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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT LIVERPOOL
(HIS HONOUR JUDGE TREVOR-JONES) [05B40097923]

Case No 2023/04020/A2
[2024] EWCA Crim 972

Wednesday 14 August 2024

B e f o r e:

LORD JUSTICE WARBY

MR JUSTICE CAVANAGH

MR JUSTICE WALL

R E X

- v -

A I W

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Mr M Walsh appeared on behalf of the Appellant

J U D G M E N T
(Approved)

Wednesday 14 August 2024

LORD JUSTICE WARBY:

1. This is an appeal against sentence in a case of sexual offending by a man who is now aged 56. The case involves the downloading of images, but most of the offending was committed against the appellant's step-granddaughter, who is now five years old.

Anonymity

2. The victim benefits from a right to lifetime anonymity under the Sexual Offences (Amendment) Act 1992. Nothing must be published which would be likely to identify her to members of the public as a victim in this case. We shall anonymise her accordingly as "C".

3. The relationship between the victim and the appellant means that we are obliged to anonymise him as well. That is a necessary precaution against C's right to anonymity being undermined by jigsaw identification. The appellant will be identified in the case title as AIW. We shall refer to him simply as the appellant.

The Sentences

4. On 28 September 2023, in the Crown Court at Liverpool, the appellant pleaded guilty to an indictment containing 16 counts. These comprised: one count of causing a child under 13 to engage in sexual activity, contrary to section 8(1) of the Sexual Offences Act 2003 (count 1); three counts of inciting a child under 13 to engage in sexual activity, also contrary to section 8(1) of the 2003 Act (counts 3, 4 and 5); two counts of assault of a child by penetration, contrary to section 6(1) of the 2003 Act (counts 2 and 6); one count of sexual assault of a child under 13, contrary to section 7(1) of the 2003 Act (count 7); three counts of taking indecent photographs of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978 (counts 8, 9 and 10); three counts of making indecent photographs of

children, contrary to section 1(1)(a) of the Protection of Children Act 1978 (counts 12, 13, and 14); two counts of possessing indecent photographs of a child, contrary to section 160(1) of the Criminal Justice Act 1988 (counts 11 and 15); and one count of possessing extreme pornographic images, contrary to section 63(1) of the Criminal Justice and Immigration Act 2008 (count 16).

5. On 23 October 2023, the appellant was sentenced by His Honour Judge Trevor-Jones. On each of the two counts of assault by penetration the judge imposed an extended sentence of 19 years, made up of a custodial term of 14 years and an extended licence period of five years. On each of the other 14 counts the judge passed concurrent sentences of imprisonment, ranging in length from five years and four months for each of the offences, contrary to section 8 of the 2003 Act, to six months for each of the offences of making indecent images.

6. The judge also imposed a Sexual Harm Prevention Order and a Restraining Order, each to last until further order. The appellant's conviction meant that he was also required to comply indefinitely with the notification provisions of Part 2 of the 2003 Act.

The Facts

7. The appellant's offending came to light after police, acting on intelligence about the distribution of indecent images of children, attended his home on 20 June 2023. When cautioned and arrested, the appellant said that he knew what all this was about. He directed the officers to a computer and three hard drives in the house. Officers seized these and an iPhone which they found at the house. The appellant also advised the officers that there was "stuff" on a computer at his mum's house, and he guided the officers there. In an initial interview, however, the appellant made no comment.

8. Examination of the iPhone revealed that it had been used to carry out internet searches for "child sleeping with parent law UK", for 1970s schoolgirl porn of various types, and for bestiality, seeking images of girls with animals. The appellant's devices proved to contain not only images downloaded from the internet, but also video and still images that appeared to be first generation images made by the user. There was a particular child who appeared in many of these images. Using a sanitised version of some of the images, officers established with the appellant's wife and her son that the child was C (the appellant's step-granddaughter, born in 2018).

9. On 16 August 2023, officers revisited the appellant's home, re-arrested him and conducted a further search. This resulted in the seizure of another computer tower, another iPhone and a suicide note dated 28 July, which detailed the appellant's addiction to pornography.

10. Examination of the devices revealed a series of offences later reflected in the indictment. We have already recounted the offences in summary. It is unnecessary to provide full detail, but we do need to set out enough of the facts to allow the case to be properly understood by members of the public.

11. Count 1 was a section 8 offence arising from a video clip of just over one minute in length, taken in October 2020, when C was 13 months old. It showed the appellant removing his penis from his shorts and causing C to touch and to rub it.

12. Count 2 (the first charge of assault by penetration) arose from a still image taken in June 2021, when C was two years and eight months old. It showed her lying down, with the appellant using his thumbs and finger on the inside of her labia to show her vagina to the camera.

13. Counts 3, 4 and 5 were also section 8 offences reflecting still and moving images, taken in January 2022, when C was three years old; November of the same year, when she was four; and in January 2023. On each occasion she was using her hands to open and spread her vagina for the camera.

