Neutral Citation Number: [2024] EWCA Crim 44

Case No: 202203621 B2 & 202203624 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT TEESSIDE
HIS HONOUR JUDGE CARROLL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/02/2024

Before:

LADY JUSTICE THIRLWALL
MR JUSTICE JAY
and
HER HONOUR JUDGE TRACEY LLOYD-CLARKE, THE RECORDER OF CARDIFF

- -

Between:

MICHAEL DAVID SALMON — **Appellant**

- and –

THE KING — **Respondent**

- -
- -

Michael Cahill (instructed by **the Registrar of Criminal Appeals**) for the **Appellant**
Matthew Bean (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 25 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 1 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

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.

MR JUSTICE JAY:

INTRODUCTION

1. On 11th July 2022 Mr Michael Salmon ("the Appellant") pleaded guilty at his Plea and Trial Preparation Hearing before HHJ Carroll ("the judge") sitting at the Crown Court at Teesside to 15 offences of a sexual nature. Court 4 was ordered to lie on the file on the usual terms. The Crown indicated that these pleas were acceptable; in particular, that Count 4 effectively incorporated Count 3. The Crown also stated that as the pleas were on a "full facts" basis it would not be constrained by the pleas as to how the case was opened. The case was adjourned for a prosecution sentencing note and a pre-sentence report to address the issues of harm, risk and dangerousness.

2. On 25th October 2022, when the matter was listed for sentence before him, the judge noted on the sidebar on the Defence Case System that he was concerned that his sentencing powers were insufficient to reflect the Appellant's criminality. He inquired whether was any reason why offences of blackmail had not been charged.

3. That hearing was adjourned and the Crown subsequently applied to amend the indictment to add Counts 17-21, i.e. five counts of blackmail.

4. The judge heard legal argument on 18th November 2022 as to whether it would be unjust and/or an abuse of process to amend the indictment at this late stage. At the conclusion of the argument, the judge indicated that he would grant leave to amend and that his written reasons would follow. The Appellant was duly arraigned on Counts 17-21 and he entered guilty pleas.

5. The judge's written reasons for refusing the abuse application may be summarised as follows.

6. First, there was no promise, express or implied, that additional charges would not be laid against the Appellant. Secondly, the Crown was quite entitled to review the case after the judge's concerns were expressed. Thirdly, there was no prejudice to the Appellant. Fourthly, the affront to public justice would lie in the Appellant not being sentenced on a basis which reflected the true gravity of his conduct.

7. The matter was listed for sentence on 21st November 2022 and the Appellant received a total sentence of imprisonment of nine years on the now 20 counts. How that sentence was composed in this complex case we will address subsequently.

8. Various ancillary orders were made which are not the subject of appeal.

9. The Appellant now appeals against sentence with the leave of the single judge. He also renews his application for leave to appeal against conviction on the ground that leave should not have been granted to amend the Indictment to add the blackmail counts.

THE FACTS

10. There were six victims in this case whom we will anonymise.

11. Counts 2, 3, 9 and 18 involved GB and RB.

12. In December 2018, the victim, GB, then aged 12 or 13, added the Appellant to her Snapchat account believing that he was a teenager called Tom or Connor. After a fortnight or so of exchanging messages, the Appellant requested that she send naked pictures and videos of herself. GB sent six photographs and three videos in which she was naked or wearing underwear and performing sexual activity on herself. GB ignored or declined two requests to meet the Appellant and blocked him on Snapchat at the end of December 2018.

13. During the August bank holiday weekend in 2019, GB added the Appellant back on Snapchat in order to ask him why he had mentioned her on a Snapchat story. The Appellant responded that it was because she had blocked him and unless she sent more indecent images he would send the ones she had sent to people at her school. On getting no response the Appellant posted *"Anyone know GBxxx12* [fuller name redacted] *and want to see some pics, message me"* and contacted GB's sister RB via Facebook messenger stating that he had naked pictures of GB and to get her to add him back onto Snapchat. He subsequently sent the images to RB and repeatedly messaged her asking if she liked the videos. After GB's mother found out, a complaint was made to the police and initially the Appellant's son was arrested. The Appellant made a further attempt to contact GB in February 2020 but by this time her mother was pretending to be her daughter.

