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[2023] EWCA Crim 53  
IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Case No: 2022/03620/A3



Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Tuesday 17<sup>th</sup> January 2023

**B e f o r e:**

**LADY JUSTICE CARR DBE**

**MR JUSTICE SWEETING**

**HIS HONOUR JUDGE THOMAS KC**

**(Sitting as a Judge of the Court of Appeal Criminal Division)**

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**ATTORNEY GENERAL'S REFERENCE**

**UNDER SECTION 36 OF**

**THE CRIMINAL JUSTICE ACT 1988**

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**R E X**

**- v -**

**KEVIN PORTER**

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**Mr N Hearn** appeared on behalf of the Attorney General

**Ms R Sadler** appeared on behalf of the Offender

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

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Tuesday 17<sup>th</sup> January 2023

**LADY JUSTICE CARR:**

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

**Introduction**

2. We have before us an application by His Majesty's Solicitor General under section 36 of the Criminal Justice Act 1988 for leave to refer a sentence which he considers to be unduly lenient. We grant leave.
3. On 11<sup>th</sup> November 2022, in the Crown Court at Guildford before his Honour Judge Black ("the judge"), the offender was sentenced to ten months' imprisonment, suspended for 18 months.
4. The offender, who is now 62 years old, was convicted upon his guilty pleas on six counts of sexual offending. He had produced indecent images of himself engaging in sexual activity with a child, including penetrative activity. He was also found in possession of a large number of indecent images of children.
5. The specific counts were as follows:
  - i) counts 1, 2 and 3: making indecent photographs of children, contrary to section 1(1)(A) and section 6 of the Protection of Children Act 1978. Count 1 involved category A count 2 category B, and count 3 category C images;
  - ii) counts 4, 5 and 6: taking indecent photographs of children, contrary to section 1(1)(A) and section 6 of the Protection of Children Act 1978. Count 4 involved category A, count 5, category B, and count 6, category C images.
6. The sentence of ten months' imprisonment was constituted as follows: on counts 1 and 4, ten months' imprisonment; on counts 2 and 5, four months' imprisonment; and counts 3 and 6, two months' imprisonment. All sentences were ordered to run concurrently with each other, and all were suspended for 18 months, with a requirement to carry out 40 days of rehabilitation activity. The offender was also made the subject of a ten-year Sexual Harm Prevention Order, notification requirements, a deprivation order in relation to various electronic and computer items, and ordered to pay £450 towards prosecution costs.
7. The Solicitor General, through Mr Hearn, submits that the sentence passed did not reflect the overall seriousness of the offending. The judge failed to draw the relevant distinction for sentencing purposes between the possession and the production counts, and ought to have adopted a lead sentence in relation to count 4, which carried a starting point under the Sentencing Council Guideline for Sexual Offences ("the Guideline") of six years' imprisonment. After appropriate adjustment to reflect all of the offending and relevant mitigating factors, an overall sentence of at least three

years and four months' custody is said to have been warranted. In such circumstances suspension would not have been an option.

8. For the offender, Ms Sadler submits, in summary, that the judge was entitled to focus on the prevention of further offending and rehabilitation in the circumstances of this case. This was a situation where a short or moderate length of custodial sentence was appropriate and, consistent with the Guideline, a suspended sentence could be justified.

### **The facts**

#### **Counts 1, 2 and 3**

9. On 17<sup>th</sup> February 2022, police attended the offender's home address to execute a search warrant. The warrant had been obtained as a result of the police receiving information that indecent images of children were being stored on a cloud storage application in the offender's name. The offender's property was searched and a number of digital devices were seized from various locations around the property. The devices were forensically analysed. Such analysis revealed that they contained a total of 4,085 child abuse images of categories A to C across the devices, 119 of which were movie files. The images were mainly of boys aged between 12 and 15 years. The majority were category C (3,431 out of the 4,085). They had all been uploaded to Dropbox, using an account in the offender's name.

#### **Counts 4, 5 and 6**

10. The forensic examination of the offender's digital devices included the examination of a computer hard drive. On that drive was found a folder from which a total of 35 files were recovered. The files were dated between 16<sup>th</sup> August 2011 and 22<sup>nd</sup> November 2011, and three were movie files. They contained indecent images of a boy, "AB", some of which showed him wearing a school uniform and standing in a wooded area. In some of the movie files AB could be seen engaging in sexual activity with the offender, including oral and anal penetration. There were also movie files showing the offender engaging in sexual activity with AB at the offender's home address.
11. At the end of one of the movie files, a rolling title appeared stating: "CREDITS [AB] – Aged 16 (at least that's what he told me!!)"
12. AB was identified and traced by the police. He was aged 15 years at the time of the footage and the images. He told officers that he had engaged in sexual activity with the offender after meeting the offender online via dating applications. He said that he had told the offender that he was 16 years old and that he had been paid for the sexual activity. He did not wish to provide a witness statement.
13. In interview the offender confirmed that he had had sexual intercourse with AB, who had told him he was 16. The sexual intercourse was consensual. The offender said that he believed that, as AB was 16, it had been lawful for such activity to be recorded. He accepted that it was not a defence, however, and apologised for his actions. He accepted full responsibility for the images. He conceded that some of the boys pictured were clearly under the age of 18. He said that he was a gay man, but had hidden his sexuality for most of his life. He had been married and had two children, but the marriage had ended. He also stated that he had been diagnosed with Parkinson's disease in 2004, at the age of 44. He had been placed on medication which had caused him to become disinhibited and to engage in risky behaviour. He

said that it was around this time that he had begun to view indecent images. He said that he was now on a different form of medication which did not cause him to behave recklessly.

### **The sentencing process**

14. The offender pleaded guilty at the first reasonable opportunity in the Magistrates' Court. He had no previous convictions. He had worked for a bank for 30 years as an IT technician. He had retired upon his diagnosis with Parkinson's disease.
15. The judge had the benefit of a pre-sentence report. The offender had told the author of the report that his medication had caused him to be more impulsive and to engage in risky behaviour. However, the author opined that this account was an attempt by the offender to minimise his role in the offending and to avoid taking full responsibility for his actions. The author opined that the offender had not acted impulsively, but had acted in a calculated fashion demonstrated, for example, by the fact that the offender had hidden devices containing indecent images throughout his home, for example, under a cutlery drawer. The offender was described as having a sexual interest in teenage males between the age of 12 and 15. He minimised his offences against AB and stated that he believed AB to be 16 years old. The offender was judged to pose a high risk of serious harm to children.
16. The judge adopted the following approach in his sentencing remarks. He acknowledged that the offences passed the custody threshold and considered that the central question was whether a custodial sentence could be suspended. In this regard, he acknowledged that the offender had admitted the offences at the earliest opportunity, and that the offender was very ill with Parkinson's disease, such that a custodial sentence would have a greater impact on him than on others. He stated that there was a realistic prospect of rehabilitation and so he was prepared to suspend a sentence of imprisonment. He stated, without identifying any starting point by reference to the Guideline, that he would adopt a "starting point" of 15 months' imprisonment in relation to the charges concerning category A images. He would reduce that term to ten months' imprisonment to reflect the early guilty pleas. He stated that he would adopt a "starting point" of six months' imprisonment in relation to the charges concerning category B images. He again reduced that term to four months' imprisonment to reflect the guilty pleas. He stated that he would adopt a "starting point" of three months' imprisonment in relation to the charges concerning category C images. He again reduced that term to two months' imprisonment to reflect the guilty pleas. He said that all sentences would run concurrently with each other. Accordingly, the overall sentence was one of ten months' imprisonment, which he suspended for 18 months.
17. At the close of his sentencing remarks, prosecuting counsel queried the judge's approach to sentence by reference to the distinction in the Guideline for sentencing purposes between offences of possession, on the one hand, and production, on the other. The judge responded by indicating that he had indeed intended to impose the same sentences on the production offences as for the possession offences.

### **The parties' submissions**

18. For the Solicitor General, Mr Hearn submits that the overall sentence passed was unduly lenient in essence for the following reasons. Fundamentally, it failed to reflect the overall seriousness of the offending. The gravamen of the offending was that the offender had produced indecent images of himself engaging in sexual activity with a

child, including penetrative activity, and that he had a long-standing sexual interest in children, as demonstrated by his possession of a large number of indecent images of children, including moving images of category A, over a prolonged period of nine years. The offender's suggestion that he believed AB to be 16 at the time had to be treated with caution, given the caption in the rolling title to which we have referred above. Further, there was no evidence before the judge that the offender's condition of Parkinson's disease was in any way linked directly to the offending in question.

19. It is said that the judge failed to acknowledge the very significant difference in the starting points between the offences involving possession and production; and that he ought to have adopted a lead sentence in relation to count 4 relating to the production of category A moving images of AB. The appropriate starting point for such offending was six years' imprisonment. An uplift was then required to reflect the associated offences of possession of indecent images, which were in themselves serious due to their volume, and the nature and duration of the offending. It is suggested that an appropriate sentence, before any reduction for mitigation and credit, would have been in the region of seven years' imprisonment.
20. It is accepted for the Solicitor General that there was significant mitigation available to the offender, including his previous good character, the prospect of rehabilitation, and his illness. A reduction of two years' imprisonment is said to have been potentially appropriate, followed by a reduction for the guilty plea. An overall sentence of ten months' imprisonment, suspended for 18 months, was simply far too low.
21. For the offender, Ms Sadler recognises the adverse view taken by the author of the pre-sentence report, but suggests that a proper understanding of the effect of the medication being taken by the offender for his Parkinson's disease would have alleviated some of the concerns. Further, the devices, it is said, had not been hidden, but were easily locatable. She emphasises the prospect of the offender's rehabilitation, evident from the pre-sentence report, and the view there expressed that the offender could be managed within the community. It is said that the judge was best placed to "get a feel" for the offender.
22. Miss Sadler's central position is that the judge's focus was correctly on the prevention of further offending through intervention. The offender had been candid about the risk that he posed. Miss Sadler submits that the judge had the fact that the offending included production well in mind, together with the relevant parts of the Guideline, such having been explicitly referenced to and reviewed by him during the hearing. Indeed, in answer to prosecuting counsel's enquiry at the end of his sentencing remarks, the judge had confirmed in terms that it had been his intention to pass the same sentences on the production offences as on the possession.

## Discussion

23. References under section 36 of the Criminal Justice Act 1988 are made for the purpose of the avoidance of gross error, the allaying of widespread public concern at what may appear to be an unduly lenient sentence, and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type: see *Attorney General's Reference No 132 of 2001 (R v Johnson)* [2002] EWCA Crim 1418, [2003] 1 Cr App R(S) 41 at [25]. We remind ourselves that the hurdle is a high one. For appellate interference to be justified, the sentence in question must be not only lenient, but unduly so.
24. The short point in this Reference is the fact that the judge failed to recognise the very clear sentencing structure identified in the Guideline. The Guideline differentiates between three levels of indecent imagery offending: namely, possession, distribution and production. Possession is at the lowest end of the sentencing range, and production is at the highest. Thus, for category A images, the starting point for *possession* is one year's custody, with a range of 26 weeks to three years' custody. The starting point for *production* of category A images is six years' custody, with a range of four to nine years' custody.
25. This distinction was not drawn in terms to the judge's attention by prosecuting counsel, who referred only to possession offending within the Guideline. Ms Sadler submits that the judge must nevertheless have had the distinction well in mind, not least because at one stage she had referred in her submissions, in the context of the Guideline, to the "problem" that some of the offending obviously fell into the production category. In his sentencing remarks, however, the judge drew no distinction between the possession and production offences. He referred only to the different levels of imagery.
26. Whatever the judge's consideration of the Guideline, he gave no explanation for departing from its structure. We do not consider that there was any proper basis for such departure. The judge did not acknowledge, as he would have been bound to do, that he was going very significantly outside the relevant sentencing range for count 4, and gave no reasons for doing so.
27. Ms Sadler pointed to the following entry in the Guideline:

"Where there is a sufficient prospect of rehabilitation, a community order with a sex offender treatment programme requirement under section 202 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentence."
28. The judge does not appear to have relied on this passage, and of course he did not impose a community order with a sex offender treatment programme. Rather, he was in no doubt that a custodial sentence was required. The reference in the Guideline to the proper availability of a community order as an alternative in appropriate cases is not a licence to arrive at a custodial term that is otherwise inappropriate. Rehabilitation is only one of the five purposes of sentencing to which a court must have regard when sentencing adults - alongside punishment, the reduction of crime, the protection of the public, and the making of reparation (see section 57 of the Sentencing Act 2020).

29. Counts 4, 5 and 6 related to production offences concerning category A, B and C images. As we have identified, the starting point on count 4 under the Guideline was six years' imprisonment. The aggravating feature on counts 4, 5 and 6 was the fact that the collection included moving images. Aggravating features on counts 1, 2 and 3 were that the period over which the images were possessed was lengthy, the volume of images high, and the number of different victims large. Further, again the collection included moving images.
30. By way of mitigation, the offender had no previous convictions; he expressed remorse; and, significantly, he suffered from Parkinson's disease. We recognise, as did the judge, the additional difficulties posed for him in prison as a result of those medical difficulties. We also recognise the prospect of rehabilitation and, consistent with that, note that the offender has completed some seven rehabilitation activity days since sentence and has engaged well with the Probation Service.
31. Taking count 4 as the lead offence, which we consider to be an appropriate approach on the facts of this case, a significant increase would be required to reflect the aggravating feature identified and, significantly, the totality of the offender's offending. There would then need to be a downward adjustment to reflect the available mitigation, before applying credit for guilty plea.
32. In our judgement, taking all the material to which we have referred above into account, a term of not less than five years' imprisonment was justified before credit for guilty pleas. After full credit, one arrives at a term of three years and four months' imprisonment.
33. Seen in this light, the custodial term of ten months was not only lenient, but unduly so. It was the result of a fundamental error of approach in relation to the material distinction to be drawn for sentencing purposes between possession and production offences.

### **Conclusion**

34. For these reasons, the Reference is allowed. The sentence on count 4 will be quashed and substituted with an immediate sentence of three years and four months' imprisonment. All other custodial sentences remain in place, to run concurrently with each other, but will also now be sentences of immediate imprisonment.
35. The offender will serve up to half of the sentence of three years and four months in custody before being released on licence, and will then serve the remainder of the term on licence. He must surrender by 10 am on Friday 20<sup>th</sup> January 2023 to Salford Custody Centre, Salbrook Road, Salfords, Redhill RH1 5DY.

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

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