14. Count 6 was the second count of assault by penetration. It reflected a two and a half minute video taken in March 2023 of C, who was then aged four and half, on her hands and knees in the bathroom, with the camera focused on her vagina and anus, while the appellant wiped her bottom and used his finger to open her vagina.

15. Count 7 was a multiple incident count alleging at least 5 sexual assaults against C between September 2021, when she was three years old, and September 2023, when she was four, all revealed by videos and still images.

16. Counts 8, 9 and 10 reflected the appellant's conduct in taking indecent images of C over a period of nearly three and a half years, from January 2020 to June 2023. Count 8 involved 43 Category A images, count 9 involved two Category B images, and count 10 involved 63 Category C images. Count 11 was the appellant's possession of a total of 104 indecent images of the complainant.

17. The remaining counts related to the downloading of indecent images of other people. Counts 12 to 15 related to images of children (whether real or generated); count 12 concerned 648 Category A images (including adults penetrating children); count 13 involved 370 Category B images; count 14 related to 597 Category C images; and count 15 related to the possession of 598 indecent images. Count 16 concerned 59 images of extreme pornography involving sex acts with animals (both video and still images).

The Sentencing Process

18. Victim Personal Statements from C's parents expressed devastation at the discovery of what had been done to their daughter. The appellant's wife (C's grandmother) described her shock, anger and sense of betrayal.

19. The appellant had no relevant previous convictions. He made early admissions to most of what he had done. In a second interview he accepted that his actions had been carried out for his own gratification. He said that he had used pornography for 35 years and had become addicted. Things had snowballed when it came to C. He expressed relief that his arrest had brought things to an end. He maintained that he had never been a threat to anybody other than to C. But he indicated that he might have gone further if the police had not intervened. In interview, and in a letter to the judge, he explained that he had been sexually abused himself as a teenager, and that he had become desensitised by his own long-term use of pornography.

20. The appellant indicated guilty pleas to nine sexual offences at the magistrates' court. Although initially he maintained that he had not penetrated C, that proved to be due to a misunderstanding of what the charge involved. His pleas of guilty at the plea and trial preparation hearing were on a full facts basis, and the sentencing judge gave him full credit for pleading guilty at the earliest reasonable opportunity. The appellant expressed remorse for what he had done.

21. By the time of the sentencing hearing it had realistically been conceded that a lengthy custodial term was inevitable. The appropriate categorisation of the offending within the applicable sentencing guidelines had become common ground. The main issue was whether the sentence could be a standard determinate sentence, or whether an extended sentence was inevitable.

22. A pre-sentence report was prepared for the specific purpose of assessing dangerousness. The author's overall conclusion was that the appellant posed a significant risk of causing serious harm to members of the public – specifically children – through the commission of further specified offences.

23. The judge took the two counts of assault by penetration (counts 2 and 6) as the lead counts on which to pass the sentence to reflect the overall criminality of the appellant's offending, with concurrent terms of imprisonment for all of the other offences. The agreed position was that the offending covered by counts 2 and 6 fell into A2 of the sentencing guidelines, with a starting point of 11 years' custody and a range of seven to 15 years. The judge concluded that those two offences by themselves would justify a total of 13 years' imprisonment after a trial. That was uplifted by eight years to 21 years to reflect all the other offences on the indictment. The reduction for the guilty pleas brought the custodial term down to 14 years. That was the custodial term imposed on each of those two counts.

24. The judge summarised the conclusions of the pre-sentence report. He held the appellant to be a dangerous offender within the statutory meaning of that term, and that it was appropriate to impose an extended sentence, with an extended licence period of five years. He then proceeded to pass the concurrent sentences we have mentioned.

The Appeal

25. In written Grounds of Appeal settled by counsel, Miss McCloskey, who represented the appellant at the sentencing hearing, the sentence was challenged as manifestly excessive on three principal grounds.

26. First, there was a challenge to the judge's conclusion that the appellant was dangerous.

That was principally based on a critique of the pre-sentence report which was said to have relied upon assumptions unsupported by evidence.

27. Secondly, it was argued that, in any event, the imposition of an extended sentence was not necessary when the appellant's risks could have been managed by a standard determinate sentence coupled with the ancillary orders imposed by the court. In support of this point it was submitted that the appellant's age would inevitably reduce any risk that presently existed and that he was insightful, remorseful, and capable of engaging with rehabilitative programmes.

28. Thirdly, it was submitted that the custodial portion of the sentence was excessive and, in particular, that when dealing with counts 2 and 6, the judge failed to make an appropriate reduction to reflect the fact that the penetration in those instances was not full, but only partial in that the appellant went only so far as C's outer labia.

29. Mr Walsh, who has appeared today on behalf of the appellant, adopts Miss McCloskey's grounds, although he has shifted the emphasis somewhat. He places greater stress on the criticism of the custodial term.

