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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/03754/A4
[2024] EWCA Crim 739



Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 14th June 2024

B e f o r e :

LORD JUSTICE WARBY

MRS JUSTICE STACEY DBE

HIS HONOUR JUDGE JOHN LODGE
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

B R D

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Mr K Walls appeared on behalf of the Appellant

J U D G M E N T
(Approved)



Friday 14th June 2024

LORD JUSTICE WARBY:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. Nothing may be published which would be likely to lead members of the public to identify any of the victims of the offending that we shall describe. That includes, in particular, the three young women we shall mention, whom we shall anonymise by referring to them as "C1", "C2" and "C3". In the published version of the judgment the appellant's name will also be anonymised, because naming him would be likely to lead to the identification of the three victims.

2. On 10th August 2023, in the Crown Court at Woolwich, the appellant (then aged 54) pleaded guilty to one count of taking an indecent photograph of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978 (count 1); three counts of making an indecent photograph of a child, contrary to the same subsection (counts 2, 3 and 4); and two counts of voyeurism, contrary to section 67(3) of the Sexual Offences Act 2003. On 6th October 2023, in the same court, he was sentenced by Mr Recorder Turner who imposed a total sentence of five years' imprisonment. A ten year Sexual Harm Prevention Order was also imposed, together with a Restraining Order to last until further order.

3. The appellant now appeals against sentence by leave of the single judge.

4. The offending came to light as a result of a police raid on the appellant's home on 9th February 2022. This led to the seizure of seven electronic devices. On one of these (the appellant's laptop computer) the police found a wealth of still and moving pornographic images of children which had been downloaded from the internet. There were 459 category A images, including 18 movies; 324 category B images, including five movies; and 64,647 category C images, including 246 movies. The downloads had been made in 2021.

5. On the appellant's iPhone were found other still and moving images. There was a photograph of a teenage girl asleep on a sofa, wearing a dressing gown which had fallen open to expose her breasts. This proved to be a photo which the appellant had taken in 2017 of C1, then aged 16. C1 was a friend of the appellant's two stepdaughters, C2 and C3. There were also several videos taken in January and February 2022. Some of these showed C2 naked in the shower at the home she shared with the appellant. Other similar videos showed C3 naked in the shower at the shared home. The videos had been taken on the phone, through the keyhole of the bathroom door. C2 and C3 were in their early 20s at the time.

6. The appellant said little in interview. He admitted visiting a porn website and said that he had downloaded several hundred images from it. But he claimed to have done so without viewing the images beforehand, and he denied that he had any sexual interest in children. Interviewed about the photograph of C1 and the videos of his stepdaughters, the appellant made no comment.

7. The facts of the case were reflected in an indictment as follows. Count 1 was a charge under section 1 of the 1978 Act, reflecting the taking of the still photograph of C1. Counts 2, 3 and 4 were further charges under the same section, reflecting the category A, B and C images respectively. Count 6 reflected a total of seven minutes and 26 seconds of video recording of C2 on a single occasion on 16th January 2022. She was shown washing and shaving herself. Count 7 was a multi-incident count concerned with four videos of C3 taken on four separate occasions between 13th January and 1st February 2022. These ranged between 25 seconds and two minutes and 33 seconds in length. They showed C3's breasts and groin area and showed her washing and shaving herself.

8. At the plea and trial preparation hearing the appellant indicated through counsel that he

would be likely to plead guilty under certain conditions. Shortly afterwards, those conditions having been met, he did plead guilty to the counts we have mentioned on a full facts basis. Two other counts of voyeurism were ordered to lie on the file. At the sentencing hearing it was agreed that the guilty pleas merited a reduction of 25 per cent.

9. The sentencing judge had the benefit of Victim Personal Statements from each of the complainants. They spoke of the shock, anxiety, fear and unease that they and other members of the household had experienced upon learning of what the appellant had done. C2 spoke of the impact on her work life and of her need to undertake counselling. C3 had been obliged to take time off work and to change her habits. The discovery of what had happened had significantly affected the relationships of C2 and C3 with their mother and their feelings about being in the family home.