14. Electronic devices were seized and interrogated. On the Appellant's mobile a Snapchat account *"TJ.2XXXX"* was recognised by the police as having been used in a closed 2019 investigation. This account had been requesting and receiving indecent images from five girls, all of whom lived in Middlesbrough and were friends or neighbours of the Salmon family. A folder on the Appellant's phone had screenshots linking him to these girls.

15. On Count 2, sexual communication with a child contrary to s. 15A(1) and (3) of the Sexual Offences Act 2003, the sentence was 12 months' imprisonment concurrent. On Count 3, distributing indecent photos of children contrary to s. 1(1)(b) of the Protection of Children Act 1978, the sentence was 24 months' imprisonment concurrent. On Count 9 attempted sexual communication with a child contrary to s. 1(1) of the Criminal Attempts Act and s. 15A of the Sexual Offences Act 2003, the sentence was three months' imprisonment concurrent. On Count 18, blackmail contrary to s. 21(1) of the Theft Act 1968, the sentence was 24 months' imprisonment consecutive to three other offences of blackmail, the details of which we set out below.

16. The overall sentence in relation to GB was, therefore, one of 24 months' imprisonment consecutive to the sentences imposed on the other victims.

17. Counts 1 and 17 involved OM.

18. The Appellant pretended to be TJ and 17 years old, and asked OM on Snapchat to send him indecent images of herself. She was 13 or 14. He asked her if she knew RBM (the victim in the next series of counts) and when she confirmed that she did he sent indecent images of RBM to her and threatened to post them on a porn site if she did not send images of herself. She sent him 60+ images and he sent pictures of his penis.

19. For the offence of sexual communication with a child, the sentence was 12 months' imprisonment concurrent. For the offence of blackmail, the sentence was 24 months' imprisonment consecutive to three other offences of blackmail.

20. The overall sentence in relation to OM was, therefore one of 24 months' imprisonment consecutive to the sentences imposed on the other victims.

21. Count 5 involved RBM.

22. RBM was 13 when she sent the 60 + images to the applicant after being asked to do so.

23. For the offence of sexual communication with a child, the sentence was one of 12 months' imprisonment consecutive to the sentences imposed on the other victims.

24. Counts 6 and 19 involved AR.

25. The Appellant contacted the 15 year old victim AR and purported to be 17 years old. Initially she refused to send him images but after the Appellant threatened to stab her family she sent about five images. Some of these images he sent on to her friend JW.

26. For the offence of sexual communication with a child, the sentence was 12 months' imprisonment concurrent. For the offence of blackmail the sentence was 24 months' imprisonment consecutive.

27. The overall sentence in relation to AR was, therefore, one of 24 months' imprisonment consecutive to the sentences imposed on the other victims.

28. Counts 7, 8, 10, 20 and 21 involved JW and BH.

29. The Appellant purported to be 14 years old when he contacted 14 year old BH and asked for indecent images. She was uncomfortable and told her friend JW, also 14 years old. Both of them messaged him via Snapchat during which they thought he was not a teenager and discovered during a video call that he was an adult male. He threatened to kill members of JW's family if she did not send images but she refused. The Appellant however sent images of other girls, whom they knew, to them both.

30. For the offence of sexual communication with a child, the sentence was 12 months' imprisonment concurrent. For the two offences of distributing indecent photos, the sentence was four months' imprisonment concurrent. For the offence of blackmail involving BH, the sentence was 24 months' imprisonment concurrent. For the offence of blackmail involving JW, the sentence was 24 months' imprisonment consecutive to the sentences imposed in relation to the other victims.

31. The overall sentence in relation to JW was, therefore, one of 24 months' imprisonment consecutive to the sentences imposed on the other victims. In relation to BH the overall sentence was one of 24 months' imprisonment concurrent.

32. Finally, we come to Counts 11, 12, 13, 14, 15 and 16. Examination of the Appellant's devices revealed a total of 41 Category A images; one Category B image and 21 Category C images. There were also 96 extreme pornographic images showing sexual interference with a human corpse.

33. For five offences of possession indecent photos of a child contrary to s. 160(1) of the Criminal Justice Act 1988, the sentences were eight months' imprisonment concurrent, four months' imprisonment concurrent and six months' imprisonment concurrent. For one offence of possessing an extreme pornographic image contrary to s. 63(1) of the Criminal Justice and Immigration Act 2008, the sentence was six months' imprisonment concurrent.

THE SENTENCING EXERCISE

34. The Appellant was aged 39 at the date of sentence. He had two previous convictions for unrelated offences. According to the pre-sentence report, he poses a high risk of causing serious harm towards children.

