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IN THE COURT OF APPEAL
CRIMINAL DIVISION

NCN: [2020] EWCA Crim 1245
Case No: 2020/02111/A2

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 17th September 2020

LORD JUSTICE DAVIS

MR JUSTICE LAVENDER

MR JUSTICE PEPPERALL

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E G I N A

- v –

ROBERT ALAN WOOLNER

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Mr G Colbon appeared on behalf of the Attorney General

Miss J F Faure-Walker appeared on behalf of the Offender

J U D G M E N T

Thursday 17th September 2020

LORD JUSTICE DAVIS:

1. This is an application by Her Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988, for leave to refer a sentence to this court on the ground that it is unduly lenient. We grant leave.

2. The offender is Robert Woolner. He is now 55 years old, having been born on 7th March 1965.

3. On 23rd June 2020, in the Magistrates' Court, he pleaded guilty to an offence of attempting to arrange or facilitate the commission of a child sex offence, contrary to section 1(1) of the Criminal Attempts Act 1981; to an offence of possessing extreme pornographic images, contrary to section 63 of the Criminal Justice and Immigration Act 2008; and also to a number of offences of recording an image beneath clothing of another person without consent, contrary to section 67A(2) of the Sexual Offences Act 2003. He was committed to the Crown Court for sentence.

4. On 17th July 2020, in the Crown Court at St Albans, the offender appeared for sentence before His Honour Judge Foster. On that occasion he was sentenced to a total of 12 months' immediate imprisonment. For attempting to arrange or facilitate the commission of a child sex offence, he was sentenced to six months' imprisonment; for possessing the extreme pornographic images, he was sentenced to a consecutive term of two months' imprisonment; and for the various offences of recording an image beneath clothing, he was sentenced to concurrent terms of four months' imprisonment, which were ordered to run consecutively to the other sentences. The total sentence, therefore, was one of 12 months' immediate custody. In addition, a Sexual Harm Prevention Order was made.

5. The facts for present purposes can be summarised relatively shortly. On 22nd October 2019, the offender was using Grindr, an online social media application used mainly by members of the LGBT community. In using it, he did not reveal his name. He contacted a person purportedly called "Ben", who described himself as a 13 year old boy. In fact, "Ben" was a police officer. The offender told "Ben" that he was attracted to younger men and said that he was aged 52. At his request, "Ben" then sent a photograph purporting to be of himself. The offender asked for something "more naughty", which "Ben" declined.

6. The same evening, the offender asked "Ben" to visit him. "Ben" said that he was on half term the following week. The offender complained that others which whom he had communicated and arranged to meet had not turned up. He asked "Ben" about his sexual experience and also requested a picture of his penis, which "Ben" declined.

7. They continued to chat. The offender asked "Ben" if they could meet immediately. There was some discussion about meeting the following week. They discussed oral sex in explicit terms. Indeed, the offender said that the semen of "young guys" tasted better than that of "older guys".

8. There was a further exchange of messages about them meeting. The offender said that, whilst he lived with other men, he could always pretend that "Ben" was his son and, if need be, they could lock his door and put the television on. There were further conversations on

subsequent days when the offender said that he did not want to waste anyone's time. He said to "Ben" that he was being careful about what he wrote in the message exchanges.

9. At just after 11am on 28th October 2019, the offender was arrested by police. He had driven to the place where he had arranged to meet "Ben".

10. An iPhone was found in his car. On subsequent examination a film was discovered which showed a man having sexual intercourse with a pig.

11. Furthermore, on the iPhone there were three films recorded beneath the skirts of schoolgirls. The longest, which lasted over one minute, showed a number of girls leaving a school bus with the camera being positioned so that it was angled upwards, showing under their skirts. There were two similar, shorter films which were retrieved. The films had been recorded during the course of the offender's employment as a school bus driver.

12. When interviewed under caution on two separate occasions, the offender answered "no comment" to all questions asked of him.

13. The offender has no previous convictions of any kind. He had received a caution for criminal damage on 17th May 2001, which for present purposes can be ignored.

14. A detailed pre-sentence report had been obtained. At that stage in his life, the offender was clearly going through a troubled time. Indeed, there have been some references to mental health issues. He has become carer for his father. He had been married on two previous occasions and has children; but also, as he said, he had also engaged in sexual experiences with other men. He could not explain why it was that he had contacted "Ben". He said that he had been suffering from depression and that he was in debt at the time. It was accepted that he was truly remorseful, and it was accepted that he had pleaded guilty at the earliest possible moment.