10. The appellant was a man of previous good character. The author of the pre-sentence report said that he had expressed remorse, which did not appear rehearsed or insincere. It was noted, however, that he appeared to minimise his actions by seeking to blame others, to justify his behaviour, and to accept no responsibility for his actions. He had referred to a breakdown in his sexual relationship with his wife. He continued to maintain that he had no sexual interest in children. He offered implausible explanations for his photography and filming of C1, C2 and C3: he claimed to have no recollection of taking the picture of C1, and that when he made the videos he had thought he was videoing his wife in the bathroom.

11. The Recorder sentenced the appellant on the basis that he had committed all the offences for the purposes of his own sexual gratification. In relation to counts 1, 6 and 7, he took account of the harm evidenced by the Victim Personal Statements. The aggravating features of count 1 were the young age of C1, the fact that the photograph was taken when she was staying at the appellant's home, and the gross abuse of trust that C1 and her parents were

entitled to place in him, coupled with the fact that the appellant had kept that photograph until his arrest nearly five years later. Counts 6 and 7 were aggravated by the location of the offending (again in the appellant's home) and by the breach of trust involved.

12. In relation to counts 2, 3 and 4, the aggravating features were identified as: first, the young age of some of the children involved (some of the category A images depicted the rape of children as young as 8); secondly, there was the sheer volume of the images downloaded (in total, some 65,500); thirdly, and consequently, there was a significant number of different victims involved.

13. In mitigation, the Recorder noted the lack of previous convictions and that there had been no further offending since the appellant's arrest. The Recorder acknowledged the remorse and regret expressed by the appellant through his counsel, and the guilty pleas. But he noted that a failure to accept responsibility was a theme of the pre-sentence report and of the Victim Personal Statements. He rejected the appellant's claim that he had no sexual interest in children.

14. The Recorder concluded that custody was the only option and that the appropriate sentence fell outside the range which could be suspended.

15. He identified the appropriate sentence after a trial for count 1 (the photograph of C1) as 14 months' imprisonment, which he reduced to ten months to reflect the guilty plea. On count 2 (the category A images), the sentence would have been 28 months' imprisonment, reduced to 21 months. That sentence was ordered to run consecutively. On each of counts 3 and 4, the Recorder identified the sentence after a trial as one of 12 months' imprisonment, but this was reduced to nine months for the guilty plea and ordered to run concurrently. On count 6, the sentence would have been 18 months' imprisonment, but it was rounded down to

13 months and it was ordered to run consecutively, to take account of the guilty plea. On count 7, the sentence would have been 22 months' imprisonment, reduced and rounded down to 16 months, but again ordered to run consecutively.

16. The total sentence was thus one of five years' imprisonment. The Recorder identified this as a sentence that took account of totality and was the least that he could pass in all the circumstances.

17. There are two broad grounds of appeal.

18. First, it is said that the notional sentences before reduction for the guilty pleas were too high. Mr Walls has submitted that the figure of 28 months identified by the Recorder in respect of count 2 was "far too high", even taking into account the offending on counts 3 and 4, which that sentence reflected. Mr Walls points out that the guideline for making category A images has a starting point of 12 months' custody. In respect of counts 6 and 7, Mr Walls again submits that each of the Recorder's notional sentences after a trial was "far too high". He accepts that the offending fell within guideline category 1, but he points out that the category starting point is six months' custody, whereas the Recorder started at 18 and 22 months' custody respectively, before applying the reduction for guilty pleas. Mr Walls further submits that there is the potential for some double counting in respect of the aggravating features identified by the Recorder.

19. Secondly, it is submitted that the Recorder erred in ordering the sentences on counts 1, 6 and 7 to run consecutively. Mr Walls argues that counts 6 and 7 involved a series of offences of a similar nature, all committed within the same time period, such that the proper application of the principle of totality would have resulted in concurrent sentences for these counts. In support of that submission, he observes that the maximum sentence for voyeurism

is two years' custody, yet these two counts resulted in a total sentence of 29 months' imprisonment. Mr Walls further argues that the consecutive sentence of ten months' imprisonment imposed on count 1 only serves to heighten the disproportionate nature of the overall sentence.

