Neutral Citation No. [2024] EWCA Crim 588

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202401565/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 16 May 2024

Before:

LORD JUSTICE DINGEMANS
MR JUSTICE WALL
HER HONOUR JUDGE DE BERTODANO
(Sitting as a Judge of the CACD)

REX
V
MICHAEL TRUNDLE

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MR J GREENAN appeared on behalf of the Appellant

J U D G M E N T
(Approved)

LORD JUSTICE DINGEMANS:

1. This is the hearing of an appeal against sentence. The appeal was adjourned from Tuesday (two days ago) because the appellant could not be produced by CVP and attempts to contact the prison in order to obtain a waiver from the appellant were unsuccessful. Subsequent investigations show that was because of other pressures on staff in the prison at the time.

Introduction

2. The appellant is an 85-year-old man who was born on 12 February 1939. He was, before the commission of this offence the subject of the appeal, of previous good character. He was prosecuted for the offence of attempted sexual communication with a child which had occurred in April 2021. He originally pleaded not guilty and there were various applications to stay proceedings as an abuse of process and to exclude evidence. Those applications did not succeed and a trial date was fixed. In the final event the appellant pleaded guilty in the Crown Court at Reading on 30 November 2023 at a time when he was entitled to 10 per cent credit for plea.
3. On 5 April 2024 the appellant was sentenced to 10 months' immediate imprisonment. A Sexual Harm Prevention Order was imposed for a period of 10 years and a statutory victim surcharge was imposed.
4. The two issues raised by this appeal are, first, whether the sentence of 10 months' imprisonment was too long, and secondly, whether the sentence of imprisonment should be suspended.

Factual circumstances

5. An undercover police operative set up a decoy profile on a website called "Tagged"

which is a free online dating and social media site intended for adults. A decoy profile depicted a pseudo-image of a boy who purported to be 19 years old. However as soon as he got chatting with a suspect the decoy would tell them that he was 14 years old, so that the person making contact would believe that they were talking to a 14-year-old boy.

6. On 27 April 2021 the decoy received a message from the appellant whose own profile stated that he was an 82-year bisexual male. The decoy replied to the message, conversation was initiated and the appellant started talking about sex almost immediately. He asked to see a picture of the decoy's penis. The decoy replied by saying that he was 14 years old. The appellant continued the sexual chat, repeating his request for a picture of the boy's penis and asking if he would have oral and anal sex with him if he lived nearby.
7. On 29 April 2021 there was another chat in which they discussed another website called "Fabguys". The appellant told the decoy to watch out for fakes on that site.
8. On 30 April 2021 there was further chat and during that chat the decoy sent the appellant a pseudo image of a 14-year-old boy in school uniform and claimed that it was a picture of himself. The picture was not indecent but the appellant responded by asking for a picture of the boy's penis. The decoy told the appellant he was at school and the appellant told the decoy he did not mind waiting and the conversation came to an end shortly after that.
9. Officers from the Paedophile Online Investigation Team investigated and attended the appellant's address. Due to his age and apparent frailty they did not arrest him and instead they invited him to a voluntary interview.
10. The appellant was interviewed on 3 August 2021. At the start of the interview the appellant appeared to suggest that he had made contact with someone else and then later

accepted contact with the decoy. He denied that there was any offence because he knew the person he was chatting to was a police officer and was only going along with it to wind up the police officer.

Sentencing

11. After the appellant had pleaded guilty a pre-sentence report was ordered. This showed that the appellant had grown up in an orphanage, joined the army at 16 for some five years before working on the buses, in the gas board and on the railways. He now has osteoarthritis in knees and shoulders. He has some tremors in his hand. He had a heart condition which had been investigated and did not cause concern but might interfere with a proposed operation in relation to his knees. He used a three-wheeled walker. The appellant lived with his wife who also had osteoarthritis. The appellant's son, who had his own family and lived nearby, popped by to see the appellant and his wife and the appellant and his wife's relationship was described as one of inter-dependence. The judge was satisfied that the appellant's son could look after the appellant's wife in the event of a custodial sentence for the appellant.

12. The pre-sentence report showed that the appellant did not accept any wrongdoing. The appellant said: "As far as I'm concerned I'm not guilty", claiming that he had used the internet to meet women aged between 45 and 60 for sex, although he suggested that he also met men for sex. The appellant contended that he knew that the purported 14-year-old was a policeman and he was asking for pictures only so he could report the policeman.

13. The probation officer concluded that the appellant took no responsibility for his actions. He was assessed as presenting a high risk of serious harm to children, being sexual, emotional and psychological harm, and the pre-sentence report noted that the appellant

was an 85-year-old man who might struggle in prison and proposed a community order with a rehabilitation activity requirement of 40 sessions which would contemplate using Maps for Change. That would address thoughts, smarter internet use and giving something back to society.

14. At the start of the sentencing hearing the judge asked counsel whether the appellant's plea of guilty was unequivocal, given the contents of the pre-sentence report. The judge recorded that the appellant had been shaking his head throughout the sentencing exercise, suggesting that he did not accept any wrongdoing. The plea was confirmed.

15. The prosecution had submitted that this was a Category B offence for the purposes of the offence specific guideline for sexual communication with a child, being no category A features present, and harm category 1 because it was very likely to have caused significant distress to the victim, it being an attempted offence. In fact the judge found it was category 2 as it involved a decoy and culpability A because it involved soliciting photographs. This gave a starting point of one year with a range of high level community order to 18 months. The judge found that there were aggravating factors and mitigating factors and that gave an overall sentence of 14 months before discount for plea, which took it down to 12 months. The judge made a further two-month reduction because it was an attempt rather than a completed offence.

16. The judge referred to substantial parts of the pre-sentence report in the sentencing remarks showing how the appellant had taken no responsibility for his actions.

17. The judge then addressed the issue of whether the sentence should be suspended and said:

> "The question really for me to decide is whether I should suspend your sentence or send you immediately into custody. In this case, I do not consider that there is any realistic prospect of rehabilitation at all, given the contents of the probation report. The most appropriate sentence would have been Horizon programme but that could only work if you had any insight. And for

> all the reasons I have set out in detail from the probation officer's report, I have grave doubts about whether you would meaningfully engage in any rehabilitative work.
>
> I am also bound to say that in my judgment, an appropriate punishment can only be achieved in this case by immediate custody because you present a danger to the public and I don't have any option, I am afraid, but to impose immediate custody in this case. I have considered the case of R v Ali and prison overcrowding but I consider this case is too serious to warrant a suspended sentence order."

The updated position

18. There is no prison report but Mr Greenan, to whom we are very grateful for his submissions both on Tuesday and today on behalf of the appellant, said that the appellant has reported that he had considerable difficulties because of his mobility problems at the start of his sentence. Tracey Coggins, a probation officer, attended the adjourned hearing and confirmed the continued availability and suitability of rehabilitation activity requirements and has made a request that in the event that a suspended sentence is imposed and a rehabilitation activity requirement is made, a condition of that sentence is that the appellant report to Staines Probation Services on Wednesday 22 May 2024.

Permissible length of sentence

19. The judge was in our judgment entitled to find that the aggravating factors in this case, namely the persistence of the offending, outweighed the mitigating factors and justified a slight increase in sentence from 12 months to 14 months. The judge also gave a discount for the fact that this was an attempt and although that reduction should have occurred before the 10 per cent discount for plea it did not materially affect the calculation of sentence. The length of the sentence of 10 months was not manifestly excessive.

Should the sentence have been suspended

20. This then brings us to the most important issue on the appeal, namely whether the sentence of 10 months should be suspended. The Sentencing Council Imposition of

Community and Custodial Sentencing Over-arching Guideline provides guidance. Factors indicating that it would not be appropriate to suspend a custodial sentence are: first, offender presents a risk/danger to the public; second, appropriate punishment can only be achieved by immediate custody; and third, a history of poor compliance with court orders. Factors indicating that it might be appropriate to suspend a custodial sentence are: first, realistic prospect of rehabilitation; second, strong personal mitigation; or third, immediate custody will result in significant harmful impact upon others.

21. In *R v Ali* [2023] EWCA Crim, [2023] 2 Cr.App.R (S) 25, a sentence of six months' imprisonment for an appellant who had already spent 29 days on segregation for throwing the boiling contents of a mug into the face of a prison officer, which caused no long term damage, was suspended. This was because of a combination of delay in charging the appellant and delay in arranging the trial, which meant that the prisoner had been released, the appellant's positive behaviour since the offending and the problem of prison overcrowding. It was recorded that in November 2022, the Minister of State had announced Operation Safeguard requesting the use of prison cells. In February 2023, which was the day of sentence in that case, the Ministry of Justice had given 14 days' notice to make prison cells in the North East, North of England and West Midlands available. Prison overcrowding continues as of 14 May 2023. The Ministry of Justice informed practitioners about Early Dawn. The likely impact the circumstances in which a prison sentence will be served either because of individual or generic circumstances may be relevant to the length of sentence and whether it should be suspended: see *R v Manning* [2020] EWCA Crim 592, [2020] 4 WLR 77. As already indicated the judge said he had regard to *Ali*, and *Ali* is not authority for the proposition that every sentence of imprisonment of under two years needs to be suspended. It is therefore necessary to

consider the relevant factors in this case and the relevant guideline.

22. So far as the fact that the offender presents a risk or danger to the public, the judge found that there was such a risk based on the pre-sentence report and there was persistence in the appellant's offending. On the other hand, there was no apparent reflection in either the pre-sentence report or in the sentencing remarks about: the three year period after the commission of these offences and before sentencing; the fact that the appellant had remained out of trouble; and the fact that the Sexual Harm Prevention Order provides protection to the public. In our judgment, the judge's approach of just accepting the pre-sentence report assessment was wrong.
23. Secondly, appropriate punishment can only be achieved by immediate custody. The judge found that this was satisfied because there was soliciting of photographs from a 14-year-old boy reported to be at school.
24. The third was that there was a history of compliance with court orders. This was not applicable because the appellant was of previous good character.
25. So far as factors indicating that it might be appropriate to suspend a custodial sentence the realistic prospect of rehabilitation. The judge found that there was no such prospect because of the contents of the report. On the other hand the pre-sentence report had recommended rehabilitative work throughout the rehabilitation activity requirements. It is apparent from the information provided by the probation officer that the rehabilitation activity requirements are expected to be workable and worthwhile and there was no apparent consideration of the fact that the appellant had remained out of trouble for a period of three years after the offending and before sentencing. In our judgment there was a realistic prospect of rehabilitation.
26. So far as the second feature was concerned, strong personal mitigation, this was present

in that the appellant was of previous good character and was suffering from illnesses, making prison more difficult.

27. The third factor was that immediate custody will result in significant and harmful impact on others. The judge considered this and found that the appellant's son would be able to assist the appellant's wife but it is plain that the appellant did assist his wife and there was some impact on his wife.

28. In the end we consider that the judge was wrong to ignore the length of time that the appellant had remained out of trouble after the commission of the offences before sentencing, when assessing the risk the appellant posed. It is apparent that rehabilitative work had been recommended by the pre-sentence report and this suggested that the writer's view of the appellant could not have been that there was no prospect of rehabilitation. We consider that this factor, when coupled with the personal mitigation of age and illness and measured regard to the current prison conditions, means that the sentence should have been suspended.

29. We take account therefore of the fact that the appellant has already served part of a period of custody. We reduce what would have been a sentence of 10 months imprisonment suspended for 18 months (to reflect the recommendation in the PSR) to 12 months and the rehabilitation activity requirements down to a maximum of 26 days.

30. For the reasons set out above, we will allow the appeal to the extent that the sentence of 10 months' imprisonment will be suspended for a period of 12 months from today with a maximum of 26 days rehabilitation activity requirement days, pursuant to section 287 of the Sentencing Act 2020. This means that if the appellant commits any offence in the next 12 months he will be dealt with for that offence and will be brought back to court for this offence and the suspended sentence may be brought into effect, less time already

served. Also for the next 12 months the appellant will be subject to the rehabilitation activity requirements. The appellant must meet with the officer supervising the rehabilitation activity requirements on Wednesday 22 May 2024 at Staines Probation Office and must attend and cooperate with any requirements and activity arranged. If the appellant does not do this he may be brought back to court and will be liable to serve the unexpired part of his sentence.

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

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