IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Couts of Justice
The Strand
London WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT STOKE ON TRENT
(MR RECORDER TAYLOR) [21GN0954723]

Case No 2024/02971/A1
Neutral Citation: [2024] EWCA Crim 1390

Thursday 31 October 2024

B e f o r e:

LORD JUSTICE WILLIAM DAVIS

MR JUSTICE MURRAY

HIS HONOUR JUDGE SHAUN SMITH KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E X

- v -

LEWIS WHITE

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Miss A Pope appeared on behalf of the Attorney General

Mr R Holt (Solicitor Advocate) appeared on behalf of the Offender

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J U D G M E N T

Thursday 31 October 2024

LORD JUSTICE WILLIAM DAVIS:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to some of the offences with which we are dealing. Under those provisions, 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 likely to lead members of the public to identify that person as the victim of the offence. We shall refer to the victim as "SB".

2. On 14 March 2024, the offender, Lewis White pleaded guilty at the North Staffordshire Magistrates' Court to six offences. He was committed to the Crown Court for sentence.

3. On 18 July 2024, in the Crown Court at Stoke on Trent, he was sentenced by Mr Recorder Taylor for a total of six offences. There were four offences of making indecent photographs of children (four separate offences dealing with different categories of images); one offence of causing or inciting a child to engage in sexual activity; one offence of engaging in sexual communication with a child. In relation to the offence of making indecent photographs involving category A images, of which there were 12, the sentence was eight months' imprisonment, suspended for two years. Shorter suspended sentences were imposed in relation to the other offences of making indecent photographs, which related to category B and C images. In respect of causing or inciting a child to engage in sexual activity, the sentence was two years' imprisonment, suspended for two years with a programme requirement and a rehabilitation activity requirement. In respect of engaging in sexual communication with a child, the sentence was 12 months' imprisonment, suspended for two years. All of those sentences were ordered to run concurrently with each other. The effective sentence was two years' imprisonment, suspended for two years.

4. His Majesty's Solicitor General applies, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer to this court as unduly lenient the total sentence imposed.

5. The offences of causing or inciting a child to engage in sexual activity and of engaging in sexual communication with a child occurred between 1 June 2022 and 31 August 2022. The child, "SB", was aged 13 at the time of the offending. The offender made contact with her via social media. During the course of his contact with her, he used various online platforms, including Snapchat and Telegram. The initial means of communication was Snapchat. When the offender's home was searched in October 2022, the police recovered an iPad on which many Snapchat exchanges and messages were found. The messaging included images sent by the offender to SB and vice versa. The images that were sent were not recoverable. The ephemeral nature of images exchanged is a function of the Snapchat application.

6. The precise dates of the exchanges of messages cannot be identified. The material available to the sentencing judge included a hundred pages of screenshots of those exchanges. The screenshots have at least six messages on each page. Many pages contain as many as twice or three times that number. Though visual images were not retained by Snapchat, the application involves each party being able to see the other. The content of the Snapchat conversation was almost entirely sexual. As well as SB sending the offender pictures of herself, he sent her pornographic images.

7. The incitement of SB to engage in sexual activity is put by the Solicitor General as the incitement by the offender of her to send him pictures of her naked or near naked in poses which were sexually arousing.

8. The sexual communication is reflected by the messages. Those messages in turn

involved at least some incitement to engage in sexual activity. We give no more than a brief sample of the messages sent by the offender:

> "I bet your little butt looks amazing, doesn't it?£
>
> "Bend over for daddy. I was right, it is amazing."
>
> "I plan on buying you sexy costumes to dress you up in and maybe a toy, so you don't have to put a hairbrush inside you."
>
> "Daddy would like to fill you with something."
>
> "Did you see I bought your toy?"
>
> "Daddy likes seeing what he is seeing."
>
> "You are such a tease."
>
> "Your sexy little tits need to be in my hands."
>
> "I can't wait to see how much of that dildo you can take."
>
> "You have the cutest nipples daddy has ever seen."

The offender was referring to himself throughout as "daddy". SB, we remind ourselves, was 13 years of age.

9. The Snapchat messaging came to an end when the offender suggested that they use Telegram instead. On the assumption that Telegram was used, the court does not know to what end and with what content. That material is not available.

10. From what we have already outlined, the sexual communication was highly sexualised. It also involved the sending of a sex toy and the sending of pornography by the offender to SB.

11. The offending came to an end when SB's sister saw messages on her telephone, and the

police were contacted.

12. The iPad on which the offender had conducted his Snapchat conversations with SB together with a mobile telephone belonging to the offender contained indecent images. There were three category A images, ten category A videos, and very many category C images and videos. Some of the category A videos were recordings of Skype calls between a male and a girl apparently aged between 12 and 14. The girl was shown penetrating her vagina with a hairbrush, digitally penetrating her vagina, and penetrating her anus with a pen. The girl was crying as she did these acts. The offender accessed these videos within the period he was communicating with SB.

13. A mobile telephone, which contained just one category B image and a number of category C images, had been used to access a Russian website, which was known to be involved in the exchange of indecent images.

14. As is often the case, it took some time to analyse the material on the offender's digital devices. When that had been done, he was interviewed on 25 May 2023, at which point he made no comment to all questions put to him.

15. The offender was born in November 1997. He is now aged 26. He was 24 at the time of the offending. He has no previous convictions.

16. The pre-sentence report disclosed that the offender had had a very troubled childhood. Amongst other things, he had been exposed to pornography from a very young age. By the time of the offences he was living in rented accommodation with his partner, and working full time as a journalist. He worked from home. The author of the report noted that the offender denied any sexual interest in children. However (to use her terminology), she "did

not discount that the offender had such an interest". We interpret that as a clear indication that her view was that he did. We share that view.

17. The pre-sentence report concluded that the offender posed a high risk of harm to children. However, the author said that, were an exceptional course to be taken and were the offender to retain his liberty, the risk was manageable within the community by programme and activity requirements. One factor that affected her thinking in that regard was that the offender, in the time since his arrest and before the sentencing hearing, had taken steps voluntarily to seek assistance of the kind that might be involved in any sex offender programme.

18. In his sentencing remarks the judge addressed the issue of the offender being make the subject of some kind of rehabilitative sentence. As to the prospect of imprisonment, the judge said this:

> "Now, what do I do with you? The most serious offence that we have already talked about of some length has a starting point of three years in a range of two to six. Anything over the starting point would mean that I can only pass an immediate custodial sentence, I cannot suspend it. What good is that going to do to someone like you? You are not going to get the treatment you require in prison, are you? They have not got the facilities, particularly at the moment, and I do not sentence either you, or any defendant, in this court because of the difficulties of overcrowding; but what I do reflect on is the fact that the resources within the prison are more limited than they usually are, and they are not very widely available most of the time."

19. That was a somewhat inelegant way of identifying that there will be cases in which, whilst a moderate prison sentence would be appropriate, there is an alternative way of dealing with offenders. The Sentencing Council guidelines for sexual offences in many different guidelines reflect this with these words:

> "Where there is 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."

20. The judge went on to refer to the guidelines for the various offences. The offence contrary to section 10 of the 2003 Act fell into category 2A of the guideline. That gave a starting point of three years' custody, with a range of up to six years. In relation to harm, the offender had caused SB to expose her naked body to him on Snapchat. As to culpability, the offender had groomed SB, and there was a significant disparity in age between them.

21. In respect of the offence of sexual communication with a child, the offence fell into category 1A, because of the solicitation of images and the sending of such image. In that respect the guideline indicated a starting point of 18 months' custody, with a category range of up to two years, namely the maximum for the sentence.

22. In relation to the indecent images, given the number of images falling into category A and their type, this involved a starting point of 12 months' custody.

23. The judge determined that all of the sentences should run concurrently. In each case the sentence he identified as appropriate after a trial was precisely the same as the starting point in the guideline. Because of the pleas of guilty at the magistrates' court, there had to be a one third reduction in any custodial sentence imposed. By that route, the judge determined that the proper overall sentence was two years' imprisonment. He imposed the sentence of three years' imprisonment on the most serious offence and ordered all of the other sentences to run concurrently. For the reasons he had articulated about the desirability of the offender receiving treatment, the judge suspended the sentences of imprisonment.

24. The Solicitor General has a single point – and it is a compelling one. Whilst it was permissible sentencing practice to order that the sentences should run concurrently, that ought to have been on the basis that there would be a sentence on the lead offence that would reflect the totality of the offending. Rather than imposing a sentence of three years' imprisonment before trial on the lead offence, it should have been considerably greater. Although there was some overlap between the offences committed via Snapchat, they concerned in fact distinct types of behaviour. Therefore, the sentence in relation to the offence contrary to section 10 required an uplift to reflect the sexual communication charge. Moreover, the category A images which the offender had downloaded and viewed were quite separate from the offending in respect of SB. These images, on the face of it, were a further indication of the sexual proclivity of the offender. They were not to be treated as "more of the same" for sentencing purposes.

25. It follows, argues the Solicitor General, that the sentence on the most serious charge should have had a notional starting point after trial of somewhere in the order of four and a half years, leading to an actual sentence of three years' imprisonment. That sentence could not have been suspended.

