

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

Neutral Citation No. [2022] EWCA Crim 1743

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202203256/A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 15 December 2022

Before:
LORD JUSTICE DINGEMANS
MRS JUSTICE McGOWAN DBE
HIS HONOUR JUDGE PICTON
(Sitting as a Judge of the CACD)

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

REX
V
LUKE FORDE

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR B LLOYD appeared on behalf of the Attorney General
MR M BAGNALL appeared on behalf of the Offender

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction and issues

1. This is an application on behalf of His Majesty's Attorney General for leave to refer a sentence to the Court of Appeal Criminal Division which the Attorney General considers to be unduly lenient.
2. On 1 September 2022 the respondent, Mr Forde, who is a 30-year-old man of previous good character, appeared in the Magistrates' Court and indicated guilty pleas to all charges. On 14 October 2022 in the Crown Court at Basildon, Mr Forde was sentenced to an overall sentence of two years' imprisonment suspended for two years, with requirements to attend a Horizon Programme, to undertake 120 hours of unpaid work and 40 days' rehabilitation activity requirement in respect of 20 separate counts, varying from attempted sexual communication with a child, (section 15A of the Sexual Offences Act 2003) attempted incitement of a child under 13 to engage in sexual activity (non-penetrative) (section 8 of the Sexual Offences Act) and attempted incitement of a child to engage in sexual activity (section 10 of the Sexual Offences Act) making indecent images, and possession of extreme pornography.
3. Mr Lloyd on behalf of the Attorney General submits that the judge erred in not placing the offences within Category A of the relevant sentencing council guideline for inciting a child to engage in sexual activity. Even if the judge had been entitled to reject planning and grooming, there was a "significant disparity of age" with Mr Forde being aged 28 at the start of the offending period and the youngest child being aged 13 and 14. On this basis the starting point for a single count in Category 1A was five years' imprisonment for the attempted incitement of a child to engage in sexual activity and whilst the starting point required downward adjustment to reflect the fact that the activity was attempted and

no sexual activity took place (see R v Reed [2021] EWCA Crim 572, [2021] 1 WLR 5429) a final custodial sentence of two years was just too low.

4. Secondly, it was submitted that even if the judge was entitled to approach the offending on the basis of his categorisation, then the judge failed adequately to adjust the appropriate sentence for one offence to reflect the fact that this was a case of repeated and sustained offending against a large number of individuals. The judge failed to pass a sentence that was just and proportionate in accordance with the totality guideline. It was submitted that even having regard to full credit for pleas of guilty a sentence far in excess of two years' imprisonment should have been imposed, meaning that the issue of suspension simply did not arise.
5. Finally, it was submitted that even if a custodial sentence of two years was justified it ought not to have been suspended. Having regard to the factors set out in the Imposition of Community and Custodial Sentences Guideline this was a case in which appropriate punishment could only be achieved by immediate custody.
6. Mr Bagnall submitted on behalf of Mr Forde that there was in fact no "significant disparity of age" within the meaning of the relevant guideline. This was a 28-year-old man who had stayed at home and taking the attempted incitement of a child offences and the reported age of the person with whom Mr Forde was communicating that difference did not amount to a significant disparity of age for the purpose of the guideline.
7. On the second ground of appeal it was submitted that the judge had had sufficient regard to totality because if one looked for example at the section 9 guideline and took it as a Category 1B starting point, that would have a starting point of one year with a category range of high level community order to two years' custody. The respondent had the benefit of an early guilty plea, the fact that these were contemplated offences for which

the downward adjustment was relevant and his previous good character. Therefore it was submitted that the judge had been entitled to take the overall aggregate sentence of two years and to suspend it.

8. As to the final point, particular reliance was placed on the judge's own remarks that nothing would have been gained by imposing an immediate sentence of custody on this individual. The judge had seen Mr Forde and was well able to take into account all the materials that had been provided about him and that included references which we have seen, from family members and those close to him.

