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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 1317



No. 202202220 A2

Royal Courts of Justice

Tuesday, 13 September 2022

Before:

LORD JUSTICE SINGH  
MR JUSTICE FRASER  
MR JUSTICE HENSHAW

**ATTORNEY GENERAL'S REFERENCE:  
Under Section 36 Of The Criminal Justice Act 1988**

REX  
V  
MARK ANTHONY WILSON

**REPORTING RESTRICTIONS APPLY:  
Sexual Offences (Amendment) Act 1992**

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MR S PERKINS appeared on behalf of the Respondent

MR B HOLT appeared on behalf of the Solicitor General

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

LORD JUSTICE SINGH:

Introduction

- 1 This is an application on behalf of His Majesty's Solicitor General for permission to refer a sentence to this court on the ground that it was unduly lenient under s.36 of the Criminal Justice Act 1988 ("the 1988 Act").
- 2 The principles to be applied on such application are well established and have been summarised as follows:
  - (1) The judge at first instance is particularly well placed to assess the weight to be given to competing factors in considering sentence.
  - (2) A sentence is only unduly lenient where it falls outside the range of sentences which the judge at first instance might reasonably consider appropriate.
  - (3) Leave to refer a sentence should only be granted by this court in exceptional circumstances and not in borderline cases.
  - (4) Section 36 of the 1988 Act is designed to deal with cases where judges have fallen into gross error: see, for example, *Attorney General's Reference (Azad)* [2021] EWCA Crim 1846, [2022] 2 Crim App R (S) 10 at para.72 in a judgment given by the Chancellor of the High Court.
- 3 The respondent offender in the present case was sentenced for a large number of offences to which he had pleaded guilty in the Magistrates' Court. There were 27 charges in all. On committal for sentence, he was sentenced by HHJ Stead at the Crown Court at Teesside on 15 June 2022 to a total of six years and eight months' imprisonment. The charges against the offender had been brought in three tranches. The first ten charges formed the basis of committal S20210372. He entered guilty pleas at York Magistrates' Court on 22 June 2021. The five charges which formed the basis of committal S20210349 were the subject of pleas on 16 August 2021 at the same court. The 12 charges that were the basis of committal S20220034 were the subject of guilty pleas at the same court on 3 February 2022.
- 4 In brief, the charges related to the offender communicating with, predominantly children, using various social media applications. He demanded indecent images of some of the children and, on occasion, threatened them with publication of this material if they did not send him further images. The facts are set out in detail at para.9 to 54 of the final reference before this court, but it is unnecessary for present purposes to rehearse the details here. It should be noted, however, that there were a large number of offences affecting many victims, including ten named victims, as well as others who clearly could not be identified because of the nature of the image offences. The offending spanned a period of some four years between 2017 and 2021. There were also disturbing elements of coercion and the making of threats that the offender would disclose to the children's parents what they had been doing on social media. On one occasion, the offender pretended to be a 10-year-old girl himself. We also note that some of the offences under committal S20220024 were committed while he had been released by the police pending investigation of earlier offences.

The Sentencing Process

- 5 The offender was born on 15 September 1986 and was aged 35. He had no previous convictions. The sentencing judge had several reports before him. These included a psychiatric report prepared by Dr James Todd on 18 October 2021. This said that the

offender has a longstanding diagnosis of Autistic Spectrum Disorder. He was himself exposed to sexual abuse at an early age. The report concluded that the offender's experiences had resulted in behavioural problems that could be described as Attachment Disorder and Conduct Disorder. A later second report was obtained, but this was not served because it did not support the recommendation that there should be a Hospital Order made under s.37 of the Mental Health Act 1983.

- 6 The judge also had a pre-sentence report prepared on 6 September 2021 and an addendum to that report of 1 April 2022. The report expressed concern about the offender's behaviour, in particular because his offending had occurred over a long period between 2017 and 2021 and the offender sought to belittle his motivations. There was according to the report a "clearly established behaviour linked to sexual offending and threatening behaviour via electronic communication all linked to children". The offender was assessed in the report as posing a high risk of re-offending. He was found to pose a medium risk of committing a serious further offence in the next two years. He was assessed as a high risk of serious harm to children. In the addendum report, the view was expressed that his behaviour was unlikely to change.
- 7 The judge also had, and we have seen, victim personal statements from two of the victims. They spoke to the continued impact on both victims of the offender's conduct.
- 8 The numerous offences in this case fell into the following categories:
  - (1) Causing or inciting a child under 13 to engage in sexual activity (non-penetrative) for which the maximum penalty is 14 years' imprisonment. There were two charges of this kind.
  - (2) Causing or inciting a child aged 13 to 15 to engage in sexual activity (non-penetrative) for which the maximum penalty is again 14 years' imprisonment. There was one charge of this kind.
  - (3) Distributing or making indecent images of children for which the maximum penalty is 10 years' imprisonment. There were 14 charges of this kind.
  - (4) Sending an electronic communication which was grossly offensive for which the maximum penalty was two years' imprisonment. There were four charges of this type.
  - (5) Disclosing a private photograph without the consent of an individual with the intention of causing that individual distress for which the maximum penalty is two years' imprisonment. There was one charge of this type.
  - (6) Engaging in sexual communications with a child for which the maximum penalty is two years' imprisonment. There were five charges of this type.
- 9 There are relevant sentencing guidelines in relation to some but not all of those offences. The judge had the benefit of a detailed sentencing note on behalf of the prosecution. He also had submissions on behalf of the prosecution and in mitigation on behalf of the offender. To some extent, criticism is now made of the way in which the case was presented before the judge by counsel for the prosecution, although, in fairness, that has not been at the heart of the submissions made on behalf of the Solicitor General.
- 10 In arriving at sentence, the judge selected as the two most serious offences the charges of causing or inciting a child under 13 to engage in sexual activity (non-penetrative) contrary to s.8 of the Sexual Offences Act 2003. He imposed a sentence of four years' imprisonment on those two charges concurrent to each other, but consecutive to the other sentences. For

the offence of causing or inciting a child aged between 13 and 15 to engage in sexual activity (non-penetrative) contrary to s.10 of the 2003 Act the judge imposed a sentence of two years' imprisonment but made this concurrent. For the offence of disclosing a private photograph without the consent of the individual with the intention of causing that individual distress contrary to s.33 of the Criminal Justice and Courts Act 2015 the judge imposed a sentence of eighth months' imprisonment made consecutive. A sentence of eighth months was also imposed for the offence of making an indecent image of a child contrary to s.1 of the Protection of Children Act 1978, but this was made concurrent. For the offence of distributing an indecent image of a child contrary to s.1 of the 1978 Act a consecutive sentence of eighth months was imposed.

- 11 Finally, it should be noted that for the offence of sending an electronic communication which is grossly offensive contrary to s.1 of the Malicious Communications Act 1988 a sentence of 16 months was imposed made consecutive. The judge made the sentence as high as it was because there was an element of racial aggravation. For the other offences, shorter sentences were imposed which were all made concurrent. The net result was that the consecutive sentences were as follows: four years' imprisonment; sixteen months' imprisonment; eight months' imprisonment, and another sentence of eight months' imprisonment. That made a total of 80 months or six years and eight months. It was and remains common ground that it was appropriate for the judge to give full credit for the early guilty pleas. The sentence was therefore the equivalent of a ten-year sentence (120 months) if there had been a trial.

#### The Sentencing Remarks

- 12 The judge noted there were so many separate charges before the court of differing types that it was not possible to deal justly with the case by fixing a sentence for each of the charges and making all of them consecutive, even though the offending in most instances was separate in the sense of involving different complainants or different activities. The judge made it clear that he had read with care the pre-sentence report and its addendum and the report of Dr Todd. The judge expressly had regard to the principle of totality. He said that it was justifiable to impose some consecutive sentences. He said the approach he would take was to breakdown the offending into categories of offence rather than concentrating upon the different charges which followed after three sets of criminal investigations against the offender. The judge was of the view that the most serious of the offences concerned causing or inciting sexual activity of a child under the age of 13. He was right to do so. The judge was well aware of the seriousness of the offences in this case. He noted that some of the offences were as serious as can be imagined of offences of their kind.
- 13 Before the judge, it was the prosecution's submission that two most serious offences fell within Category 3B of the relevant guideline. The guideline recommends a starting point of five years' custody with a range of three to eight years. As we have noted, the judge imposed a sentence of four years' imprisonment on each of those two charges, but that of course reflected the early guilty pleas. He also made them concurrent to each other. The judge was aware that it would not be impossible to impose consecutive sentences, for example in relation to the making and possessing of indecent images of children. He chose, however, to make them concurrent for two reasons: first, the principle of totality and, secondly, in order to reflect the mitigation available to the offender in respect of his personal situation, capacity and difficulties. In relation to one offence, as we have said, the judge imposed a sentence of 16 months' imprisonment, which reflected the maximum penalty of two years after trial for such an offence. He did so because of the racial aggravation in that case.

14 The judge expressly addressed the issue of dangerousness at page 6F to G of his sentencing remarks:

"... it will be apparent from what I have said so far that I do not intend to apply the dangerousness provisions now enshrined in section 280 of the Sentencing Act. I have considered those matters, as I am duty bound to do so but, in all the circumstances, which include the fact that the defendant had not otherwise offended, he now being thirty-five, and also the fact that he has admitted these matters, and also the fact that he did not in fact make direct contact with any of the complainants in this case, I certify that I do not intend to apply the dangerousness provisions applicable though they otherwise are."

Submissions on behalf of the Solicitor General

15 On behalf of the Solicitor General there are two main submissions which are made by Mr Holt:

- (1) The judge erred in failing to make a finding of dangerousness in respect of the offender.
- (2) The overall sentence did not adequately reflect the entirety of the offending behaviour. In particular, it is submitted that it was wrong in principle for all the sentences imposed under S20220024 to run concurrently to the other sentences.

16 Other more specific criticisms are made in relation to two specific charges in relation to categorisation, for example, but Mr Holt candidly accepted at the hearing before us that those were unlikely to make any material difference to the overall outcome of this application.