26. The Respondent's Notice served on behalf of the offender is nothing if not succinct. The material part reads as follows:

> "Taking into consideration the particular facts of the case in conjunction with the sentencing guidelines, the judge sentenced properly in accordance with his public duty, balancing all relevant factors, both aggravating and mitigating."

27. The correct formulation of what an unduly lenient sentence is, is still that provided by

the then Lord Chief Justice in *Attorney General's Reference No 4 of 1989* [1990] 1 WLR 41:

> "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."

The issue in this case is whether it was reasonable to find that the entirety of the offending could be reflected in a sentence after trial of three years' custody, which meant that the sentence imposed was one that could be suspended.

28. We consider that there is considerable force in the argument of the Solicitor General that the judge adopted an approach to imposing concurrent sentences that failed to give any weight to the different types of offending.

29. There were aggravating factors in respect of all of the offences. The offending was mitigated by the offender's good character, his age when he offended and the steps he had taken voluntarily to address his behaviour in the period prior to the sentencing hearing. The judge concluded that the aggravating and mitigating factors balanced each other out. We do not understand the Solicitor General to attack that conclusion. That was clearly a matter of judgment for the sentencing judge. It is not suggested that the judge's exercise of his judgment was wrong.

30. But the sentence imposed on the lead offence undoubtedly required an uplift to allow for the multiplicity of offences. In writing, the Solicitor General argued that the uplift ought to have been between 18 months and two years, so as to give a sentence after trial of at least four and a half years and up to five years' imprisonment. On that basis, applying a reduction of one third for the pleas of guilty, the appropriate sentence should have been at least three years' imprisonment – a sentence which could not have been suspended.

31. We agree with the Solicitor General that the sentencing exercise in this case did not involve the analysis of the issues and an approach which was right in principle. We asked Miss Pope what then were we to do. She agreed what we had to do was to conduct the sentencing exercise properly. We agree with her that the eventual sentence should have been at or around three years' imprisonment i.e. to be applied to the lead offence.

32. But that is not the end of the matter. In each of the relevant guidelines the rubric to which we have already referred appears:

> "A community order can be a proper alternative to a short or moderate length custodial sentence."

A sentence of three years' imprisonment is a moderate length custodial sentence.

33. The judge's concern, as set out in the sentencing remarks to which we have already referred, was that the protection of children, which was undoubtedly required in relation to this offender, would be better served by him undergoing intensive rehabilitation, rather than by serving a relatively short sentence. The view the judge expressed as to the benefits of rehabilitation in this particular offender's case was, in our judgment, well founded. This is a case where there is a sufficient prospect of rehabilitation that a community order with a sex offender treatment programme should have been made. Had the judge conducted the sentencing exercise properly, that is the order he should have made.

34. Section 36 of the 1988 Act requires us, where we find that the sentencing of a person has been unduly lenient, to quash any sentence passed on the offender, and in its place pass any sentence we think appropriate for the offending, and as the court below had the power to

pass. In almost every other circumstance that involves this court imposing either a sentence of immediate custody, where none has been imposed before, or a longer sentence of custody than the court below imposed.

35. In this instance we consider that the sentence imposed by the judge was unduly lenient in terms of the length of the custodial term, but we conclude that once the appropriate custodial term had been determined, the particular circumstances of this case meant that a community order was the better option. Therefore, that is the course we propose to take.

36. We shall quash the suspended sentences of imprisonment imposed on the offender and we shall impose in their place, and in relation to each of the offences, a community order for three years. Attached to that community order will be requirements: a programme requirement of no more than 35 days or sessions, intended to allow completion of the Horizon programme; a rehabilitation activity requirement, not to exceed 35 days or sessions, which will allow the Probation Service to engage in preparatory work for the Horizon programme, as well as further post-programme work after the completion. In addition, rehabilitation activity requirement days will be used to monitor the offender's mental health.

37. Those are the two requirements that will be attached to the community order. The order is for three years, and it must continue until the time that the programmes have been completed. The court is aware that the current procedure followed by the Probation Service is automatically to determine orders after two years. That must not apply in this case, and the requirements must be completed.

38. There is a statutory requirement that the order involves a punitive element. The offender is new employment. In addition to the community order and in order to reflect the punitive element that is required, we shall impose fine of £250. It is apparent that the offender has the

means required to pay a fine. There will be a collection order for payment in 28 days.

39. Because the offender is not at court, he must attend before his probation officer within the next 14 days in order that the officer can inform Mr White in full of his obligations. The officer will also inform him that if he breaches the terms of the order, or if he commits any further offence, he will be re-sentenced for these offences. Whoever re-sentences him will have the benefit of this judgment. That identifies that the appropriate custodial sentence for the offences is three years' custody after a full reduction for the pleas of guilty.