Factual circumstances

9. So far as the relevant facts are concerned, the offending related to Mr Forde's conduct on the social media platform KIK using the profile "bored lad" and his interactions with an undercover police operative for one offence - and that was one of the 16 separate people that he had apparently contacted online - and interactions with apparently genuine children. The offending occurred between autumn 2020 and late 2021.
10. Each of the offences were charged as attempted offences because it was not possible to identify the children and their respective ages with any clarity. Some of the children or purported children gave ages online but of course, as Mr Bagnall fairly pointed out, it was impossible to determine whether those ages were genuine or whether the others were people masquerading as children online.
11. As a result of Mr Forde's activity on the internet, in particular with the undercover police officer, police attended his home address in Westcliff-on-Sea on 24 November 2020. The door was answered by Mr Forde's mother who indicated that Mr Forde was upstairs. Mr Forde was told that he was under arrest and he and his mother became very emotional which delayed his arrest. Eventually he was cautioned and taken into custody. Police

carried out a search. Photographs were taken. A pair of underpants were discovered, which we have seen on the DCS, which bore a close resemblance to those depicted in the profile image of "bored lad" and the police seized Mr Forde's iPhone and laptop. The iPhone was found to contain indecent images. In addition the police recovered from it chat records that formed the basis for the offences involving 16 separate persons. Counts 17 to 19 reflected indecent images of children and count 20 reflected possession of an extreme pornographic image.

12. So far as count 1 was concerned, which was attempting to engage in sexual communication with a child (section 15A), that reflected Mr Forde's interaction with "Hannah" a female child purporting to be 14 years old. The offending took place between 2 October 2020 and 5 October 2020. The transcript from the telephone showed that Mr Forde had indicated his age as being 28. Hannah replied that she was half his age. Mr Forde recognised that he should not be talking to Hannah but still continued to communicate. He told her that it should be illegal for her to be as hot at her age so that people like him did not get tempted. He commented on a picture of her in a bikini and told her that it was her fault and that he was enjoying the view. He explained how he could seek her out and not rape her but indicated a preference for rough consensual sex, to which Hannah replied, "Yeah I'm 14 and that's still rape". Mr Forde then went on to ask various other sexual questions.

13. Count 2 was attempting to incite a child under the age of 13 to engage in sexual activity (section 8) and this was non-penetrative. This was the offence committed with the undercover police officer who had adopted the profile of a 12-year-old girl called "Ellie". The conversation took place between 27 September and 21 October 2021. Mr Forde started communicating on 27 September when he messaged Ellie with, "Hey, how you

doing." He then sent her a picture of his profile with him in his underpants and he asked for ASL - which is age, sex and location - to which Ellie had replied: "12, UK and female". He continued to chat. He told her he was jerking off but could not show her that because she was 12. The conversation continued on and off. Mr Forde then told her he was in bed and horny and that she was a "horney kinky fuck" and that he was watching porn and she should take her clothes off and watch some, and that she may want to rub herself. He asked her on 15 October if she tried rubbing herself and the more she did it the more it would be easier to have sex eventually.

14. On 20 October he told her that she looked pretty cute and when asked for a picture he said: "I can't put my face out there talking to someone your age ... not that I've said anything too bad but I very easily could ... just know that it is pretty naughty".

15. Count 3, which is the last one on which it is necessary to give some detail about because the criminal activity in each count was similar to each other, involved Mr Forde's communication with "Spam". Spam purported to be 15 years old. Communication started on 21 September 2020. Mr Forde said: "Hello you nasty little whore" and "How you doing?" Spam replied: "Guess" and Mr Forde replied: "Very very horny?" Spam replied: "Of course" and Mr Forde replied: "I reckon you should send me a pic and remind me of what you look like. I lost our convo." A picture was then sent of a female taking a selfie in front of a mirror. The female was in underwear. The face was seen but the age was undetermined. Mr Forde replied: "Jeeez I remember you now" and "You have the hot slutty mum as well don't you?" Spam replied: "Of course". Mr Forde replied: "Let's see her too, my cock needs more waking up." Spam then sent a picture of a female from behind wearing knickers and a top and a female looking back towards the camera over her right shoulder. The age remained undetermined. Mr Forde replied:

"Very good definitely remember you now ... Now both of you come and ride my hard cock." Spam said: "Nice try" and Mr Forde replied: "Everyone likes a trier ... I'd honestly fuck you so hard ... you got an unreal body, just wanna split those legs as wide as they'll go." Spam then sent him a picture of a female genital area with legs spread and a hand touching the vagina. No face was seen and the age remained undetermined. Mr Forde replied: "Holy fuck, don't think I've ever seen your pussy ... Then I'm gonna lick that tight pussy until you beg for my dick." Spam replied: "I don't think you'll take that long."