20. We are grateful for Mr Walls' submissions, on which we have taken time to reflect.

21. We start with the sentence of ten months' imprisonment in respect of count 1. Although charged under the same statutory provision as counts 2, 3 and 4, this was offending of a different nature. In this instance the appellant was present, he observed the victim and he took the photograph. He created the image. The offending was, therefore, akin to voyeurism. In terms of the guideline for indecent images, the offending fell within the sentencing guideline category for production of a category C image. The starting point for offending in that category is 18 months' custody, and the range is one to three years. There were several aggravating factors, as we have noted. In our judgment, Mr Walls is right not to criticise the length of this sentence.

22. We turn next to counts 6 and 7. Mr Walls is right to concede that each was a category 1 offence. There was raised harm because the victim was recorded in her own home. There was raised culpability, because of the planning, the recording and the abuse of trust. The category starting point for a single offence of this kind is six months' custody, as counsel submits. However, the range goes up to 18 months. For each of counts 6 and 7 there were significant aggravating factors going beyond the matters taken into account in the process of categorisation: the location in the bathroom; the period over which the victim was observed; the degree of intimacy of the private acts observed; and the impact on the individual victim. The sentence on count 7 also had to reflect the multi-incident nature of the Crown's case on that count, which was conceded by the plea, and the persistence and duration of the offending

which it covered.

23. Apart from the guilty pleas, there was little by way of mitigation. In a case such as this, the absence of previous convictions carries little weight.

24. For all these reasons, we are satisfied that the Recorder was justified in treating count 6 as serious enough to justify a sentence after a trial that was towards the top of the category range. For count 7 (the multi-incident count), it was not wrong in principle to start with a notional sentence that was above the category range for a single offence.

25. Although the offences in counts 6 and 7 were committed close in time to one another, concurrent sentences were by no means mandatory. There were two different victims. Count 1 was widely separated in time from counts 6 and 7. We see no error of principle in the Recorder's decision to make all three sentences consecutive. Nor do we consider the resulting overall sentence on these counts to be excessive, looked at in isolation.

26. But these sentences were not imposed in isolation. We therefore turn to consider the three counts relating to the downloaded images.

27. The Recorder approached those counts as a group, treating count 2 as the lead offence on which he imposed a sentence to reflect the overall criminality. He had to reflect not only the gravity of some of the Class A images, but also that of the Class B and C offences. The Class C images involved a very large number of victims. The guideline range for making and possessing Class A images goes up to three years' custody.

28. Even so, the Recorder's notional sentence after a trial of 28 months' custody was extremely severe. In our judgment, it bordered on being disproportionate in itself.

29. When we turn to consider the overall impact of the Recorder's approach, we find ourselves persuaded that this appeal should be allowed. A total sentence of five years' imprisonment, after reduction for the guilty pleas, was, in our judgment, manifestly excessive. The reason, in our view, is that the Recorder failed to give sufficient effect to the principle of totality. He applied that principle by rounding down individual sentences to a small degree, but he did not go further. In our judgment, he should have done.

30. We have concluded that the most appropriate way to ensure that the overall sentence is no more than is just and proportionate to the offending in this case is to quash the sentence of 21 months' imprisonment on count 2 and to substitute a sentence of 11 months' imprisonment. All other aspects of the sentencing will remain the same. The effect will be to reduce the overall sentence of imprisonment from one of 60 months' imprisonment (five years) to one of 50 months' imprisonment (four years and two months).

31. To that extent this appeal is allowed. The notification requirements and the other orders that were imposed at first instance are unaffected.

32. There is one other matter. The Recorder told the appellant that, unless he was released earlier on licence, the period he would serve in custody was two-thirds of the five year sentence imposed (that is to say 40 months). The Criminal Appeal Office has noted that the Recorder was in error in this respect. The Recorder was no doubt seeking to reflect changes in the law brought about by the Police, Crime, Sentencing and Courts Act 2022. That Act increased the proportion of a sentence that has to be served before automatic release, from half to two-thirds of the custodial term in certain cases. But although the relevant provisions do apply to offences of the kind with which this case is concerned, they only apply where a person is sentenced to between four and seven years' custody "for an individual offence".

The provisions are not triggered where, as here, a total sentence of between four and seven years is made up of several consecutive periods, each of which is shorter than four years.

33. It follows that the appellant should have been told that the minimum period he would have to serve in custody was half the total sentence. That was 30 months.

34. As a result of our decision today, the maximum period that will have to be served before release on licence is now 25 months.

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

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