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NCN: [2021] EWCA Crim 1484

IN THE COURT OF APPEAL

CRIMINAL DIVISION



CASE NO: 2021 02800 A2

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 7 October 2021

LORD JUSTICE HOLROYDE

MR JUSTICE HOLGATE

MRS JUSTICE COCKERILL

REFERENCE BY THE ATTORNEY GENERAL UNDER s.36 CRIMINAL JUSTICE ACT 1988

REGINA

v

MARK BUCKLEY

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MR B LLOYD appeared on behalf of the Solicitor General

MR M CONNOR appeared on behalf of the Offender

J U D G M E N T

1. LORD JUSTICE HOLROYDE: On 4 August 2021, in the Crown Court at Chester, Mark Buckley was sentenced by His Honour Judge Thompson to a total of 2 years' imprisonment suspended for 2 years, with a rehabilitation activity requirement for 30 days and ancillary orders, for eleven sexual offences, mainly involving sexual communications with persons he believed to be adolescent girls. Her Majesty's Solicitor General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the sentencing to this court so that it may be reviewed.
2. The offences were committed between July and December 2020. Mr Buckley was then aged 45 and of previous good character, save for a formal caution in 2006 for an offence of damage. He was in good employment and living with his partner. He is the father of four children, one of whom is an adult. The other three lived, as we understand it, with their respective mothers.
3. Six of the offences were admitted in the magistrates' court and were the subject of a committal for sentence to the Crown Court. Mr Buckley was entitled to full credit for his pleas to those charges. The remaining five offences formed counts on an indictment to which Mr Buckley pleaded guilty at a plea and trial preparation hearing and for which he was accordingly entitled to credit of one-quarter.
4. We can summarise the facts briefly for present purposes.
5. In July 2020 Mr Buckley made contact on a Kik messenger account with "Jess", who was in fact an undercover police officer pretending to be a 13-year-old girl. Mr Buckley sent her photographs of himself over the course of a few days. He resumed contact with her in September, at which point his messages became sexualised. He sent her an image of a man with an erect penis and began to ask her sexual questions. In November he sent a picture of himself naked from the waist down and said he would send her a video of himself masturbating.
6. The messaging of "Jess" gave rise to count 8 (attempted incitement of a child to watch a sexual act) and count 5 (attempted sexual communication with a child). When arrested on 1 December 2020, Mr Buckley admitted the exchange of messages but falsely claimed that he had not thought that "Jess" was under 18.
7. Mr Buckley also claimed that there were no indecent photographs on the phone which the police had seized from him on arrest. That too was untrue. Examination of the phone resulted in counts 1 and 2 (making indecent photographs of children), relating to one category B photograph and eight category C photographs or videos. It also gave rise to count 3 (possession of those indecent photographs) and count 4 (possession of three still images comprising prohibited sexual images of young children). The examination of the phone also gave rise to charge 7 (possession of extreme pornography) in relation to a video of an adult woman whose vagina was being licked by a dog.
8. Also on the phone were a number of Kik messenger chats. Some were with persons who said they were 17. Two, however, were with persons calling themselves "Jenz" and "Chloe" who said that they were 15. The true identities and ages of those correspondents have not been established.
9. Mr Buckley's exchange of sexualised messages with "Jenz" gave rise to three charges: charge 1, attempted sexual communication with a child; charge 2 -- which was the most serious of all the offences -- attempted incitement of a child to engage in sexual activity; and charge 9, attempted incitement of a child to watch a sexual act.
10. In summary, Mr Buckley exchanged naked photographs with "Jenz", asked sexualised questions of her, told her that he would like to engage in mutual oral sex with her, asked her to video herself masturbating, and expressed his wish to ejaculate over her. As the judge was to observe during the sentencing hearing, charge 2 was particularised as involving non-penetrative sexual activity when in fact it could have been alleged that Mr Buckley was attempting to incite penetrative activity.
11. Mr Buckley's exchange of sexualised messages with "Chloe" included references to oral sex and masturbation. This gave rise to charge 11 (attempted sexual communication with

a child).

12. When interviewed about these chat exchanges, Mr Buckley again claimed to have believed that "Jenz" was over 18. However, he pleaded guilty to the offences as we have indicated.
13. A pre-sentence report was prepared for the assistance of the court. Mr Buckley accepted full responsibility for his offending and expressed what the author of the report assessed to be genuine remorse. Mr Buckley acknowledged that he needed assistance in understanding his motivation for committing these offences and expressed his willingness to engage in any necessary interventions. Again the author of the report assessed as genuine Mr Buckley's expressed desire to gain insight into what he had done and to move forward in a positive manner.
14. The pre-sentence report also referred to Mr Buckley's children. Very sadly, the youngest two had very recently suffered the sudden death of their mother. Mr Buckley was distressed by his realisation that because of his offending he would not be able to care for those girls. He was also fearful that immediate imprisonment would result in the loss of his employment and would cause him and his present partner to lose their home.
15. The judge in his sentencing remarks indicated that the sentences which would otherwise be appropriate had to be reduced because they involved attempts rather than full offences, incitement rather than causing, no actual sexual activity, and at best uncertainty as to whether any of the victims was a real child.
16. The judge noted that charge 2 was a category 2A offence under the relevant sentencing guideline, with a starting point of 3 years' custody and a category range of 2 to 6 years.
17. The judge then said of that starting point that it *"... has got to be reduced of course because of the factors I have already set out. It has got to then be increased because it seems to me the appropriate way of dealing with the case is to 'aggravate' for all the offences and load them onto the most serious offence, which is Charge 2, and then pass concurrent sentences."*
18. *"That leaves me in a position where effectively the sentence after trial, had you had a trial on all of these matters, would have been three years' imprisonment; that has to be reduced by a third because of the timing of your plea in relation to that matter."*
19. *"That leaves on Charge 2 a sentence of two years. In relation to the other charges it seems to me the appropriate sentences would be as follows: Charge 1, twelve months; Charge 7, three months; Charge 8, six months; Charge 9, six months; Charge 11, twelve months. Then in relation to the indictment: Count 1, three months; Count 2, two months; Count 3, three months; Count 4, two months; and Count 5, twelve months. They are all prison sentences; they are all concurrent with each other, leaving a total of two years' imprisonment."*
20. The judge then considered whether it was appropriate to suspend that sentence and decided, in what he regarded as a difficult case, that he could. Thus he imposed the total sentence of 2 years' imprisonment suspended for 2 years, a rehabilitation activity requirement for 30 days and a Sexual Harm Prevention Order.
21. This court has helpfully been provided with a progress report from the probation officer who is supervising Mr Buckley during his sentence. Mr Buckley has reiterated his intention to cooperate with the Probation Service and to engage in interventions to address his sexual offending. He has demonstrated his cooperation and commitment in that regard. He became distressed when discussing his children and what is referred to as *"his now ex-partner"*. He had been suspended from his work following press reports of his sentence. He hoped to be reinstated but would lose his employment and his home if imprisoned. Plans were in place for him to have supervised contact with the two youngest children (now in the care of their maternal aunt) but that would of course be adversely impacted by immediate imprisonment. He was fearful of the possibility that this Reference might result in his having to go to prison.
22. On behalf of the Solicitor General, Mr Lloyd submits that the total sentence was unduly lenient. There should, he submits, have been a total custodial sentence significantly in excess of 2 years and therefore no possibility of its being suspended. He does not separately

challenge the judge's decision to suspend if the 2-year term was not unduly lenient, realistically acknowledging that suspension was open to the judge although other judges might have come to a different conclusion.

23. In agreement with the judge, Mr Lloyd identifies charge 2 as the most serious offence. He submits that it was necessary to move upwards from the starting point of 3 years to reflect the period of time over which the offence occurred, the grooming behaviour involved and the substantial age disparity. He accepts that the sentence then fell to be reduced to reflect the decision in the case of Reed [2021] EWCA Crim 572, the personal mitigation and the guilty plea. The core of his argument is a submission that whilst a sentence of 2 years might have been appropriate for charge 2 alone, the judge failed to increase that sentence to reflect the criminality of the other offending which was to be dealt with by concurrent sentences. In this regard Mr Lloyd suggests that the passage which we have quoted from the sentencing remarks was perhaps equivocal as to whether the judge intended his sentence to cover all the offending; but if he did, submits Mr Lloyd, then the total term was insufficient.
24. He argues that charges 8 and 9 each fell into category 3A of the guideline applicable to them, with a starting point of 26 weeks' custody and a range of up to 1 year. It was necessary, he submits, for the total sentence to reflect those serious offences and all the other offences.
25. Mr Connor, representing Mr Buckley in this court as he did below, resists the application. He submits that in all the circumstances, including the absence of any real child victim and the absence of any contact, the appropriate sentence on charge 2 was less than the guideline starting point of 3 years, before giving full credit for the guilty plea. He acknowledges of course the need to reflect the other offences, especially charges 8 and 9, in the final sentence. He submits, however, that none of the other offences was a particularly serious example of its kind. He relies upon the personal mitigation to which we have referred, adding that, as he understands it, Mr Buckley's second oldest child is also without the care of her mother at present. Mr Connor submits that the overall sentence of 3 years' imprisonment, before giving credit for the guilty plea, was appropriate and that the decision to suspend the sentence cannot be criticised.
26. We are grateful to both counsel for their written submissions and for the clarity and focus with which each of them has addressed us this morning.
27. No criticism is or could be made of the judge's approach of treating charge 2 as the lead offence, increasing the sentence which would be appropriate on that charge in order to reflect the overall criminality and then imposing concurrent sentences for the other offences. It is, in our view, clear from the passage in the sentencing remarks which we have quoted that the judge concluded that a total of 3 years' imprisonment, before reduction for guilty plea, was appropriate in relation to the offending as a whole. The real issue as we see it is whether the total sentence fell below the range properly open to the judge and so was unduly lenient.
28. The foundation of the Solicitor-General's application is the submission that charge 2 in isolation merited a sentence of 3 years before reduction for the guilty plea. We do not accept Mr Lloyd's submissions in that regard. We must of course consider that offence on the basis of the particulars alleged against Mr Buckley and admitted by him, not on the basis that he could or should have been charged with an offence involving penetrative activity. True it is that there were aggravating features of charge 2, as Mr Lloyd has identified; but there were also the features mentioned by Mr Connor which limit the seriousness of the offence, and there was in addition strong personal mitigation. In particular we take the view that significant weight has to be given to the combination of the fact that Mr Buckley had no previous convictions and only one formal caution for an offence which was neither recent nor relevant; his genuine remorse; his genuine desire to address his offending behaviour; and the consequences both for him and for his two daughters of the untimely death of their mother.
29. We accept Mr Connor's submission that none of the other offences was a particularly bad

example of its kind. They nonetheless undoubtedly added significantly to the overall seriousness of the offending during the relevant period of several months. We have considered carefully whether the total sentence of 3 years, before reduction for the guilty plea, properly reflects that offending as a whole.

30. It was certainly a lenient total sentence and we regard it as falling at the lowest end of the range properly open to the judge. We are not, however, persuaded that it was unduly lenient. We are encouraged in that conclusion by the contents of the recent report, which confirms that Mr Buckley's expression of commitment to addressing his offending was genuine. We would also think it right in the very particular circumstances of this case to give some weight to the great anxiety which we accept Mr Buckley has suffered whilst awaiting this hearing in fear that it may result in his now having to go into custody. In that regard the sad circumstances of his daughters are capable in our view of being a relevant consideration.
31. We have indicated that no separate challenge has been made to the judge's decision to suspend the sentence of 2 years' imprisonment. In any event, we could see no basis on which the judge's decision in that regard could be challenged.
32. For those reasons, grateful though we are to Mr Lloyd for his helpful submissions, we refuse this application for leave to refer.

Mr Lloyd, Mr Connor, thank you both very much.

MR CONNOR: Thank you, my Lord.

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

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