[2024] EWCA Crim 399
IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202300256/A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 26 January 2024

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE GRIFFITHS

HER HONOUR JUDGE ANGELA RAFFERTY KC
(Sitting as a Judge of the CACD)

REX

v

JOHN PETER NOBLE

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR R DAVIES appeared on behalf of the Appellant.

J U D G M E N T

1. **MR JUSTICE GRIFFITHS**: This is an appeal against sentence. On 19 July 2021, the Honorary Recorder of York (HHJ Morris) passed an extended sentence on the appellant of 14 years, made up of a custodial term of 10 years and an extended licence period of 4 years. The appeal is against the custodial element only.

2. The appellant was 36 years old. The sentence was for nine sexual offences and included activation of part of a previous suspended sentence for four sexual offences. The sentencing on all nine of the current offences and also the activated suspended sentence on the previous four matters was concurrent.

3. The nine offences being sentenced for the first time were eight offences of arranging the commission of a child sex offence, contrary to section 14 of the Sexual Offences Act 2023, and one offence of attempting to breach a sexual harm prevention order, contrary to section 1 of the Criminal Attempts Act 1981.

4. The four offences in respect of which a previously suspended sentence was activated were attempting to engage in sexual communication with a child aged 12, attempting to engage in sexual communication with a child aged 14, attempting to cause or incite a girl aged 12 to engage in sexual activity and attempting to cause or incite a girl aged 14 to engage in sexual activity. For each of these four offences the original sentence of the Recorder of York had been 24 months, suspended for 24 months, concurrent.

5. Although it is clear from the sentencing remarks that the judge's final sentence was an extended sentence of 14 years, including a custodial term specified in the court record as 10 years, the way in which this was distributed between the nine current offences and the activated sentences on the other four matters is less clear from those remarks alone. We will come back to that because it is possible to clarify the details by looking at other materials and it is desirable that the record should be clear and correct about the individual sentences as well as in respect of the overall sentence to be served.

6. The facts of the original four offences were that the appellant had sexual conversations by telephone with what he believed to be a 12-year-old girl, although she was in fact a paedophile hunter group decoy of full age. He asked her to engage in sexual activity with him, and on herself. These were the offences of attempting to engage in sexual communication with a child aged 12 and attempting to cause or incite a girl aged 12 to engage in sexual activity. A police investigation then found chats with another decoy purporting to be a 14-year-old girl, and these formed the basis for the offences of attempting to engage in sexual communication with a child aged 14 and attempting to cause or incite a girl aged 14 to engage in sexual activity. There were 10 category C images on a phone that was seized at the time, which gave rise to two charges of making

and distributing indecent images of the child. No separate penalty was imposed for the image offences. The suspended sentence of 2 years suspended for 2 years was passed on the other matters on 19 September 2019. A sexual harm prevention order was also imposed until further order.

7. On 17 March 2021, the appellant began to have communications with a person who presented herself as a single mother called "Louise" who had two daughters aged 4 years and 4 months old respectively. She was in fact an undercover law enforcement officer. The contact began on a social networking app called "Similar World". The officer followed up a message from the appellant in a group about incest, asking about mothers sexually involved with their daughters. She and the appellant exchanged numbers and began to message on WhatsApp and then by telephone call. The appellant referred to his sexual harm prevention order. The appellant showed enthusiasm for what Louise told him about being a mother sexually involved with her own young daughters. They began to make plans about what the appellant hoped to do with Louise and her fictitious 4-year-old daughter at his flat in Ripon.

8. The plans were developed over the period 17 March to 1 April. They included plans for the appellant to have vaginal sexual intercourse with the 4-year-old (two charges, namely offences 1 and 2); plans for the appellant to perform oral sex upon her (offence 3); the appellant causing or intending to cause Louise to make the 4-year-old masturbate on the journey to meet the appellant (offence 4); the appellant himself intending to masturbate over the child and ejaculate on her (offence 5); the appellant intending to teach Louise to teach the 4-year-old how to masturbate the appellant's penis with her hand (offence 6); the appellant intending Louise to make the child urinate into a glass for the appellant's sexual gratification (offence 7) and the appellant intending to use a vibrator to penetrate the 4-year-old (offence 8).

9. The plans for the encounter were concrete and fully developed. They included discussion of parking arrangements, discussion about when the visit to the appellant's flat could take place so that abuse could be carried out there, the walking distance, the carrying of belongings to and from the car, and other practical matters. As a result, the appellant went to Ripon Marketplace on 30 April; to meet Louise, and to put the plans into action with the 4-year-old. He was then arrested. He had with him three pouches of baby food and a tube of sexual lubricant that he had just bought from Boots. He gave a "no comment" interview in relation to the offending but acknowledged his address, his mobile phone and his account on Similar World. He denied a sexual interest in children.

10. The plan was for Louise and her daughter to stay overnight with the appellant, and this was a breach of the sexual harm prevention order (which prohibited staying with a child under 18 without the consent of Social Services).

11. The appellant's previous convictions, when sentenced for the second time by the Honorary Recorder of York, were those we have already described. He had no others.

12. A pre-sentence report, prepared before the sentence passed in 2019, noted that the appellant had accessed the "Stop it now" service and completed up to section 17. He was living with a long-term partner who had warned him against his online sexual activity and played no part in it. He referred to depression and some suicidal ideation. He minimised his offending and did not appear to understand its seriousness. That earlier report recommended that, if any custodial sentence were to be suspended, the appellant should be required to complete a well-established accredited programme which helped sex offenders avoid future offending.

13. The pre-sentence report prepared for the sentencing in 2021 showed that the appellant had completed this accredited programme, but he was again minimising his sexual offending and he was self-centred and self-exculpatory in his explanations. He appeared to be manipulative. He was inclined to grooming and to the evasion of legal restrictions upon him. He denied being a danger to children. His latest offending was an escalation of what he had done before, both in terms of the activity planned and the exceptionally young age of the child he believed to be real.

14. The appellant pleaded guilty at the earliest opportunity and was therefore entitled to a full credit of one-third against any custodial sentence in respect of the matters as to which he pleaded guilty.

15. The prosecution submitted that, in the case of a real child, the four offences involving penetrative activity fell in category 1A of the guideline because of the intended penetration, the significant degree of planning, the significant disparity of age and the appellant acting with another. This produced a guideline starting point of 5 years, in a range of 4 to 10 years, for each offence. The guideline also makes provision for adjustment to be made in respect of the absence of a real child. The judge agreed with that analysis of the guideline. The prosecution submitted that the three offences involving masturbation fell into guideline category 2A because of the planned non-penetrative touching of naked genitalia, the significant degree of planning, the disparity of age, and acting with another. The guideline starting point would therefore be 3 years, in a range of 2 to 6 years, for each of those offences. The prosecution submitted that in the case of the urination offence, the guideline category would be 3A, because it did not involve penetration or touching of naked genitalia, but still involved significant planning, disparity of age and the involvement of another adult. The guideline starting point for that offence was therefore 26 weeks, in a range of high-level community order to 3 years.

16. Aggravating features were: the breach of suspended sentences for similar offending,

previous convictions, and the planned ejaculation, which was specifically referenced in the conversations.

17. The prosecution submitted that attempted breach of the sexual harm prevention order fell in category 1A of the relevant guideline, as a very serious breach eliciting very serious harm or distress had been it been the completed offence.

18. Passing sentence, the Recorder of York made a finding of *dangerousness* which is not challenged. He indicated that the sentence would be reduced because there was no real child.

19. He then said:

> "For the proposed contact offences, had, as I have already said, this child been real...then the trial figure would have been about 11 or 12 years and would have required consecutive sentences in amongst those charges. As there was no such child, I will say the offending is worth ten years. That reduces it to six years eight months for a plea and six and a half for totality and COVID...
>
> The suspended sentence will be activated but reduced because I am incorporating it into an extended sentence, which means you will serve two-thirds of it rather than the half which you would have served if it was not incorporated into the extended sentence, and it also reflects totality. So I am reducing that to 18 months. So that will be 18 months concurrent for the suspended sentence.
>
> The breach of the sexual harm prevention order is of the most serious sort. It is worth four years after a trial. I reduce that, and this again will be concurrent, to 32 months, and I reduce it for totality and for the short-term COVID problems to two years, but that would be consecutive to the suspended sentence had I been not incorporating it in the extended sentence."

20. The judge indicated that this produced a total extended sentence of 15 years but corrected this to 14 years when it was pointed out to him that 14 years was the maximum sentence for the lead contact offences.

21. It is possible from the court record and the relevant legislation to understand in more detail the individual terms which flowed from these remarks, and we state these as follows.

i. For each of the eight offences of arranging the commission of a child sex offence, contrary to section 14, an extended sentence of 14 years (a custodial term of 10 years and an extended licence period of 4 years).

ii. For attempting to breach a sexual harm prevention order, 2 years' imprisonment concurrent.

iii. The suspended sentences of 2 years were activated with a reduced term of 18 months' imprisonment, concurrent on each offence and to the other sentencing.

iv. A total sentence, therefore, of 14 years, comprised of a custodial term of 10 years and an extended licence period of 4 years.

22. A further sexual harm prevention order was imposed and the police notification requirements and inclusion on the Disclosure and Barring Service list were also set out.

23. The imposition of a single extended sentence of 14 years to reflect the totality of offending in this case was permissible (see R v Pinnell & Joyce [2010] EWCA Crim 2848, at paragraphs 20-22). No challenge to that approach has been suggested in this appeal. It was a lawful sentence, in the way that we have understood and stated it. So far as necessary, the record sheet should be amended to reflect its component parts correctly.

24. We have the benefit of written submissions from Mr Magarian KC and oral submissions from Mr Davies. We are very grateful to both counsel for their submissions. We spent a good deal of time reading the background papers and considering the written submissions and we were therefore particularly impressed by the brevity, relevance and cogency of the oral submissions which were presented to us by Mr Davies of counsel. We are very grateful to him for the assistance which he has given us this morning.

25. The grounds of appeal are that the custodial term of 10 years' imprisonment was manifestly excessive on the following basis.

26. First, 10 years (it is said) was not justified for offence 1. As a category 1A offence, the starting point in the case of a real child was 5 years, in a range of 4 to 10 years, aggravated by breach of the suspended sentences. It is argued that the correct sentence, in the absence of contact with the real child, was about 5 years which, if the suspended sentences of 2 years were activated in full, would result in a total of 7 years' custody, not 10. An alternative way in which it is put in argument is that, if the starting point of 5

years were treated as being subject to upward movement because of the aggravating factors, a sentence of about 7 years' custody, not 10, should have been the end point.

27. Second, it is suggested that the breaches of court order and of the sexual harm prevention order may have been double counted if the terms were treated consecutively. It is argued that, if the intended sentence for the substantive offending was 6½ years (based on the end point in the sentencing remarks, after reductions for the absence of a real child, totality, Covid and credit for plea), and if it was intended to add 18 months consecutively for the activated suspended sentences, then the total custodial term would have been 8 years not 10 years.

28. Third, it is argued that the reduction on account of there being no real child, from "about 11 or 12 years", to 10 years, was not enough.

29. The question for us is whether the sentence was manifestly excessive.

30. The most recent sexual offences were serious, and some of them attracted, it is conceded, a starting point of 5 years each. However, there were eight of them and, even applying the principle of totality, and the fact that they were against a single proposed victim over the course of a single visit, they did not overlap. Each one involved planning of a serious, separate, criminal sexual act in relation to a very young child.

31. The case of R v Reed [2021] EWCA Crim 572, did not specify the reductions to be applied for the absence of a real child, although it made it clear that such a reduction would normally be appropriate. Nor does the guideline specify a specific proportion, the guideline now reflecting the reasoning in Reed. The cases are necessarily fact specific. However, the reduction will be less in a case such as the present, where the appellant was, in his own mind, only stopped by arrest at the place where he had arranged to meet the child and her mother and take her back to his flat for sexual abuse.

32. The Sentencing Guideline says, in relation to "arranging or facilitating the commission of a child sexual offence" under section 14:

> "No sexual activity need take place for a section 14 offence to be committed (including in instances where no child victim exists). In such cases the court should identify the category of harm on the basis of the sexual activity the offender intended, and then apply a downward adjustment at step two to reflect the fact that no or lesser harm actually resulted.
>
> The extent of this adjustment will be specific to the facts of the case. In cases where an offender is only prevented by the police or others from conducting

> the intended sexual activity at a late stage, or where a child victim does not exist and, but for this fact, the offender would have carried out the intended sexual activity, only a very small reduction within the category range will usually be appropriate."

33. The judge indicated a reduction of 1 or 2 years, from 12 or 11 years, in the passage of his sentencing remarks which we have quoted.

34. The judge's notional term of 12 or 11 years included all the criminality, because he was sentencing concurrently for everything. The final custodial sentence of 10 years, after credit for plea, was to reflect: (first), four child sex offences with starting points of 5 years each, before taking account of aggravating features, mitigating features and the absence of a real child; (second), three child sex offences with starting points of 3 years each, before aggravating and mitigating features and the absence of a real child; (third). the urination offence, for which the starting point was 6 months before adjustment; (fourth), the activation of a full 18 months of the suspended sentences in respect of the earlier offending; and (fifth), a penalty for attempted breach of the sexual harm prevention order, for which the guideline starting point was 3 years, in a range of 2 years and 4 years 6 months for the completed offence.

35. There was little or no mitigation in this case apart from the credit for plea, although the judge did mention the effects of Covid.

36. There were unusually strong aggravating features, not least the escalation in offending, after completion of intervention programmes which had given the appellant a chance to reform. Not only had he failed to reform, but he had also got very much worse, and he had offended during the currency of the suspension.

37. We recognise that, even before credit for plea, very substantial reductions fell to be made in respect of the starting points for the nine current offences by reason of the offences not being completed with a real child and, much more so, to give effect to the principle of totality when arriving at a final sentence reflecting all the offending.

38. However, the judge's final custodial term of 10 years, after credit for plea, was equivalent to 8 years 6 months without the activated 18-month suspended sentences, which did not fall to be reduced by credit for plea. Eight years 6 months was equivalent to 12 years 9 months before credit for plea.

39. In view of the multiple offences and the applicable starting points, 12 years 9 months

was, on any view, a very substantial reduction indeed for the absence of a real child and totality. The judge's concurrent sentencing to a total custodial term of 10 years, after credit for plea, had to be just and proportionate to the offending as a whole. We are satisfied that the sentence easily passed that test, and we are not persuaded that the sentence was manifestly excessive.

40. In deference to the submissions of Mr Davies, we observe that, if the judge had taken 11 or 12 years for the child sexual offences, and then reduced it to 10 years as he indicated in view of the absence of a real child, applied full credit for the early guilty plea, coming to a figure of 6½ years or a little more, and then taken account of a potential 2-year sentence for attempted breach of a sexual harm prevention order, with the addition of the 18 months which it fell to be included by way of activation of the suspended sentence, he would have reached a figure which might have been a little over 10 years, which is in the area being suggested to us by Mr Davies. That is not however, we think, the correct way of approaching this sentence. We suggest that the analysis that we have applied is the better route to assessing whether this sentence was manifestly excessive and also, and in particular, whether it was just and proportionate to the offending as a whole.

41. We do not consider it to be manifestly excessive however it is analysed. Nor do we consider it to be other than just and proportionate to the offending as a whole. The appeal is therefore dismissed. But the record will be amended, so far as necessary, in order to reflect the judge's sentences on the individual offences as we have analysed them.