IN THE COURT OF APPEAL
CRIMINAL DIVISION
Case No: 2022/03421/A3
[2023] EWCA Crim 370

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 14th March 2023

B e f o r e:

VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE HILLIARD

MR JUSTICE CHAMBERLAIN

R E X

- v -

PAUL HARRIS

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Mr P Pride appeared on behalf of the Appellant

Miss I Delamere appeared on behalf of the Crown

J U D G M E N T

Tuesday 14th March 2023

LORD JUSTICE HOLROYDE: I shall ask Mr Justice Chamberlain to give the judgment of the court.

MR JUSTICE CHAMBERLAIN:

1. On 20th June 2022, in the Crown Court at Aylesbury, the appellant Paul Harris pleaded guilty to four counts on an indictment: arranging or facilitating the commission of a child sex offence, contrary to section 14 of the Sexual Offences Act 2003 ("the 2003 Act") (count 1); making indecent images of a child, category B (count 2); and making indecent images of a child, category C (counts 3 and 4).

2. On 26th October 2022, Her Honour Judge Tulk imposed a sentence of seven and a half years' imprisonment, after credit for the guilty plea, on count 1. No separate penalty was imposed on counts 2, 3 and 4. A Sexual Harm Prevention Order was imposed and an order for forfeiture and destruction of the devices on which the images were stored was made.

3. The appellant appeals against sentence by leave of the single judge. It is contended that it was manifestly excessive.

The Indictment and the Relevant Statutory Provisions

4. The indictment alleged that between 8th July and 4th August 2021, the appellant had "intentionally arranged or facilitated an act which he intended to do in any part of the world, which would involve the commission of an offence under any of sections 9 to 13 of the Sexual Offences Act 2003, namely sexual activity with a child".

5. Sexual activity with a child is the offence created by section 9 of the 2003 Act. At the

time the offences were committed, this was the most serious of the substantive offences whose arrangement or facilitation was prohibited by section 14. However, with effect from 28th June 2022 that provision was amended to cover arranging or facilitating a wider range of substantive offences, including, in addition to those previously listed, those created by sections 5 to 8. Section 5 creates the substantive offence of rape of a child under 13.

The Facts

6. The appellant engaged in online chats via social media with two individuals, "Nick" and "Lucy", who he believed were the parents of three children: a 10 year old girl, described as "non-verbal" and autistic; a 7 year old boy; and a 2 year old girl. "Nick" and "Lucy" were in fact undercover police officers and the children were fictional.

7. "Nick" explained to the appellant that the children had been trained over many years to be abused and were available for others to abuse at the discretion of "Nick" and "Lucy". The appellant described to "Nick" his sexual interest in children and claimed to have engaged in sex acts with children approximately 40 years ago. He said that he would like to meet "Nick" and "Lucy" and wanted to have full penetrative vaginal and anal sex with the 10 year old girl, to engage in oral and anal penetration of the 7 year old boy, and oral penetration of the 2 year old girl.

8. During the online chats the appellant questioned how and where the sexual activity would take place. "Nick" confirmed that penetrative sexual activity would take place in the bedroom, with "Nick" watching, and that the appellant would then watch "Nick" rape the 10 year old girl. The plans were discussed in considerable detail in several telephone calls between the appellant, "Nick" and "Lucy". The appellant asked whether he could ejaculate inside the 10 year old, to which "Nick" said no; and whether he could perform oral sex on the 2 year old. It was agreed that the appellant would bring sweets.

9. Arrangements were made for the appellant to meet "Nick" and "Lucy" with the children at a house in Milton Keynes on 3rd August 2021. The appellant said that he had booked a day off work for this purpose.

10. He then travelled from his home in Daventry to the agreed meeting point by car. He stopped en route to buy sweets and condoms. These, along with Viagra and the phone recording the online chat, were found when the car was searched after the appellant's arrest at the meeting point.

11. On the phone were four category B indecent photographs of children (the subject of count 2). When his home was searched, police found an iPad on which were stored the category C images (to which counts 3 and 4 related). The indicative search terms the appellant had used included references to incest and special needs related paedophilia.

12. In interview, the appellant admitted that it had been his intention to have penetrative sex with the 10 year old, receive oral sex from the 7 year old, and lick the vagina of the 2 year old. He could not be 100 per cent sure that he would have gone through with it, but he may have done. He said that comments about his previous abuse of children were fantasy. They were made to keep "Nick" and "Lucy" engaged.

The Sentence

13. The judge took count 1 as the lead offence and indicated that she would treat counts 2, 3 and 4 as aggravating it. She noted that she had initially not understood why count 1 had been arranging or facilitating sexual activity with a child, since the most serious offence which the appellant would have committed, if he had gone through with the plan, was rape of a child under 13. However, section 14 had been amended with effect from 28th June 2023. The

consequence, the judge said, was that if the offending had occurred 11 months later, it would have had a maximum sentence of life imprisonment, and the guideline would have been very different too.

14. The judge found that there was no doubt that when he set off on 3rd August 2022, the appellant intended to commit the offences discussed. She noted that these facts placed the offence in category 1A in the Sentencing Council guideline for the section 9 offence. That gave a starting point of five years' imprisonment, with a range of four to ten years. However, the judge regarded it as significant that had the offence been committed 11 months later, the maximum sentence would have been life imprisonment, with a starting point of 16 years and a range of 13 to 16 years. She considered that she had to take into account current sentencing practice. The maximum was now significantly higher. She had to made allowance for the fact that these were not real children, so no activity took place, or could have taken place. She also bore in mind that up to the age of 58 the appellant had led an exemplary life (apart from what was going on late at night on his computer), and that his relationship with his wife, children and grandchildren had been destroyed.

15. The judge said that the shortest term she could impose was one of ten years' imprisonment, before credit for the guilty plea, giving seven and a half years, to reflect the guilty plea at the plea and trial preparation hearing.

Discussion: The Law

16. Section 59 of the Sentencing Codes provides as follows:

> "(1) Every court —
>
> (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and

> (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,
>
> unless the court is satisfied that it would be contrary to the interests of justice to do so."

17. The Sentencing Council guideline for the offence of arranging of facilitating the commission of a child sex offence provides as follows:

> "When sentencing a section 14 offence, sentencers should refer to the guideline for the applicable substantive offence of arranging or facilitating under sections 5 to 12 …"

It goes on to indicate, however, that the guideline for the substantive offences created by sections 5 to 8 are of relevance only where the offence is committed on or after 28th June 2022. In our view, this is the correct approach, and nothing in the case law undermines it.

18. In *R v H* [2011] EWCA Crim 2753, [2012] 2 Cr App R(S) 21, this court considered and gave general guidance on "issues which arise in the context of crimes brought to justice many years after they were committed, sometimes described as 'historic' or 'cold cases'": see [1]. It made clear that its conclusions were not confined to sexual crime: see [5]. The principles enunciated by the court at [47] include these:

> "(a) Sentence will be imposed at the date of the sentencing hearing, on the basis of the legislative provisions then current, and by measured reference to any definitive sentencing guidelines relevant to the situation revealed by the established facts.
>
> (b) Although sentence must be limited to the maximum sentence at the date when the offence was committed, it is wholly unrealistic to attempt an assessment of sentence by seeking to identify in 2011 what the sentence for the individual

> offence was likely to have been if the offence had come to light at or shortly after the date when it was committed. Similarly, if maximum sentences have been reduced, as in some instances, for example theft, they have, the more severe attitude to the offence in earlier years, even if it could be established, should not apply.
>
> (c) As always, the particular circumstances in which the offence was committed and its seriousness must be the main focus. …"

The court noted that this approach did not offend article 7 of the European Convention on Human Rights, or the common law prohibition on retrospective penalisation, provided that the sentence imposed did not exceed the maximum that could have been imposed when the offence was committed: see [18] and [19]. This was reiterated in *R v Clifford* [2014] EWCA Crim 2245, [2015] 1 Cr App R(S) 32, at [38] and [40].

19. The reasoning in *H* was reflected in the definitive guideline on historic sexual offences published in 2013, which applied to offences under the Sexual Offences Act 1956, or other legislation predating the 2003 Act. Paragraph 3 of Annex B to that guideline provided as follows:

> "The court should have regard to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003."

20. In *R v Forbes* [2016] EWCA Crim 1388, [2016] 2 Cr App R(S) 44, Lord Thomas CJ, with whom the other members of the five-judge constitution agreed, made clear that the intention was that historic offences should be sentenced "by measured reference to" the current guideline. This meant that the judge should not simply apply the current guideline, subject to any maximum applicable at the time, but should use it in a "measured and reflective manner" to arrive at the appropriate sentence: see [9]. This applied to the selection

of an "equivalent offence" and also to the determinate of the appropriate sentence, having regard to that guideline, as adjusted by reference to the maximum sentence applicable to the offence charged; see [10]. In selecting the equivalent offence, the judge might have to refer to more than one guideline: see [12].

21. The guideline for historical sexual offences has since been updated to reflect this reasoning, so that it now provides as follows:

> "The court should sentence by measured reference to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003."

22. In our judgment, the problem under consideration in *H*, *Clifford* and *Forbes* was one which arose in the particular situation where the offence of which the offender had been convicted was "historic" in the sense that it was one for which there was no currently applicable guideline. That was what necessitated the identification of an equivalent offence.

23. In the case with which we are concerned, by contrast, the appellant was convicted of the offence of arranging or facilitating the commission of the section 9 offence. That is not a historic offence in the sense in which that word was being used in *H* and subsequent cases. It is an offence of which he could still be convicted today, and for which there remains an applicable guideline. That guideline, and no other, was "relevant to the offender's case" for the purposes of section 59(1)(a) of the Sentencing Code. In our view, the judge was therefore mistaken in referring to the guideline for the section 5 offence.

24. Comprehensive guidance on the section 14 offence is given in *R v Privett* [2020] EWCA Crim 557, [2020] 2 Cr App R(S) 45. The offence is a preparatory one, which is complete when the arrangements for the commission of the offence are made, or the intended offence

has been facilitated. Guilt is not dependent on the completed offence happening, or even being possible. So, the absence of a real victim does not reduce culpability: see [59] and [60]. The correct approach to sentencing is to identify the category of harm on the basis of the sexual activity the defendant intended, and then to adjust the sentence to ensure that it is commensurate with, or proportionate to, the applicable starting point and range if no sexual activity had occurred, including in cases where the victim was fictional: see [68].

Discussion

25. Was the sentence imposed on the appellant manifestly excessive? The judge was entitled, on the evidence, to conclude that the appellant intended to commit the offences he had arranged to commit. He had said so himself when interviewed by the police. Moreover, his admissions were consistent with the items found in his car.

26. Under the guideline for the section 9 offence, there was no doubt that these were category A offences in terms of culpability: there was a significant degree of planning; there was an abuse of trust, because the offence was to involve the parents of the fictional children; there was specific targeting of a vulnerable child, because the 10 year old was said to be non-verbal and autistic and there was evidence that the appellant had a particular interest in children with special needs; and there was a significant disparity in age. There was also no doubt that the harm was in category 1, because the appellant intended to penetrate the girl vaginally and anally, and to watch while her father did so. These elements alone would place this offending near the top of the range for the section 9 offence. In this case the plan involved the abuse of three children and was truly depraved. It included oral and anal penetration of the 7 year old boy, and abuse involving oral penetration of the 2 year old girl. The children were to watch their siblings being abused in the presence of their parents and with their parents' complicity.

27. In our judgment, completed offences on these facts would justify a starting point right at the top of the category range for the section 9 offence. A modest uplift would be justified to reflect the indecent images offences, for which no separate penalty was imposed. A reduction would then have to be applied to reflect the fact that these were not completed offences because, although the appellant had gone some distance towards executing the plan, the fact remained that no real children were harmed.

28. It should also be borne in mind that the precise details of the plan reflect a scenario created by undercover police officers, albeit one with which the appellant was happy to go along. A further reduction was called for given that the appellant had no previous convictions and to reflect the complete destruction of his relationship with his wife, children and grandchildren.

29. Taking all these matters into account, a sentence of ten years' imprisonment, before credit for the guilty plea, was in our judgment manifestly excessive. We consider that the correct sentence was one of eight years' imprisonment, before credit for the guilty plea, giving a sentence of six years' imprisonment, after taking account of the guilty plea at the plea and trial preparation hearing.

30. We shall therefore quash the sentence imposed by the judge and substitute a sentence of six years' imprisonment. To that extent the appeal is allowed.

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