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IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Case No: 2023/03191/A2

**[2023] EWCA Crim 1640**



Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Thursday 14<sup>th</sup> December 2023

**B e f o r e:**

**MR JUSTICE TURNER**

**and**

**SIR ROBIN SPENCER**

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**R E X**

**- v -**

**DYLAN JOSHUA BENJAMIN MARSHALL**

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**Mr T Roseman** appeared on behalf of the Appellant

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



Thursday 14<sup>th</sup> December 2023

**MR JUSTICE TURNER:**

1. On 13<sup>th</sup> June 2023, having pleaded guilty to three charges relating to indecent images of children before the Colchester Magistrates' Court, the appellant (then aged 21) was committed for sentence to the Crown Court, pursuant to section 14 of the Sentencing Act 2020.

2. On 23<sup>rd</sup> August 2023, in the Crown Court at Chelmsford, the appellant was sentenced to 30 months' immediate imprisonment in respect of each count of making an indecent photograph of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978, to run concurrently with each other. The individual charges related to categories A, B and C images. A number of ancillary orders were made, most of which are not the subject of appeal, save in relation to the duration of the notification requirements and the Sexual Harm Prevention Order.

3. The appellant appeals against sentence with the leave of the single judge.

4. The facts are these. On 1<sup>st</sup> October 2022, on receipt of information, police officers executed a search warrant at the appellant's address and seized his iPhone. On it they found 35 category A indecent images of children. 17 were unique, of which eight were videos and nine were images. These had been created between March and July 2022. The total duration of the videos was four minutes and 54 seconds. In relation to Category B, there were four unique videos, created between April and May 2022, the duration of which was one minute and 12 seconds. There were also 53 Category C images: 25 unique images, which were 21 images and four videos, created between March and September 2022; the duration of the videos was one minute and 42 seconds. The identity of the children concerned was never

ascertained.

5. The appellant made no comment in interview, save to say that he had never seen any indecent images of children and was not a risk to children. He was interviewed again several months later and stood by his initial statement. He declined to comment on most of the questions that were put to him.

6. The case against the appellant proceeded on the basis that the making of the images under subsection (a) was to be treated as amounting to possession for the purposes of sentence and the application of the relevant sentencing guideline. Such an approach gave rise to a starting point of one year's custody, with a category range of 26 weeks to three years.

7. During the course of the sentencing hearing the prosecution opened the case on this basis when the judge intervened. He pointed out that in the pre-sentence report the appellant had given a full account of his offending to the author, which involved an admission that he had sent indecent images to people with whom he was in contact in a network on the internet. He had also admitted that these images were of girls he knew.

8. Thereafter, the judge proceeded on the basis that the case fell to be sentenced not within the category of possession in the guideline, but of distribution, which provided for a starting point of three years' custody and a category range of two to five years. The judge appeared to have abandoned an earlier suggestion that this may have been a case of production in the absence of evidence that the appellant had actually created the images in the first place. It was an aggravating feature that the images were of children he knew. Taking into account the appellant's good character, his mental health difficulties, abusive upbringing and the remorse he had shown, the judge came down from the starting point to 45 months, before allowing a discount of one third to reflect his guilty pleas. By this route she reached the

sentence of 30 months' imprisonment on each charge, to run concurrently.

9. The judge did not appreciate, however, that the offence of distribution of indecent photographs comprises a separate offence to that of making them. The former is created by section 1(1)(a) of the Protection of Children Act 1978, and the latter by subsection (b). It was simply not open to her to sentence on a basis that a different offence to that to which the appellant had pleaded guilty had been committed. If authority were needed for this proposition, it may be found in *R v Canavan* [1998] 1 WLR 604, in which this court held that sentences should reflect only the offences of which the defendant has been convicted or has pleaded guilty. Accordingly, the judge's approach to sentence was wrong in principle.

10. The author of the pre-sentence report recommended that an appropriate course would be to order that the appellant should be made subject to a community order of 24 months' duration, with the requirements that he complete an accredited programme requirement of 40 sessions and a rehabilitation activity requirement of at least 38 days. He suggested that the punitive element of any order could be addressed by an unpaid work order.

11. It is to be noted that the guideline provides that where there is a sufficient prospect of rehabilitation, a community order with a Sex Offender Treatment Programme requirement under section 202 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentences.

12. In the circumstances, we quash the sentences of imprisonment and accede to the recommendation of the author of the pre-sentence report, to the extent that the appellant will be the subject of a community order with the requirements we have identified.

13. The appellant having already served nearly four months in custody, we do not consider it

appropriate at this stage to impose any additional punitive sentence, whether by making an unpaid work order or otherwise.

14. In order to reflect the reduction in sentence, we reduce the period of notification and the period under the Sexual Harm Prevention Order to one of five years, rather than ten years. That period is to commence on the date of conviction, namely 13<sup>th</sup> June 2023.

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