15. When the matter came before the judge, counsel then appearing for the prosecution (not Miss Faure-Walker) expressly stated to the judge that for the purposes of the relevant sentencing guideline, this was to be categorised as a category 3A case.

16. For present purposes it is necessary to refer to the applicable guidelines. With regard to the guideline contained in the definitive guideline for sexual offences issued by the Sentencing Council concerning section 14 of the Sexual Offences Act 2003, the guideline refers to the guidelines for the substantive offences. The box says, amongst other things:

> "Sentencers should refer to the guideline for the applicable, substantive offence of arranging or facilitating under sections 9 to 12. … The level of harm should be determined by reference to the type of activity arranged or facilitated. Sentences commensurate with the applicable starting point and range will ordinarily be appropriate. …"

17. Reverting to the guideline relating to sexual activity with a child (section 9) and causing or inciting a child to engage in sexual activity (section 10), the box at page 45 of the guideline, amongst other things, says with regard to section 14:

> "The starting points and ranges in this guideline are also

> applicable to offences of arranging or facilitating the commission of a child offence. In such cases, the level of harm should be determined by reference to the type of activity arranged or facilitated. Sentences commensurate with the applicable starting point and range will ordinarily be appropriate. …"

18. So far as categorisation is concerned, for harm, category 1 involves penetration of the vagina or anus, using body or object, or penile penetration of mouth, in either case by or of the victim. Category 2 involves touching or exposure of naked genitalia or naked breasts by or of the victim. Category 3 involves "other sexual activity".

19. So far as culpability is concerned, there was no dispute that this case was to be categorised as category A. Here there had been significant planning; there had been grooming behaviour; and there had been a significant disparity in age.

20. For the purposes of the guideline, the starting point for category 1A offending is five years' custody, with a range of four to ten years' custody. For category 3A, the starting point is 26 weeks' custody, with a category range of a high level community order to three years' custody.

21. As we have said, for the purposes of the argument before the judge, counsel then appearing for the Crown ascribed this to category 3A. Counsel went on to say this:

> "It would have been 1A had this not been a decoy. But, as I understand the law in relation to this area, that when you have a decoy, you do not put it in category 1, because there is talk about oral sex, where it would go otherwise, but you put it in the lower category, category 3, because nothing was ever going to happen. But it is certainly category A…"

Having so stated, counsel then, understandably, referred to the starting point and range appropriate for category 3A.

22. Mr Colbon, then as now appearing for the offender, proceeded in his submissions by way of mitigation on the same footing, as, entirely understandably, also did Judge Foster. In his thorough sentencing remarks, Judge Foster went through the facts, indicated that he did not feel it was appropriate to suspend the sentence, as Mr Colbon had urged him to do, and then stated:

> "I must treat this as category 3, and I do so."

Accordingly, he passed the sentences we have indicated.

23. There were no aggravating features over and above those contained in the appropriate categorisation of the offence in terms of culpability, although it is to be borne in mind that this was culpability category A for more than one reason. On the other hand, there was

significant mitigation available to the offender in that there were no previous convictions; in remorse; in his being a carer for a dependent relative; and not least, in his guilty pleas at the earliest opportunity. In addition, reference can properly be made to the onerous prison conditions currently extant by reason of the Covid-19 pandemic, as has been discussed in a number of cases in this court.

24. The principal problem in this case derives from the acceptance by prosecution counsel below that for the purposes of the guidelines relating to section 14, the case was to be categorised as category 3A, and not category 1A. It is now said by Miss Faure-Walker, on behalf of the Solicitor General, that that was a wrong approach in the light of the recent decision of a constitution of this court in *R v Privett* [2020] EWCA Crim 557. That case had been decided shortly before the hearing in the offender's case, but had not been reported in any law report. It evidently was not known either to counsel who then appeared for the prosecution or to Mr Colbon, who appeared for the offender, or to the sentencing judge. What is said is that, in the light of that decision, this case should have been categorised as category 1A and, consequently, the relevant starting point under the guideline, before factoring in such aggravating factors as there were and then the mitigation that there was, was one of five years' imprisonment.

25. We should note that this case had probably incorrectly been charged by way of attempt by reference to section 14, when, more strictly, the substantive offence of section 14 should have been charged. However, no objection was taken to that in the court below, and it does not bear on the relevant exercise today.

26. As *Privett* identifies, there is a line of authority to the effect that where the victim is, in truth, fictional and where no sexual activity can occur or has occurred, then there can be no sexual activity of the kind identified in the first two elements of harm for the purposes of category 1 of the guideline. The harm, accordingly, must be designated as "other sexual activity" and so be category 3. That was so held in *Attorney General's Reference No 94 of 2014 (R v Baker)* [2014] EWCA Crim 2752: albeit that it should be noted that that was not a case charged by reference to section 14 of the 2003 Act but by reference to section 10 of the Sexual Offences Act 2003, as a charge of incitement of a (real) girl to sexual activity which never in fact occurred. That approach was followed and adopted in other cases, including cases charged as section 14 cases where the intended victim was fictious: see, for example, *R v Stillwell* [2016] EWCA Crim 1375 and *R v Allington* [2019] EWCA Crim 1430. That is to say, for the purposes of the categorisation in terms of harm the matter was treated as category 3.

27. However, another line of authority is to wholly different effect: that the relevant categorisation is to be taken by reference to the harm actually intended, even if it was not achieved, or even if it was not capable of achievement: see *R v Bayliss* [2012] EWCA Crim 269. *Bayliss* was itself a section 14 case, where the purported victim was fictitious. It was held in *Bayliss* that the appropriate way in which to treat the fact that necessarily no harm in fact occurred was to make an appropriate reduction in the sentence to reflect that fact. But otherwise, for the purposes of harm, the focus was on what was actually intended. That approach was then followed in cases charged under section 14 of the 2003 Act such as *R v Collins* [2015] EWCA Crim 915 and *R v Lewis* [2016] EWCA Crim 304.

28. It is not necessary for this court to refer to the various authorities in detail, as all of them are fully discussed in *Privett*. In giving the judgment of the court in *Privett*, and after fully reviewing and assessing the authorities and the contents of the relevant definitive guideline, Fulford LJ (Vice President of the Court of Appeal Criminal Division) said this of section 14 offences:

"59. It is necessary, in our judgment, to keep in mind the terms of this offence. It is intentionally arranging or facilitating activity which would constitute a child sexual offence, intending that it will happen. This is a preparatory offence, albeit it could cover the case in which the offence was carried out. However, in that latter situation, the offender would ordinarily be charged as a participant in the full offence.

60. The offence is complete when the arrangements for the offence are made or the intended offence has been facilitated and it is not, therefore, dependent on the completed offence happening or even being possible, and the absence of a real victim does not, therefore, reduce culpability.

…

65. There are clearly some similarities between the position in *Baker* and the present appeals. There was no actual sexual activity in any of the cases. These four appellants were charged with 'arranging or facilitating the commission of a child sex offence', and (as rehearsed above) sentencers are enjoined to refer to the relevant guideline for the applicable substantive offence of arranging or facilitating under sections 9, 10, 11 and 12. Indeed, under the Guideline, for sections 9 and 10 the level of harm for a section 14 offence should be determined by reference to the type of activity arranged or facilitated ([63] above). In *Baker*, the offence to which the offender pleaded guilty was one of 'inciting a child to engage in sexual activity' (section 10). Accordingly, whilst in the instant appeal the four appellants were charged under section 14, the relevant guideline to which the sentencer needed to refer was the same as that which applied in *Baker*. The three categories of harm applicable to both cases are set out at [47] above.

66. Notwithstanding those similarities, the court in the present case is dealing with a different offence and, at least to an extent, different circumstances from those that applied in *Baker*. We are unable to accept the submission that *Baker* requires that section 14 offences in which there is no real child must always be treated as category 3A offences under the Guideline. We recognise that aspects of the decision in *Baker* may well need to be revisited in the light of this judgment, but our present concern is with these section 14 offences.

67. Focusing on the particular issue raised in these appeals, we consider that for a section 14 offence, the position under the Guideline is clear: the judge should, first, identify the category of harm on the basis of the sexual activity the defendant intended ('the level of harm should be determined by reference to the type of activity arranged or facilitated'), and, second, adjust the sentence in order to ensure it is 'commensurate' with, or proportionate to, the applicable starting point and range if no

> sexual activity had occurred (including because the victim was fictional) ('sentences commensurate with the applicable starting point and range will ordinarily be appropriate')."

The court thus approved the approach taken in section 14 cases such as *Bayliss, Collins* and *Lewis*, and disapproved the approach taken in section 14 cases such as *Stillwell* and *Allington.* The court went on to say this:

> "72. Sentencers in future with section 14 offences in these circumstances should follow the Sentencing Guideline in the way we have described above at [67]. This may lead to the result that a defendant who arranges the rape of a fictional 6-year-old is punished more severely than a defendant who facilitates a comparatively minor sexual assault on a real 15-year-old. In our view, there is nothing necessarily wrong in principle with that result. The sentence should be commensurate with the applicable starting point and range, and in cases where the child is a fiction this will usually involve some reduction (as in *Bayliss*) to reflect the lack of harm."