35. In his sentencing remarks the judge stated that the Appellant had pleaded guilty to 21 counts (in fact there were only 20) of sexual offences towards young female children who were mostly 12-13 years of age. The Appellant had been manipulative and then threatening both emotionally and physically. He had displayed "wickedness" and a "shocking betrayal of the children". The judge noted the devastating impact on the young girls. There were two victim personal statements which made very concerning reading.

36. Other than credit of one-third for the guilty pleas, there was little to mitigate the offences and the remorse expressed carried little weight. The judge did not find that the appellant was dangerous albeit he was on the boundary; and, in any event, a lengthy determinate sentence would address the risk he posed. In respect of the sentences passed on each count the judge noted that the principle of totality applied and that the sentences should be adjusted so that the total sentence was proportionate. In regard to the blackmail counts, the judge considered that the starting point would be six years if they were standalone counts. The judge's approach was to halve the six years for totality before giving full credit for the guilty pleas.

37. We note first of all that it was wrong to make an adjustment for totality before applying the appropriate credit for the guilty pleas. However, if that error had any impact on the outcome, it would have been to the Appellant's benefit.

THE RENEWED APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION

38. It is convenient to deal first of all with the renewed application for leave to appeal against conviction.

39. The Appellant's argument in November 2022 was that it would be an abuse of process to accede to the late application to amend to introduce the five blackmail counts. Reliance was placed on the second limb of the abuse jurisdiction, and in particular on the case of *R v Maxwell* [2010] UKSC 48; [2011] 2 Cr App Rep 31. In essence, it was said that by indicating that 15 guilty pleas were acceptable, the Crown effectively compromised the issue of criminal liability, and that it would be an affront to public justice to permit the blackmail matters to proceed. Mr Cahill relied on a number of authorities in support of his submissions which we will consider below. In a detailed written ruling the judge rejected that submission. The Appellant's arguments on abuse were repeated in this court despite the detailed rebuttal of them by the single judge.

40. We pay tribute to Mr Cahill's oral argument. He stuck tenaciously to his guns. Ultimately, although we have been persuaded to grant leave to appeal against conviction, we have reached the conclusion that an abuse of process has not been made out and that this conviction on the foot of the Appellant's five guilty pleas is safe.

41. In *R v Bloomfield* [1997] 1 Cr App R. 135, the defendant was charged with possession of a class A drug. At the PTPH the Crown informed defence counsel in private that it would be offering no evidence: it was believed at that stage that the defendant was the victim of a set up. Owing to the presence of a number of individuals in court, the judge was told this in his chambers and the matter was listed for mention on a later occasion when no one was expected to be present. Subsequently, however, and before the mention hearing, the Crown re-evaluated the case and decided to proceed. This Court, Staughton LJ presiding, held that it was an abuse of process for the Crown to do so. The reason for this conclusion was as follows:

> "The statement of the prosecution that they would offer no evidence at the next hearing was not merely a statement made to the defendant or to his legal representative. It was a made *coram judice*, in the presence of the judge. It seems to us that whether or not there was prejudice it would bring the administration of justice into disrepute if the Crown Prosecution Service were able to treat this Court as if it were at its beck and call, free to tell it one day that it was no going to prosecute and another day that it was."

42. In *R v Edgar* [2000] (unreported, 21st February 2000), the facts were that the defendant pleaded guilty to some charges in return for the prosecution dropping others. The Crown later decided that it was acting under an erroneous apprehension as to the governing law, and sought to proceed on the basis of the charges that it had indicated it was not proceeding with. The Divisional Court (Schiemann LJ and Silber J) decided that the integrity of the criminal process would be undermined if compromises of this sort were not stuck to.

43. In *R v Love and Hyde* [2013] EWCA Crim 257; [2013] 1 WLR 1987 the Crown had made an application to amend the indictment to substitute the word "dwelling" for "building" in the particulars of the offence. This Court refused to permit the defendants to vacate their guilty pleas.

44. Finally, in *R v Jordan Antoine* [2014] EWCA Crim 1971, this Court held that in a situation where the Appellant had already been sentenced for certain offences it would require the presence of special circumstances before further charges could be preferred.

45. It seems to us that these decided cases turn on their own particular facts. In *Edgar*, and in contradistinction to the instant case, a deal was done between the prosecution and the defendant whereby the latter would plead guilty to some offences if others were not proceeded with. In such circumstances, it may readily be appreciated that it would be an affront to justice to permit the prosecution effectively to renege on that agreement. In *Love and Hyde*, the issue was somewhat different, namely whether the defendants should be permitted to vacate their pleas, but the change in the form of the indictment was minor. In *Jordan Antoine*, the defendant had already been sentenced.

46. We do not consider that the facts of *Bloomfield* are analogous to those of the instant case or that the case sets forth a principle of general application. In *Bloomfield* the prosecution stated before the judge that they would be offering no evidence on the sole matter that was before the Court. At the end of its judgment, this Court emphasised that the case had turned on its special facts.

47. In the present case, the Appellant pleaded guilty on a "full facts" basis. It made no difference to any aspect of the case that the prosecution were prepared to leave Count 4 on the file on the usual terms. Accordingly, the statement to the effect that the pleas were acceptable to the Crown meant no more, and no less, than the Appellant was accepting his guilt across the board. He was compromising nothing. The Appellant was aware that the prosecution would be contending that his conduct amounting to blackmail, not that it was yet encapsulated in counts that alleged exactly that, should be treated as substantially aggravating the offences under s. 15A of the Sexual Offences Act 2003. It was, therefore, scarcely an affront to justice for the prosecution to seek to place the offences of blackmail formally before the Court in the form of five fresh Counts on this Indictment. The greater affront to justice would have been that the Appellant's sentence would not have reflected his overall culpability. Accordingly, the Appellant's objection was purely technical, and when the matter was finally opened to the Court after his guilty pleas were taken no new facts were introduced.

48. It follows that the judge was correct in ruling that there was no abuse of process on these particular facts, and this appeal against conviction must be dismissed.

THE APPEAL AGAINST SENTENCE

49. Turning to the sentence appeal, the Appellant's essential argument is that the judge failed to have sufficient regard to the principle of totality and took too high a starting point on three of the blackmail counts, namely counts 17, 18 and 21. These counts were considerably less serious than counts 19 and 20.

50. In oral argument Mr Cahill emphasised that on the judge's approach, which was in the main to impose consecutive sentences in relation to the different victims, it was necessary at the final stage of the exercise to step back and ask the question whether a notional sentence of 12 years' imprisonment before credit for the guilty pleas was simply too high.

51. In our judgment, there is some force in the submission that the judge ought to have differentiated between the various blackmail offences because some were more serious than others. There is also some limited force in the submission that a notional sentence of six years on a standalone basis was too high. Although there are no Sentencing Guidelines for the offence of blackmail, a review of the cases noted in *Banks on Sentence* reveals that it is only in very serious cases indeed that sentences at this level are considered.

52. However, the issue for this court to determine is whether the overall sentence of nine years' imprisonment was manifestly excessive or wrong in principle. Given the judge's approach to this complex sentencing exercise, which in our view was a reasonable one, it must be borne in mind that each blackmail offence was very significantly aggravated by the matters for which concurrent offences were also imposed. The six years notional sentence was not a standalone figure in the sense that no other factors bore upon it. It

is also relevant that two of the blackmail offences were at the most serious end of the scale, involving threats to kill. For understandable reasons the judge was concerned to differentiate as little as possible between the various victims.

53. Furthermore, the judge gave significant discounts for totality in relation to four of the blackmail offences, and in respect of one of them, count 20, he imposed a concurrent sentence.

54. The final point to be made is that the judge was in our view merciful in not imposing consecutive sentences on the six offences involving possession of indecent photos. We have no doubt that had the judge's overall sentence for the other matters been slight lower, he would probably have imposed consecutive sentences on these matters. What this demonstrates is that the judge carried out the very exercise the Appellant criticises him for not doing: he stood back from the overall sentence he was minded to impose to check whether a further adjustment was necessary to reflect the principle of totality.

55. Standing back from this sentence, we have reached the conclusion that nine years' imprisonment overall was not manifestly excessive for this lengthy and disturbing catalogue of serial offending involving young and highly impressionable children. Some of this offending, as we have said, was at a high level of gravity.

56. It follows that this appeal against sentence must be dismissed.

DISPOSAL

57. The appeals against conviction and sentence are both dismissed. The representation order granted along with the appeal against sentence is extended to cover the application for leave to appeal conviction, leave having been granted.