16. There was more of the conversation which it is not necessary to repeat, before Spam sent a picture of her breasts and Mr Forde replied "... at 15 that's Pretty big" and Spam said: "They've been that size since I was 11" and Mr Forde replied: "Whaaaat, that's crazy." The conversation continued until 22 September 2020 and restarted on 15 February 2021 along the same lines.

17. Counts 4, 5 and all the other counts contain a similar type of conversations and offending until one comes to counts 17, 18 and 19 where there were indecent images found in Mr Forde's devices, 17 within Category A, 15 within a Category B and 26 within Category C. There is a Thompson Schedule which we have read. The Category A material involved penetrative activity with children as young as five. Count 20 was for possession of extreme pornography which showed a single image depicting a young female lying on her back with a dog licking her vagina.

18. There were 16 separate victims of this offending, one of whom it was known was a police officer.

The sentencing remarks

19. The judge noted that it was not known who the people were that the offender was conversing with. They were apparently children although one was an undercover police

officer. What was known was that Mr Forde thought he was communicating largely with girls who were in their early teenage years. It was also clear that Mr Forde knew what he was doing was wrong and that what he was suggesting to them was also wrong. There were 20 counts. The judge recorded that he had to consider whether to send Mr Forde to prison for quite a considerable period of time. The judge took account of the defence submissions that to place these in Category A for the purpose of the guidelines would be to miss the point of what was actually going on and to stretch the language of the guidelines. The judge indicated that he rejected the prosecution submissions that the offences were within Category A, meaning that there was no five-year starting point. The defence had submitted that these were always two-way conversations and that the disparity of age was not in fact great, as envisaged by the guideline. The defence also relied on the fact that there was no sexual activity which had taken place and that Mr Forde should have full credit for his pleas of guilty. There were no previous convictions and there were references. Although the offences crossed the custody threshold, there was no benefit to society by actually sending Mr Forde to prison and the judge said he would pass the appropriate sentence but then suspend it. He imposed a sentence of two years' imprisonment suspended for two years, with the community requirements already indicated.

Decision on the appeal

20. In our judgment it is not necessary to resolve the issue raised by the first ground of appeal which is whether there was a “significant disparity in age” for the purpose of the guidelines. There are obviously points that can be made both ways about the wording of the sentencing council guidelines on inciting a child to engage in sexual activity, contrary to section 10, and the meaning of “significant disparity of age” in this case given the

evidence about Mr Forde's chronological development. Further any starting point would need to be adjusted to reflect the fact that it was an attempt and no sexual activity took place. In our judgment it ought to be reserved to a case where it does arise and it is necessary to determine.

21. That then leaves the second point which was advanced on behalf of the Attorney General which was that in aggregate this offending was too serious to result in a sentence of two years' imprisonment. The judge, it was submitted, must have failed to take into account the totality principle set out in the relevant over-arching guideline because the sentence was not just and proportionate.
22. We have noted the points that have been raised on behalf of Mr Forde. The fact is that this was an individual (Mr Forde), aged 28, still living at home and of previous good character, with a chronological development which did not match his actual age. We also have seen the pre-sentence report which was referred to and the various references which were written but in our judgment we do not consider that it is possible to say that the judge has fairly reflected all of Mr Forde's criminality in the sentence that was passed. With 16 separate purported victims of this offending, with the nature of the discussions, some of which have been set out in the judgment, and the nature of the offending and criminality which was carried out by Mr Forde, we consider that the judge, even taking into account the starting points and sentences which he imposed, was required to make at least some of the offending consecutive to each other to have fair regard to the principle of totality and to reflect the overall criminality.
23. We have decided that leave ought to be granted for the Reference. The Attorney's Reference should be allowed to the extent that the sentence on count 2 remains that of two years and the sentence on count 3 remains that of two years but rather than being

concurrent it is made consecutive. That gives an overall sentence of four years' imprisonment which it is not lawful to suspend. All the other sentences remain concurrent as before. To that extent therefore the Reference is allowed in that the sentence on count 2 becomes one of two years' imprisonment, not two years suspended, and the sentence on count 3 becomes one of two years' imprisonment, not suspended but consecutive to the sentence on count 2.

24. We are very grateful for the submissions made on behalf of the Attorney General and the respondent.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk