

IN THE COURT OF APPEAL

CRIMINAL DIVISION

NCN: [2019] EWCA Crim 1538

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday, 3 September 2019

B e f o r e:

LORD JUSTICE GROSS

MR JUSTICE STUART-SMITH

R E G I N A

v

CONNOR MACHIN

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Mr P Du Feu appeared on behalf of the **Appellant**

J U D G M E N T

(As Approved)

1. MR JUSTICE STUART-SMITH: On 29 March 2019, in the Crown Court at Oxford, the appellant pleaded guilty to the offences which we will identify in a moment. On 2 July 2019, at the same court, His Honour Judge Daly sentenced the appellant as follows. On count 1, which was a charge of making indecent photographs of children, contrary to section 1(1)(a) of the Protection of Children Act 1978, on the appellant's plea of guilty he was sentenced to 8 months' imprisonment. On count 2, which was a charge of making indecent photographs of children, contrary to section 1(1)(a) of the Protection of Children Act 1978, on his plea of guilty he was sentenced to 2 months' imprisonment concurrent. On counts 3 and 4, which were counts of distributing indecent photographs of children, contrary to section 1(1)(b) of the Protection of Children Act 1978, on his plea of guilty he was sentenced on each count to 16 months' imprisonment concurrent.

2. On count 5, which was a charge of distributing indecent photographs of children, contrary to section 1(1)(b) of the Protection of Children Act 1978, on his plea of guilty he was sentenced to 2 months' imprisonment concurrent. On count 6, which was a count of possessing an extreme pornographic image, contrary to section 63(1) of the Criminal Justice and Immigration Act 2008, on his plea of guilty he was sentenced to 2 months' imprisonment also concurrent. The total sentence was therefore one of 16 months' imprisonment. Ancillary orders were also made.

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

4. The background may be shortly stated. The appellant is a young man of previous good character and a good employment record. He is 24 now. He was 22 at the time of the offending. Having previously worked in landscaping, he worked at the material time on a building site. From time to time other people working on the building site would send indecent images and videos to their workmates. This was said to be for the “shock factor”. The appellant has always maintained, and the judge accepted, that he did not have a sexual interest in the content of the material that was being circulated and that he did not have an unhealthy interest in children.

5. As well as receiving the materials that others sent to him, the appellant took an active part on three occasions by sending an image or video to one of his workmates. In interview he said that he did not realise that he was committing an offence or how seriously the courts treat conduct such as this. But in the course of his relatively short interview for the purposes of preparation of the PSR he was reported to have shown some victim empathy and it was said that on reflection he could recognise the harm that is caused to victims of abuse by the circulation and maintaining of such material.

6. The appellant has always said that he never went searching for indecent images. The prosecution confirmed that there was no evidence that he had ever done so. He indicated his intention to plead guilty at the earliest opportunity and in due course did so.

7. On the information available to the court, none of the appellant’s workmates who had sent the material to the appellant or to whom he had distributed it were prosecuted.

8. The detail underlying the counts is as follows. There were nine still and three video images on the appellant’s phone that were assessed to be within category A. The still images were inaccessible even to the police. It was not possible to say if they were multiple copies of one image or included more than one image. The videos were three copies of one video. These images formed the basis for count 1.

9. There were four images falling within category C, which were four copies of the same image. These images formed the basis for count 2.

10. The appellant sent the video that was the subject of count 1 to two separate friends. These distributions formed the basis for counts 3 and 4. The appellant sent the image that was the subject of count 2 to one friend. This distribution formed the basis for count 5.

11. There were 19 extreme pornographic images on the phone. They formed the basis for count 6.

12. In addition to his early pleas of guilty, previous good character and good work record, there was significant personal mitigation available to the appellant. First, there were supportive references from his father, step-grandfather and a previous employer to the effect that this offending was completely out of character to the extent of being “almost unbelievable” from a man who was described by his employer as being an enormously funny and kind man who would always lift the site with his quick humour.

13. Second, he had struggled with and overcome PTSD and depression after a friend had been hit by a drunk driver and died in his arms some years before.

14. Third, he was providing important care and financial support for his mother, who had suffered from

breast cancer and a breakdown that led to her being sectioned and committed as an inpatient. There were continuing care needs, not least because the difficulties just described had led to the breakdown of his parents' marriage.

15. A letter to this court from his mother says that she is worried his imprisonment will mean she cannot access her continuing treatment once a sister becomes unavailable to help on the expected birth of a child. As a consequence of the loss of the appellant's income we have been told today that she is now homeless.

16. Fourth, in April 2019, he suffered a serious accident when he fell from a ladder onto some scaffolding. He fractured two vertebrae and suffered a deep soft tissue injury to his thigh which became infected and will cause a permanent limp.

17. The PSR made the points to which we have already referred. It assessed there to be a low likelihood of reconviction. Use of the Thornton's Risk Matrix led to him being assessed as a medium risk of reconviction for a sexual crime with most recent figures indicating that 2 per cent of such offenders were reconvicted of a sexual crime within 2 years and 3 per cent within 3 years.

18. Turning to the prospect of a custodial sentence, the PSR noted that it would lead to the loss of his employment and loss of support for his mother and suggested that his previous emotional problems may cause difficulties such that he should be monitored for the risk of self harm or suicide. It pointed out that a short immediate custodial sentence may not give sufficient time for work required to explore and address his offending behaviour. This recommendation appears to have been on the assumption that there was, contrary to the finding of the judge, some unhealthy sexual interest in children.

19. In the light of these observations, the PSR proposed that a 3-year community sentence would be appropriate with an unpaid work requirement and attendance on courses to address his thinking.

20. The judge's sentencing remarks were short but clear. Having "largely" accepted that the appellant is not attracted to young children, he correctly pointed out that other people are, that photographs and images are produced to meet their demand, and that young children suffer as a result. He made clear that distribution, even to a limited group of workmates, was more serious than the fact of possession because the image was then out of his control.

21. We note in passing that although this observation was correct, there was no evidence of further distribution by others to whom the appellant sent the material that formed the subject of counts 3, 4 and 5.

22. The judge then correctly identified that counts 3 and 4 fell within category A of the guideline for the possession and distribution of indecent images of children, which indicated a starting point 3 years and a range of 2 to 5 years. He assessed the present case as being towards the bottom of the range. It is apparent, though the judge did not expressly say so, that he reached a sentence of 2 years before reducing it by one third for the appellant's plea of guilty, which led him to impose sentences of 16 months concurrent on counts 3 and 4.

23. Adopting the same implicit reasoning, he reached a sentence before discount for plea of 12 months on count 1 and 3 months on counts 2, 5 and 6. Those sentences were then reduced for plea.

24. The judge did not refer to the definitive guideline for the imposition of community and custodial sentences. We therefore do not know whether he considered it. Nor did he either state or explain that only an immediate custodial sentence was appropriate or why a non-immediate custodial sentence could not be

justified in this case. He merely said, "I am afraid the resulting sentence is one of immediate imprisonment". By making the sentences on each count concurrent he reached the overall sentence of 16 months, which he imposed.

25. We accept that these were significant offences. That said, the scale of possession was comparatively limited in the context of other cases that come before this and the Crown Court and the distribution offences were, as the judge correctly recognised, towards or at the bottom of the relevant category. Perhaps most importantly, these offences were the result of extreme stupidity rather than any paedophile tendencies.

26. We have outlined the background and the mitigation that was relevant for the judge's consideration. In the light of these features, close consideration needed to be given to the question whether a suspended sentence or community order could provide sufficient restriction on the offender's liberty by way of punishment and if the view should be taken that this was a case that was on the cusp of custody, then whether there would be an impact on dependants that would make a custodial sentence disproportionate to achieving the aims of sentencing.

27. In our judgment, the most material factors when deciding whether or not an immediate custodial sentence was necessarily to be imposed is the Judge's acceptance that this appellant was not acting pursuant to an unhealthy interest in children and the relatively limited circumstances of his possession and distribution.

28. Approaching the case by reference to the factors identified at page 8 of the Definitive Guideline on the Imposition of Community and Custodial Sentences, the first point is that the appellant does not pose a substantial risk or danger to the public. The information provided by the PSR indicated a small statistical risk and there was no reason to suppose that the appellant would fall within the category of those who reoffend rather than those who do not. His belated recognition of the impact of his offending is at least a hopeful sign.

29. Second, there is no history of poor compliance with court orders as the appellant is of previous good character.

30. Third, the personal mitigation is strong, even if not overwhelming.

31. Fourth, immediate custody was, and is, likely to have a significant harmful effect on his mother and on the information provided to this court may already have done so.

32. Fifth, in our judgment, the proposal put forward in the PSR for a sentence other than an immediate custodial sentence was appropriate, albeit that the judge's findings mean that the proposed requirements would be of limited relevance.

33. For these reasons, we consider that on the specific and unusual facts of this case it was not necessary to impose an immediate custodial sentence and that the sentence imposed, though apparently in accordance with the letter of the sexual offences guidance, was wrong in principle because it failed adequately to consider or implement the features that we have identified.

34. We therefore quash the sentence imposed below and substitute a suspended sentence of the same length suspended for 2 years. Taking into account the period already spent in prison and the unusual features of the case to which we have referred, we do not consider it appropriate to impose the conditions suggested by the PSR. They would have been relevant had there been evidence of an unhealthy interest

in children, which on the judge's findings is lacking in this case.

35. To this extent, this appeal is allowed.

36. I think I should say - and, Mr Du Feu, you will undoubtedly explain in full detail to your client - that if he were to be convicted of any other offence at all during the period of 2 years for which the suspension is operative he would be liable to be brought back before the court for resentencing on this offence and if that were to happen, the overwhelming likelihood is that the sentence which we have suspended would be reactivated.

37. We believe the sex offenders register will now be 7 years, but, if need be, it can be referred back to us on an administrative basis.

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