17 It is submitted by Mr Holt that there was ample material before court to find the offender dangerous. In particular:

- (1) The persistent offending against a number of victims.
- (2) The contents of the reports that had been prepared about the offender.
- (3) The lack of any genuine remorse.

18 It is submitted that the accounts provided by the offender to the report writers showed a contrived account that was ultimately not advanced by him. He had suggested that he had a benign motivation for his offending, although it is and has been readily accepted on his behalf that that did not provide a defence. He had suggested that he committed the offences in order to deter children who were making themselves vulnerable on the internet by revealing sexual images of themselves.

19 It is acknowledged that this court has shown a reluctance to interfere with the findings by a sentencing judge in relation to dangerousness where the judge has correctly applied the principles: see *R v Johnson* [2006] EWCA Crim 2486 at para.11 in which the judgment was given by the then President of the Queen's Bench Division. He said in relation to applications for reference by the Attorney General that:

"The Reference will not succeed unless it is shown that the decision was one which the sentencer could not properly have reached." [Para.11(i)]

- 20 Nevertheless, it is submitted that where a sentence has been found to be unduly lenient, it is open to this court to substitute a finding of dangerousness: see *R v Thomas and Bonner* [2022] EWCA Crim 665 at para.39.
- 21 The second main submission and the one on which Mr Holt has focused his oral submissions before us today is that the overall sentence was simply too lenient, in particular because there were concurrent sentences imposed for all the offences under committal S20220034. It is submitted that there should at least have been consecutive sentences in relation to some of these offences. By reference to the sentencing guideline on totality, it is readily accepted by Mr Holt that a just and proportionate sentence is not reached simply by adding up individual sentences. A reduction is appropriate in order to reflect the overall gravity of a defendant's offending behaviour.

#### Submissions for the Respondent

- 22 On behalf of the respondent offender, Mr Perkins submits that the judge was entitled to reach the conclusion that the offender was not dangerous. This was particularly in the light of the traumatic nature of his own early years; the particular difficulties associated with ASD; the absence of prior offending; factors pointing away from dangerousness, including the absence of any identified psychiatric condition, although in oral submissions Mr Perkins has rightly corrected that to accept, in the light of Dr Todd's report, that there is an identified psychiatric condition; and the absence of any grooming and/or direct contact offending. Mr Perkins points out that the judge gave this sentencing exercise careful consideration, adjourning it when there was insufficient time to hear it on the first occasion. He also retired for over an hour after the hearing and delivered reasoned sentencing remarks. Mr Perkins has reminded this court of the terms of s.308 of the Sentencing Act 2020 and he submits that the judge correctly had regard to all of the factors which he was required to consider by the legislation. We accept those submissions concerning the issue of dangerousness.
- 23 As this court has said on numerous occasions, including in *Johnson*, it is not its role on an application for reference such as this to substitute its own assessment of dangerousness for that of the sentencing judge. This court's role is the important but limited one of asking whether the judge has erred in principle and whether the conclusion reached was properly open to him. We do not consider that this is a case in which there would be a proper basis for this court to interfere with the assessment formed by the sentencing judge after careful consideration of all the relevant factors.
- 24 Next, Mr Perkins submits that the overall sentence passed was equivalent to a total sentence of 10 years after trial and that that was not unduly lenient, despite the number and different types of offence in this case. He also submits that the offences committed under S20220034 were committed between April 2020 and August 2020 and so broadly overlapped with those committed under committal S20210349 (May to September 2020). He submits that it would arguably have been unjust if the judge had imposed consecutive sentences for offences which had been committed contemporaneously with admitted offences, yet delayed in investigation and notification to the CPS reviewing lawyer. Overall, Mr Perkins submits that this was a complicated sentencing exercise conducted conscientiously by an experienced judge of the Crown Court.
- 25 We recognise that this was a difficult sentencing exercise, but, with great respect to the judge, we have reached the conclusion that the overall sentence in this case was unduly lenient in accordance with the principles we have identified at the outset of this judgment. In particular, it was wrong to make all of the offences under committal S20220034 concurrent, even having regard to the principle of totality. The number of different victims,

the duration of the offending and its seriousness lead us to the conclusion that it was not reasonably open to the sentencing court to make all of those sentences concurrent. On the other hand, it is common ground that justice would not be served by simply making all of the sentences consecutive.

- 26 In the circumstances, what we propose to do is to take the sentence passed on the most serious charge under committal S20220034, which was charge two (causing or inciting a child under 13 to engage in sexual activity – non-penetrative), that is for four years' imprisonment, and make that consecutive rather than concurrent. In our judgment, that would lead to a total sentence which reflects the overall justice of the case.

#### Conclusion

- 27 For the reasons we have given, we grant the application for permission to refer this sentence to this court under s.36 of the 1988 Act. On that reference we make the sentence of four years' imprisonment on charge 2 under committal S20220034 consecutive to the other sentences. That means that the total sentence imposed on the offender is therefore 10 years and eight months' imprisonment.
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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge