

NCN: [2019] EWCA (Crim) 1628  
No: 201901626 A4  
**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Wednesday, 4 September 2019

**B e f o r e:**

**LORD JUSTICE SIMON**

**MRS JUSTICE McGOWAN DBE**

**MR JUSTICE FREEDMAN**

**R E G I N A**

v

**JOSHUA CHARLES IAN DE-BANKS**

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**Ms N Hartford-Bell** appeared on behalf of the **Appellant**

**J U D G M E N T**

**LORD JUSTICE SIMON:**

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. 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 that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
  
2. On 8 March 2019 the appellant pleaded guilty to two sexual offences in the Crown Court at Oxford. There was a hearing on 29 March when the facts were opened and a discussion about the terms of a sexual harm prevention order to be imposed. On 3 April he was sentenced by His Honour Judge Ross on count 2, sexual communication with a child contrary to section 15A of the Sexual Offences Act 2003, to a term of 8 months' imprisonment suspended for 24 months, with specified requirements. On count 5, causing or inciting a child to engage in sexual activity, contrary to section 10 of the Sexual Offences Act 2003, to a term of 24 months' imprisonment suspended for 24 months with requirements. The sentences were ordered to be served concurrently and so the overall term was a custodial term of 24 months suspended for 24 months. The sentence was expressed as a term of imprisonment, but since the appellant was 20 at the date of conviction, the sentence should have been expressed as detention in a young offender institution. That should be corrected and we shall so order. In addition the appellant was made the subject of an SHPO.
  
3. He appeals against the sentence, including the terms of the SHPO, with the leave of the

single judge.

4. On 16 September 2018 the mother of the victim, JW, (who at the time was 15) contacted her local police force because her son had left home after taking 16 paracetamol tablets. Police located JW and described him as being withdrawn and refusing to engage with them. He was sectioned under the Mental Health Act and taken to hospital where he received support from the NHS Child and Adolescent Mental Health Service (CAMHS). Whilst there JW spoke to the CAMHS Unit and later opened up to police officers about the fact that he was chatting to a male called "Josh". Police officers advised JW to stop communicating with Josh but at the time they were unclear if he understood that advice. At that stage it was not possible to identify the appellant as the other party to the communications, which were of a sexual nature.
5. On 19 September officers from the South Yorkshire Police spoke again with JW (with his mother present) and the officers explained to him their concerns over contact with Josh. JW did not want the police to take any action.
6. After some further work between the family, South Yorkshire Police and Thames Valley Police, supported by JW's mother, the police identified the appellant and he was issued with a Child Abduction Warning Notice ("CAWN") on 17 October 2018. The notice notified the appellant that in the light of JW's age he was not to have any contact with him either directly or indirectly. The appellant signed the CAWN and no further action was taken.

7. On 19 December 2018 the appellant was arrested at his home and a house search was carried out. Various items including a mobile phone were seized. A phone had been found hidden in a sock among other clothes in the washing machine. The contents were subsequently downloaded and police found a number of sexual messages between the appellant and a male named "Jack". At that time it was not known who this named person was. The number was searched with the local police systems but it did not come up with any matches.
8. The messages on the download consisted of the appellant saying things like: "I'll fuck you if you want me to" and "Do you want to wank?". The messages also contained exchanges of graphic photographs of erect penises in images close to ejaculation.
9. On 28 January 2019 the appellant called the police stating that he was cutting his wrists, and officers attended. He was on bail at the time with conditions not to contact anybody under the age of 18 and the officers noted that he was acting strangely with his mobile phone. They asked the appellant if they could look at it and he agreed. They saw recent messages exchanged between the appellant and "Jackie" together with a phone number. The messages exchanged were of a sexual nature and the pair had exchanged pictures of their penises. The appellant told the officers that "Jackie" was an adult. The number was later identified as belonging to JW. It followed that the appellant had breached his CAWN and had committed further offences of inciting a child and sexual communication with a child.
10. On 4 February 2019 the appellant was arrested again. He was interviewed and told the

police that "Jack" was a male called Lewis Roper, that he was over 18 and worked at British Airways as a flight attendant. He thought he was 22 years old and lived somewhere in London near the airport. He also claimed to have seen him driving. The appellant went on to say that he had first met Jack about 2 years ago on Facebook as he was a friend's ex. Around that time he saw Jack's Facebook status saying he felt down so he messaged him to see if he was okay. He said that he did not like to see people upset or sad and wanted to cheer him up. He described their relationship as being close and they would help each other when needed. About 6 months ago he said they started exchanging sexual pictures of each other masturbating and ejaculating along with sexually explicit conversations. He said that sometimes he would be aroused by the messages and the pictures he received and sometimes masturbated himself after he received them. He said on occasions they would video call each other through WhatsApp and would masturbate together. He described Jack as being good and kind hearted and he could relate to him as they both suffered mentally, but described Jack as 'being in a better place' than him.

11. The appellant was asked about the CAWN issued in October in relation to JW. He remembered receiving it and that it meant that he was not to have contact with him until he was 16 years old. He denied having any contact with him since it was issued. He said he did not breach the CAWN and was not aware of anyone sending messages on his behalf, but said his phone was not being protected and he sometimes left it charging at his mum's and aunt's house.
12. He was asked if Lewis Roper was JW and he denied that this was so, and again denied having any contact with JW since the CAWN had been issued. When he was told the

phone number for Jack in his phone had been linked to JW he asked for a break in the interview and to speak to his solicitor. The interview was paused and when he resumed he answered "no comment" to questions put to him.

13. The appellant was aged 20 at the date of conviction and sentence. He had six previous court appearances for eight offences between 2015 and 2017. In May 2015 he had received an 8-month referral order for possession of a bladed article in a public place and using threatening and abusive words. Within a matter of weeks in June and July 2015 he was again found in possession of a bladed article.
14. In January 2016 he was made the subject of a supervision requirement for an offence under section 127(1)(a) of the Communications Act 2003. In April 2017, he was fined for damaging property and in October and December 2017 he was in breach of a non-molestation order imposed under the Family Law Act 1996 for which he was sentenced to 16 weeks' youth detention suspended for 12 months.
15. A pre-sentence report recorded that the victim of the communication offence was his sister whom he had threatened to stab after sending her a photograph of a knife. The breaches of the non-molestation order involved his sister. He was assessed as posing a high risk of serious harm to children, the risk being higher to vulnerable individuals and as a high risk of re-offending. During his most recent supervision order his attendance had been positive, but the work undertaken had been adversely affected by his chaotic presentation. The author had significant concerns about his risk and ability fully to engage with a community based sanction.

16. This was a matter that plainly affected the Judge's view of the matter. If a community-based sentence were to be imposed the report recommended a 24-month community order with a requirement to attend a Horizon Programme designed for sexual offenders, 35 days' rehabilitation activity requirement and an unpaid work requirement.
17. In passing sentence the Judge noted that the background had been hard to understand when the case had been before the court on 29 March. Some of the dates were wrong and it was unclear whether or not the offences had been committed while on bail or during the currency of a suspended sentence. It transpired that the suspended sentence to which he was subject had come to an end the day before he began his communications with JW. The Judge did not think that was accidental.
18. The Judge referred to the Sentencing Council Guidelines in relation to offences under section 10 of the Sexual Offences Act 2003. He accepted that it was category 3, the lowest level in terms of harm. The issue was in relation to his culpability.
19. There was not a huge age disparity, but there was a limited degree of grooming. The most significant aspect however, which brought the case firmly and squarely within Category 3A, was that the sexual images of JW were recorded and retained. There was no doubt about that; and the fact that the activity took place by way of digital communication made no difference.
20. The starting point for a category 3A offence was a term of 26 weeks, with a range between a high level community order and 3 years' custody. However, the Judge concluded that

the appellant had caused severe harm to JW.

21. It was clear, in the Judge's view, on the bases of the available material that the result of the appellant's communication with him had caused JW to change his behaviour, fleeing from home, taking an overdose and subsequently being admitted to psychiatric care under the Mental Health Act order. We should note at this point that the grounds of appeal advanced by Ms Hartford-Bell take sharp issue with this statement of fact. The Judge added that there also seemed to have been some offending after the appellant had received the CAWN. It was not that he was offending on bail but some analogy could be drawn. It was an aggravating feature that although not subject to a suspended sentence at the time, he had begun his offending in relation to JW the very day after that suspended sentence came to an end. The Judge accepted that it was not an easy sentencing exercise and he accepted that the appellant's age and lack of maturity had an impact on his responsibility. The Probation Service regarded him as being at a high risk of re-offending and a medium risk of causing serious harm to others. They also had significant concerns about the risk he posed and his ability fully to engage with a community based sanction. He had lied in interview and had not entered pleas until the indictment was put to him. His credit for plea was therefore 25%. The Judge concluded that after trial, despite his age and the sentence would be discounted for that, the sentence would have been 32 months' imprisonment. With 25% credit the sentence on count 5 would be reduced to 24 months. This sentence would be suspended for two reasons: first, having served 7 weeks in custody the appellant knew what it was like; second, the length of the period that would be served on licence if there were an immediate custodial sentence would be insufficient to complete the Horizon Sexual Offending Programme for which there was considerable evidence of success. The

court understood the concerns of the Probation Service as to his engagement with that programme but concluded that the sentence should be suspended with requirements: first, every month the court would receive a progress report on his engagement and he would attend the court for a revue; second if there were any sign that he was failing to engage and the order was not working or if he missed any appointments the court would be sending him immediately back to custody to serve the sentence that had been suspended. In the Judge's view this was the most effective sentence on count 5 because it was the most likely to provide long-term protection. On count 2 there would be a concurrent sentence of 8 months likewise suspended. By virtue of the nature of the sentence he would be subject to supervision by the Probation Service for the next 2 years. During that 2-year period he would reside as directed by his supervising officer. He would attend and successfully complete the Horizon Programme for sex offenders. He was required to register as a sex offender. He would undertake unpaid work for the community for 200 hours. The Judge ended his remarks by saying that he was a sex offender and it was time that he acknowledged that. He felt more sorry for himself than for others and needed to remember that JW took his overdose because of what he did. Of that the court was not in doubt.

22. The court had earlier made a SHPO until further order as amended following discussions. If he failed to comply with any of the conditions (and that meant a single missed appointment for unpaid work or the Horizon Programme or supervision) then he would be brought back to court for sentence and he would go into custody. The court covered the supervision aspect by way of a 35-day rehabilitation activity requirement. The court set a date for his first appearance for review of 7 May 2019.

23. In the grounds of appeal Ms Hartford-Bell makes essentially two points. First, she submits that the Judge repeatedly approached the sentencing on a false basis to the discredit of the appellant. The second, in any event, insufficient account was taken of the appellant's personal mitigation. The fact that he was a vulnerable and immature young man with many disadvantages in his background, under the care of the Social Services. In addition, Ms Hartford-Bell submitted that the sentence of imprisonment was wrong in principle and manifestly excessive in length. She submitted that it was not a category 3A offence and she drew attention to the particular circumstances of the offender with his troubled background.
24. Finally and in any event, she submitted that no SHPO should have been made and/or, if made, it should not have been in the terms that it was. She further argued that it was too long and without limit and its terms were not necessary to protect the public from serious sexual harm from the appellant.
25. In our view it is clear that the Judge erred in a significant respect when passing sentence. He regarded it as material and such as to make the offending more serious that the appellant's crimes had caused JW to change his behaviour, flee from home, take an overdose and subsequently be admitted to psychiatric care under the Mental Health Act order. This was however to misunderstand the chronology. The indictment charged the appellant on both counts with conduct spanning 1st December 2018 and 4 February 2019. The factual matters relied on by the judge occurred in September 2018 before the CAWN was issued in October. What the Judge regarded as a most significant aggravating circumstance was not.

26. Nevertheless, in our view the Judge was entitled to view the offending as falling within category 3A. The appellant had been warned and had disregarded the warning. There was an element of grooming and the sexual images of JW had been retained. The starting point for such an offence was a term of 26 weeks' custody. The previous convictions were aggravating circumstances but his vulnerability and immaturity were mitigating factors.
  
27. In our view, the sentence of 24 months suspended for 24 months was not an appropriate sentence in the circumstances. The offending should have led to an overall sentence of 12 months before credit for the plea and with credit of 25% to a term of 9 months. Accordingly, we quash the sentence of 24 months and substitute a sentence of 9 months' detention suspended for 18 months. The unpaid work requirement will be reduced from 200 hours to 100 hours however the other conditions will remain unaffected.
  
28. So far as the SHPO is concerned, the nature of the offending required that JW should be protected from himself however willing or unwilling he was to engage with the appellant. No point was taken at the time as to any of the terms and the general assertion that its terms were not necessary was not sustained. Nevertheless, we regard it as necessary to make it clear, if it was not clear from its terms, and there was certainly ambiguity created by the judge's observation, that it is limited to a period of 10 years and is not without limit.
  
29. To that extent, the appeal will be allowed.