Discussion

30. Like Mr Walsh, we begin by a consideration of the custodial term. We do not think that the judge's notional sentence for the penetration offences can be categorised as manifestly excessive, or as making inadequate allowance for the limited degree of penetration. These were two distinct offences, separated in time by some 21 months. The total sentence after a trial which the judge identified for both was 13 years, which is only two years above the starting point for a single offence. Accordingly, although the judge did not spell this out, the inference is that each considered in isolation would have attracted a sentence in the lower part

of the category range.

31. Nor do we consider that the judge can be said to have erred in his approach to totality. The decision as to the uplift that should be applied to reflect a series of disparate offences is not a scientific exercise. We do note, however, that each of the four section 8 offences fell into category 2A of the guidelines, with a starting point of eight years' custody, and a range of five to ten years. In sentencing for those offences, the judge clearly applied the category starting point of eight years. That, in turn, was the total uplift he applied for all four of those offences and all the other eight counts. The resulting notional sentence of 21 years after a trial is long, but in our judgment it is just and proportionate to the offending. This was sustained and severe sexual abuse of a very young and vulnerable victim over a period of years for personal gratification.

32. We turn to the challenge to the imposition of an extended sentence. In granting leave to appeal, the single judge expressed considerable doubt that this was sustainable. Mr Walsh wisely took a steer from those observations. We have not been persuaded that such a challenge has merit.

33. In reviewing this aspect of the case we have had regard to the principles identified by this court in *R v AYO* [2022] EWCA Crim 1271; [2022] 4 WLR 95. As noted in that case, at [12] to [13], the assessment of risk must be made at the date of sentencing, and on the assumption that the offender is not in custody. But the sentencer may take account of all relevant evidence that could bear on the predictive assessment. That is the approach that was adopted by the author of the pre-sentence report in this case, which is a careful document.

34. Under the heading "Likelihood of further offending", the report states that the RSR tool placed the appellant in the medium risk category for serious offending. The author, however,

assessed the real risk as likely to be higher, due to dynamic factors such as a lack of adult friends and family and poor decision making. These are not, in our view, appropriately described as "assumptions". They are tailored assessments based on observation of the facts of the case.

35. Under the heading "Risk of serious harm", the report concludes that the appellant poses a "very high risk" of causing serious physical, emotion and psychological harm to children, and a high risk to the public in the form of family members of those children. The risk factors identified include: the entrenched nature of the appellant's behaviour; the deceptive and manipulative methods he had shown towards family members in order to gain access to C; the planning involved; the high level of sexual pre-occupation; and the loss of all family support. Again, these are all points firmly grounded in the evidence available to the author of the report.

36. The appellant's own remarks in interview lend support to the author's assessment. He conceded that there had been a serious escalation in his behaviour, facilitated by his desensitisation to sexual abuse of children through an addiction to pornography depicting such abuse. He told the police: "I definitely think that if you hadn't knocked on the door, something may have gone even further and that's why I'm quite glad about the intervention, that you've caught me before something like that happened".

37. Nobody suggested that the police intervention had changed the appellant's personal characteristics. As for age, whilst an offender's age can in principle have a bearing on the assessment of risk – and in the case of an older person may lead to reduced opportunities or reduced motivation to offend (see *AYO* at [13]) – this appellant was only 55 years old at the date of sentence.

38. In these circumstances we are satisfied that there was ample evidence that the appellant met the statutory criterion and that the judge's decision on that point is not open to criticism.

39. The next question is the one that was evidently the focus of the argument before the sentencing judge, namely whether the risk identified required the imposition of an extended sentence, or whether, as the appellant contends, those risks could be adequately managed by interventions in custody and a sentencing package falling short of an extended sentence. The imposition of an extended sentence does not inevitably follow from a finding of dangerousness. In some cases a very long, standard determinate sentence may obviate the need for an extended sentence: see *AYO* at [14] to [15], where the court have the example of a sentence that would keep the offender in prison "until he is very elderly". That, however, is not this case.

40. Nor have we identified any evidence that the appellant's propensity to offend in the relevant ways would be materially affected by treatment or other interventions that might be available whilst in custody. The highest it has been put in the documents we have seen are statements in the pre-sentence report that the appellant "presented as motivated" to engage in a sexual offender programme and that he might benefit from one if the prison psychology department found that he met the criteria. The report also states that he could benefit from engaging with the prison education department and that an approved job on release could reduce feelings of loneliness and boredom, as well as manage sexual preoccupation. These, however, are all tentative and inconclusive points. The report provides no support for the contention that the appellant could and would eliminate or reduce his risk by engaging in rehabilitative work.

41. On the other hand, the pre-sentence report does expressly note and take into account that upon release the appellant "would need to manage intense feelings of isolation and

loneliness". The report identifies concerns that he could target infant children who would have no capacity to defend themselves. The judge was entitled to sentence on the basis that these are risks that would exist and which required intervention and management via the licence regime that comes with an extended sentence. These are different issues from those which the Restraining Order and the Sexual Harm Prevention Order were imposed to address.

42. For these reasons this appeal is dismissed.

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

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