partner. That information was not before the judge through no fault of the applicant or his solicitors, as we have already emphasised.
- 23 Of the three factors in the Guideline indicating that suspension would not be appropriate, two factors were absent. In the light of the pre-sentence report, the applicant did not present a risk or danger to the public, nor was there any history of poor compliance with court orders. In respect of the third factor, however, the judge concluded that appropriate punishment could only be achieved by immediate custody.
- 24 The Guideline emphasises that the factors for and against suspension should be "weighed" in considering what is the proper course to take. It is a sensitive balancing exercise. It is obviously not simply a question of numbers or of ticking boxes. It may often be the case that the offending is so serious that appropriate punishment can only be achieved by immediate custody, even if all the factors in favour of suspension are present and none of the other factors against suspension. However, this court has emphasised on several occasions the importance of identifying and weighing the competing factors. The judge may have done so in this case, but he did not make it apparent in his sentencing remarks. Had he been provided with the information we now have, which greatly strengthens the force of the three factors in favour of suspension, we think he would not so readily have reached the conclusion he did in this difficult case, and may not have reached that decision at all.
- 25 We have to look at the current position. The applicant has now served seven weeks in custody, the equivalent of a three-month sentence. That sentence has been harsher for him because, sadly, he contracted Covid and was in isolation for a significant period. The immediate punitive impact of the sentence of imprisonment has therefore already been felt. Reviewing the exercise of weighing the factors for and against suspension on the information now available, we think that justice can best be done by suspending the remainder of the sentence. For the reasons already explained, we think the term was too long in any event and failed adequately to reflect the applicant's personal mitigation. In reducing the length of the term to be suspended, we also bear in mind that he has served the equivalent of three months.

- 26 For those reasons, we shall reduce the term of imprisonment from 18 months to 12 months and order that the sentence be suspended for a period of two years. Following the recommendation in the pre-sentence report, there will be a rehabilitation activity requirement for up to 20 days. Had it not been for the fact that the applicant has already served the equivalent of a three-month sentence, we would also have imposed an unpaid work requirement, but in the circumstances we do not think that it would be just and proportionate to do so.
- 27 We therefore grant leave. We allow the appeal. We quash the sentences of 18 months' imprisonment on Counts 1 and 2 and we substitute concurrent sentences of 12 months' imprisonment on those counts, suspended for a period of two years, with a rehabilitation activity requirement of up to 20 days. We do not interfere with the length of the sentences on the remaining counts, which remain concurrent with the sentences on Counts 1 and 2, but those other sentences will also be suspended on the same terms. All other orders remain in place.
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CERTIFICATE

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This transcript has been approved by the Judge.