29. As conceded before us by Mr Colbon on the behalf of the offender, and rightly so, this court should follow the decision in *Privett* – a decision with which, we would respectfully add, we in any event agree. It follows that the judge, entirely inadvertently in adopting the approach advanced before him by both counsel, wrongly categorised this offending as category 3A when, in truth, it should have been categorised as category 1A, with a correspondingly significantly higher starting point: albeit a significant reduction was then to be made to reflect the fact that there was and could have been no sexual activity as such, as well as allowing for such other mitigating factors as were present and for credit for the guilty plea.

30. Miss Faure-Walker accepts that this was not the approach taken in *R v Manning* [2020] EWCA Crim 592, a case which was in fact decided the day after *Privett*. But in *Manning* the charges were not charges brought by reference to section 14, as such, but were charges by reference to sections 9 and 10 of the 2003 Act. Besides, in *Manning* it was conceded, without any argument, that the correct categorisation on the relevant counts in that case was 3A in the light of the *Baker* decision. *Privett* was not cited or drawn to the attention of the court. Thus, in our judgment, the decision in *Manning* cannot displace the reasoned conclusion by reference to section 14 cases expressed in *Privett*.

31. Miss Faure-Walker also very properly referred us to the subsequent decision in *R v Russell* [2020] EWCA Crim. That, too, was a case where the victim was fictitious. The charges were not framed by reference to section 14 but by way of attempts to cause or to incite by reference to sections 9 and 10 of the 2003 Act. One issue was whether the matter should be treated as category 1A or category 3A for the purposes of the guideline. The trial judge had adopted category 1A. It was argued in the Court of Appeal, amongst other arguments, that he had been wrong to do so. *Privett* was cited to the constitution of the court adjudging *Russell*. But the focus of the argument, and certainly the focus of the decision, seems to have been based on the authorities tending the other way, not least *Baker*. There was, at all events, no discussion in the judgment of the court in *Russell* of the case of *Privett*. Moreover, it may be added that the Crown was not represented in *Russell* and so was not in a

position to address any argument on the point. On the contrary, the court shortly asserted in the course of its judgment, without any elaboration, without any reasoning and without any discussion of *Privett*, that "the [judge] should clearly have treated this as a category 3A offence".

32. We have considerable reservations about this conclusion, bearing in mind the observations made in *Privett* in this context. However, be that as it may, in the present case the position is clearly distinguishable because the present case involves a charge by reference to section 14, whereas in *Russell* it did not. Thus, *Russell*, as we say, can be distinguished. Nevertheless, we would say that we consider that the implications of *Privett* on cases charged by references to sections 9 and 10, or attempts thereunder, may need to be explored further when such matters directly arise for consideration; and *Russell* should not, we respectfully suggest, be taken as binding and decisive authority on the position.

33. Against that background, we turn to the appropriate outcome for this case. On the basis of *Privett*, it is clear that this case should have been categorised as category 1A offending, with a starting point of five years' custody. Aggravating factors were not really present (and of course one must in any case avoid double counting in this context, although, as we have said, there were several features which attracted higher culpability). There was, however, as again we have indicated, significant mitigation available to the offender in the way which we have recounted, and also bearing in mind current prison conditions. It is, of course, right that there should be a significant discount to reflect the fact that no sexual activity ever occurred in line with the principle laid down in *Bayliss*, and, of course, full credit also should be accorded for the guilty plea.

34. In such circumstances, the sentence on count 1 was, albeit entirely inadvertently, clearly imposed on a wrong basis and must be adjudged to be unduly lenient. We consider, having regard to all the circumstances of this case, and having regard also to the fact that no sexual activity did occur or could have occurred, that the appropriate sentence, before credit for the guilty plea, would have been in the order of three years' imprisonment. Giving credit for the guilty plea, that gives rise to a resulting sentence of two years' imprisonment. In our view, that is the sentence which should be substituted on count 1. The consecutive sentences imposed on the other counts will stand. We consider that the overall sentence of 30 months' imprisonment thereby reached is the appropriate sentence as a mater of totality for the offending in the circumstances of this particular case.

35. Accordingly we allow the Reference and substitute the sentence we have indicated.

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