Neutral Citation Number: [2024] EWCA Crim 415

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/03429/A5

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 18th April 2024

B e f o r e:

LORD JUSTICE SINGH

MR JUSTICE JAY

THE RECORDER OF NORTHAMPTON
(His Honour Judge Mayo)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

JASON NEWMAN

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Mr P Binder appeared on behalf of the Appellant

J U D G M E N T
(Approved)

Thursday 18th April 2024

LORD JUSTICE SINGH:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. This is an appeal against sentence brought with the leave of the single judge.

3. On 14th September 2023, in the Crown Court at Swindon, the appellant (then aged 35) was sentenced by Mr Recorder Garlick KC in the following way: on each of counts 2 and 3 (Making indecent photographs of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978), concurrent terms of 23 months' imprisonment; on count 4 (Causing or inciting a child to engage in sexual activity, contrary to section 10(1) of the Sexual Offences Act 2003), 41 months' imprisonment; and on count 5 (Sexual activity with a child, contrary to section 9(1) of the 2003 Act), 41 months' imprisonment. All of the sentences were ordered to run concurrently with each other. Accordingly, the total sentence was 41 months' imprisonment. Other appropriate orders were made. Count 1 was ordered to remain on the file in the usual terms.

4. The facts may be summarised as follows for present purposes. Between January 2020 and June 2021 the appellant committed a number of sexual offences against C1, who was then aged between 8 and 9. Counts 2 and 3 reflected the taking of indecent images of C1, nine of which were at category B and 264 at category C. There was also contact sexual offending. Count 4 represented at least two occasions when the appellant made C1 touch his penis.

Count 5 represented at least two occasions when the appellant touched C1's penis under and over clothing.

5. C1 was a child with complex needs. His cognition was delayed by up to three years; he had significant speech and language delay; and there were incontinence issues. As a result, C1 was placed under a special healthcare plan and attended a complex needs resource base at his local primary school.

6. The appellant had a niece who attended the same school. He developed a friendship with C1's mother. The appellant became a trusted visitor. He helped wash C1, sometimes after C1 had soiled himself.

7. Between February 2019 and March 2021, there was some Social Services' involvement due to concerns about the ability of C1's mother to protect her children because of her relationship with the appellant. There had been earlier concerns about the appellant's behaviour when he was a teenager, although those concerns had not resulted in any prosecution.

8. The appellant also associated with C1's friends. The father of one child discovered text messages on his son's mobile phone which showed that the appellant had been associating with a group of young boys aged between 9 and 11 at a local outside "den" area. Concerned, the father reported what he had found to the police. On 16th July 2021, the Child Internet Exploitation Team received information that the appellant had uploaded an indecent image to the internet. The image was of C1 with his naked genitals exposed. C1's identity was confirmed by C1's head teacher and the appellant was arrested on 21st July 2021.

9. The appellant's address was searched. There were numerous framed photographs of C1

around the bedroom. Indecent images of C1 were found on mobile phones belonging to the appellant. There was also a computer tablet which showed that the appellant had exchanged indecent images of C1 between different email accounts registered in his name. Many of the images had been taken at C1's address.

10. C1 was interviewed in the presence of a social worker and said that the appellant had asked C1 to touch his penis in exchange for gifts and that the appellant touched C1's penis over and under his clothing. He also said that the appellant had told him not to tell anyone.

11. The appellant was interviewed by police on 21st July and 17th August 2021, but denied the offences.

12. It is important to refer to the procedural chronology, which is a little unusual. The appellant pleaded guilty to the offences on 4th July 2023, which was the first day of the scheduled trial. Before that date, on 12th September 2022, there had been a section 28 hearing at which C1 had been cross-examined on behalf of the appellant. Many of the advantages which usually flow from a guilty plea, even a late one, had therefore already been lost. The Recorder gave credit of only five per cent for the late guilty pleas; but no complaint could be, or has been, made about that, subject to an arithmetical point to which we shall return.

13. The appellant was aged 35 at the date of conviction and sentence. He was aged approximately 30 at the date of the offences. He was of previous good character. The Recorder had a number of reports before him, which we have also seen. They included a pre-sentence report, a psychological report, with an addendum, and an intermediary report. The Recorder had a Victim Personal Statement from the mother of C1. We also have the benefit of a prison report since sentence.

14. The Sentencing Council has issued a definitive guideline in relation to the offences of sexual activity with a child under section 9 of the 2003 Act, and causing or inciting a child to engage in sexual activity under section 10 of the 2003 Act, with effect from 1st April 2014. The maximum sentence available in law is 14 years' custody. Factors which indicate culpability A are set out in the definitive guideline. On behalf of the appellant, Mr Binder very fairly acknowledges that at least the following four are arguably present in this case: elements of grooming; abuse of trust; the recording and retention of sexual images of the victim; and a significant disparity in age. It seems to us that there is also, at least arguably, the further culpability A factor of deliberate targeting of a vulnerable child.

15. Category 2 harm in the guideline is where there is touching or exposure of naked genitalia by or of the victim.

16. For an offence which falls into category 2A – and it was accepted both before the sentencing court and in this court that the case falls within category 2A – the guideline recommends a starting point of three years' custody, with a category range of two to six years. Amongst the mitigating factors which should be taken into account is mental disorder or learning disability, particularly where linked to the commission of the offence. In this regard, reference should be made to the definitive guideline on sentencing offenders with mental disorders, developmental disorders or neurological impairments, which has had effect from 1st October 2020. At paragraph 9, that guideline observes that culpability may be reduced if an offender was, at the time of the offence, suffering from an impairment or disorder. It will only be reduced if there is sufficient connection between the impairment and the offending behaviour (see paragraph 11). In some cases, the impairment may mean that culpability is significantly reduced. In others it may have no relevance to culpability. A careful analysis of all the circumstances of the case and all relevant materials is therefore required (see paragraph 12). Where relevant expert evidence is put forward, it must always

be considered. The sentencer must state clearly their assessment of whether the offender's culpability was reduced and the reasons for that, and the extent of that reduction. The sentencer must also state, where appropriate, their reasons for not following an expert opinion (see paragraphs 13 and 14).

17. Paragraph 22 of the guideline states that where custody is unavoidable, consideration of the impact on the offender of the impairment may be relevant to the length of sentence. This is because an offender's impairment may mean that a custodial sentence weighs more heavily on them and/or because custody can exacerbate the effects of impairment.

18. In the present case there was a psychological report from Dr Kim Chiu, dated 3rd August 2022, which expressed the opinion that the appellant is of "extremely low intellectual and adaptive functioning". His IQ score would be 56, meaning that his performance is better than only 0.2 per cent of those in the general population.

19. There was an addendum report, dated 14th August 2023. At paragraph 4.2.1, Dr Chiu expressed the opinion that individuals whose intellectual functioning is similar to that of the appellant often face significant challenges in understanding the consequences of their actions. At paragraph 4.2.2, Dr Chiu said that while the appellant had pleaded guilty to the charges, given his level of intellectual functioning, it was possible that he struggled to make sense of the consequences of his actions at the time of the index offending. At paragraph 4.2.3, Dr Chiu said that while there is no evidence of a linear relationship between IQ and one's judgment/ rationality, having an extremely low level of intellectual functioning means that one's ability to process information and make informed decisions is likely to be impaired. At paragraph 4.5.1, Dr Chiu aid that for individuals with very low levels of cognitive and adaptive functioning, like the appellant, challenges associated with custody could be more pronounced. He could face significantly more difficulties adapting to prison life. For

example, he may struggle to communicate effectively with prison staff and inmates, and he may be at risk of being exploited by others.

20. In that context, at the hearing before us, Mr Binder has drawn attention to the prison report, which this court has. He submits that that adds a degree of weight to the suggestion that custody is likely to be more burdensome for the appellant than for ordinary prisoners; for example, because of the relative lack of availability of suitable educational programmes for him.

21. The pre-sentence report is also of some importance, as were all the other matters which the Recorder had to take into account. The author of the pre-sentence report advised that the appellant presents a high risk of serious harm to children, both male and female. He also poses a medium risk of serious re-offending over the next two years. The author, doubtless having in mind the culpability A factors, suggested that there was abuse of trust, sexual images of the victim had been recorded, the targeting of a vulnerable child, and identifiable grooming behaviours. The author advised that they had worked with many individuals similar to the appellant, with regard to his individual needs, and that the prison establishment had been able to manage and support those needs.

22. Although the Recorder's sentencing remarks were relatively brief, it is clear that he had regard to everything that had been said on behalf of the appellant, in particular his mental health issues. He referred to them expressly at page 2F-G, and said (at page 2E) that the sentences would have been "much higher" had it not been for what had been said in mitigation. The Recorder also took into account that the appellant was a man of previous good character. Nevertheless, he took the view that these were extremely serious offences for which he had to impose custodial sentences. He ordered those sentences to run concurrently with each other because he expressly had regard to the principle of totality.

23. The Recorder said that the sentence on count 2 had a starting point of two years' custody. Giving five per cent credit for the late guilty plea, that was reduced to 23 months. The same sentence would be passed on count 3. The Recorder said that the starting point on count 4 would have been three and a half years' custody. After giving five per cent credit, that was reduced to 41 months' imprisonment. That is the subject of some complaint before this court now. The Recorder said that the same sentence would be passed in respect of count 5. As we have said, that made a total sentence of 41 months' imprisonment.

24. The single ground of appeal is that the sentence was manifestly excessive, in particular because insufficient discount was given to reflect the appellant's personal circumstances and mitigation – most notably his learning disabilities.

25. In developing his ground of appeal, Mr Binder, to whom we are grateful, submits that according to the World Health Organisation's Manual ICD-10, the appellant's IQ score equates in adults to a mental age in the 9 to 12 years bracket. Put another way, he submits, the appellant was himself a vulnerable individual who functions at the intellectual level of a child. Mr Binder submits that it is not possible from the Recorder's sentencing remarks to discern the extent to which he reduced the starting point to allow for matters raised in mitigation before providing credit for the guilty plea. He submits that the Recorder did not allow sufficient discount for the mitigating factors, in particular the appellant's low level of intellectual functioning.

26. At the hearing before us, Mr Binder has also made a subsidiary complaint which relates to what he submits was a mathematical error which crept into the Recorder's sentencing remarks at page 3B. As we have said, the Recorder indicated that the notional sentence after trial would have been one of three and a half years' imprisonment, but gave five per cent

credit for the late guilty pleas. Mr Binder makes the point that since three and a half years is 42 months, a discount of five per cent ought to have resulted in a figure just under 40 months, rather than the figure of 41 months in fact imposed.

27. We say about that argument simply this. As has often been said in this court, sentencing is not an arithmetical exercise. It is an art, not a science. As will become clear later in this judgment, the crucial question for this court is whether the sentence in fact passed of 41 months' imprisonment is manifestly excessive.

28. It is clear from the definitive guideline for the offences on counts 4 and 5 that the recommended starting point is three years' custody for a single offence, with a category range of two to six years.

29. We have to bear in mind that in this case there was more than one offence. The other sentences were properly made concurrent. That was correct. But in those circumstances regard must be had to the total sentence passed to ensure that it reflects the full gravity of the overall offending. Furthermore, and very importantly in our judgment, the presence of multiple culpability A factors required there to be an uplift well above the starting point recommended in the guideline of three years. In this case an increase to around four and a half years would have been justified. The fact that the Recorder took as a starting point, before credit for the guilty plea, a period of three and a half years, and even if he has fallen into some kind of arithmetical error, does not materially alter the fact that he did have regard to the mitigation available to the appellant, and in particular his mental health issues.

30. In any event, the question at the end of the day for this court to determine is whether the sentence in fact passed is manifestly excessive. In our judgment it is not. In all the circumstances we have reached the conclusion that the sentence of 41 months' imprisonment

in total cannot be criticised by this court.

31. Accordingly, this appeal against sentence must be 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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