No: 201900809/A1

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

NCN; [2019]EWCA Crim 1871

Wednesday, 30 October 2019

B e f o r e:

LORD JUSTICE IRWIN

MRS JUSTICE ANDREWS DBE

HIS HONOUR JUDGE AUBREY QC

(Sitting as a Judge of the CACD)

R E G I N A

v

MATTHEW ANDREWS

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Mr K Volz appeared on behalf of the **Appellant**

J U D G M E N T

(Approved)

MRS JUSTICE ANDREWS:

1. On 12 October 2018 the appellant, then aged 31, pleaded guilty to distributing indecent photographs of children contrary to section 1(1)(b) of the Protection of Children Act 1978 (count 1). The appellant also pleaded guilty to breach of a Sexual Offences Prevention Order ("SOPO") (count 2). The SOPO had been passed in connection with the appellant's previous conviction in 2015 for nine offences relating to the possession and distribution of indecent images for which he had been sentenced to 26 months' imprisonment suspended for two years.

2. This was the second time that the appellant had committed a specified sexual offence under Part 2 of Schedule 15 of the Criminal Justice Act 2003, and therefore the sentencing judge was required to make an assessment of whether the appellant was dangerous within the meaning of section 229 of the Act. She carried out that assessment with the assistance of a pre-sentence report and a psychiatric report and found the appellant to be dangerous. On 18 February 2019 she passed an extended sentence of five years' imprisonment on the first count, comprising a custodial term of three years and an extended licence period of two years.

3. He appeals against the finding of dangerousness on the basis that there was no, or no significant, evidence upon which to base a finding that he posed a significant risk of causing serious physical or psychological harm to members of the public by the commission of further specified offences.

4. The judge also initially said that she was passing an extended sentence in like terms in respect of the breach offence, to run concurrently. That sentence was unlawful because that offence did not fall within Schedule 15. The parties were notified, and the case was re-listed before the judge on 12 April 2019, who corrected the sentence under the slip rule by removing the extended licence period and substituting for it a determinate sentence of three years' imprisonment.

5. The facts of the offending are briefly as follows. The appellant, pretending to be a female named Amy, interacted with another male, whom we shall call X, on a dating website named Badoo and, later, on WhatsApp using an unregistered mobile phone. The SOPO prohibited him from creating a false online persona. Whilst chatting on WhatsApp he sent X a mixture of indecent pictures and videos of female children: six Category A images, three Category B images and four Category C images. He pretended that Amy was the mother of girls who liked to walk around the house naked and suggested that X should take photos of Amy and her daughters naked. He then sent a photograph of Amy and her supposed four-year-old daughter sitting in a bath with their faces covered.

6. In his response, X made it clear that he was interested in Amy, not the child. The appellant then sent him an indecent photograph of a little girl, supposedly Amy's daughter at a younger age. He told X that the daughter had lost her virginity at the age of one and sent increasingly indecent material in support of that assertion. The videos showed the supposed daughter being abused by a woman, then a man and finally by two men. The appellant asked X more than once whether X wanted to have sex with the child.

7. X was deeply shocked by what he saw. He went to the police and reported the matter. They subsequently identified the appellant as the offender. They arrested him on 21 August 2018 and seized the mobile phone that he had used to send the images, but he refused to give the police the PIN number (in breach of the SOPO) or to cooperate with their enquiries.

8. After the appellant had pleaded guilty, the judge adjourned the sentencing hearing for the preparation of a pre-sentence report and a psychiatric report. The appellant gave very different accounts of his offending to the author of the pre-sentence report and to the psychiatrist. He told the former that he had no recollection of his conversation online with X, attributing this to his level of intoxication through alcohol consumption. He tried to minimise his offending behaviour. The author of the report found the supposed amnesia implausible. The appellant continued to deny any sexual attraction towards children or that his offences were sexually motivated. However, the report referred to a disclosure that he made previously to probation (and recorded in an earlier report) that he had been interested in paedophilia and wanted to be part of the dark web. His behaviour was assessed as escalating. He was seeking more excitement from more extreme conversation, interaction and images.

9. The author of the pre-sentence report was of the view that the appellant's lifestyle and associates were linked to his risk of serious harm and of his offending behaviour. He assessed him as posing a medium risk of committing further offences of a similar nature and a high risk of serious harm towards female children. Whilst the nature of that risk was said to be around the appellant accessing and distributing further abusive images of children for his own sexual gratification, in addition to that of others to whom he sent the images through the internet, the author of the report expressed the opinion that the index offence highlighted an increase in the

likelihood of a contact sexual offence being committed by the appellant. Despite this, he was not of the view that the appellant was dangerous within the meaning of the 2003 Act.

10. The consultant forensic psychiatrist who examined the appellant recorded a different explanation for his offending behaviour, namely that someone else had asked him or told him to send the images and that getting the images for a more dominant person was the form of any gratification he obtained. He claimed that he had never viewed the images and only noted the verbal description of them. The psychiatrist said that he was unable to comment on what the appellant had said about that. Addressing the question of whether the appellant was likely to broaden his offending in the future, so as to include contact offences, the psychiatrist recorded the appellant's outright denial of this. He said that on the basis of what he was told by the appellant and the nature of the charges, he believed there was no significant evidence to suggest that the appellant was yet seeking out any ability to form contact offences or to find children to groom himself.

11. In addressing the question of dangerousness, the psychiatrist set out the correct legal test. He then addressed various factors pertaining to risk, including the fact that the appellant had claimed to be the victim of historic sexual abuse himself when he was a child. The psychiatrist concluded that overall, he believed the court might consider the appellant to be dangerous, but he did not really explain why. What he said was that his was the second similar offence and there appeared to have been efforts to conceal his offending from those who were monitoring him. There was no significant or relevant mental disorder. Whilst there was no clear evidence to suggest that he appeared interested in committing contact offences, the doctor felt that he minimised his role in his current re-offending and would benefit from a sex offender treatment programme.

12. In her careful sentencing remarks, the judge made reference to the detailed skeleton argument from the appellant's counsel, Mr Volz, addressing the issue of dangerousness. She set out the correct legal test. She correctly pointed out that the appellant already had one previous qualifying offence. Mr Volz agreed with the judge that there was a significant risk of the appellant committing further specified offences. The area of disagreement was whether there was a significant risk of serious harm to members of the public caused by the commission of such further offences. The judge said that she had formed the view on the basis of the psychiatric report, X's witness statement and the different accounts given by the applicant of his offending behaviour that there was such a risk. She accepted that what she was going to do was not the norm, but having regard to everything she had read, she considered that the test had been made out.

13. On behalf of the appellant, Mr Volz drew attention to the provisions of the Dangerous Offenders Guide for Sentencers and Practitioners. He relied especially on paragraph 6.4.1 of the Guide in which it is pointed out that even serious offences can be committed in ways which do not give rise to a significant risk of serious harm. That is true, but as the Guide also makes clear the absence of actual harm caused in the instant offence does not lead automatically to the conclusion that there is a negligible risk of serious harm in the future.

14. However, Mr Volz submitted that in the instant case it was wrong in principle to conclude that the appellant was likely to cause serious harm because (a) the risk of a contact offence involving a child was negligible and no one had suggested that such an offence was likely, (b) although a contact offence was not a necessary precursor to a finding of dangerousness, in this case no children were contacted or sought to be contacted and (c) unlike those involved in production of indecent material, a distributor did not create the risk of causing serious harm but rather perpetuates the harm caused by others. Although he realistically acknowledged the argument that those who download or distribute such material encourage the market for abusing children online, he submitted that there needed to be something more than that for a finding of dangerousness in the instant case.

15. Where a sentencing judge has applied the correct test and has taken into account all the relevant material, as the judge did in the present case, the court will be very slow to interfere with his or her assessment of dangerousness. Each case must turn on its own facts. However, in this case we are persuaded by Mr Volz that despite the careful approach that she took, the evidence before the learned judge fell short of establishing the requisite risk of serious harm. Despite the acknowledged risk of an escalation in the appellant's behaviour, he had neither contacted nor sought to make contact with any child and there was no clear evidence that he would be likely to do so. All the offending communications had been with X and other adults. This was only the second incident of distribution offending.

16. Read as a whole, despite the concerns expressed by the doctor, the psychiatric report did not support a finding of dangerousness, nor did the circumstances of the offending described by X. The applicant's attempt to minimise his behaviour and to conceal his activities, though matters of concern, would not be enough in themselves to demonstrate the necessary risk of causing serious physical or psychological harm.

17. It is rightly accepted by Mr Volz that no complaint can be made about the length of the determinate sentence that the judge passed after giving credit for the guilty plea. Therefore, we allow the appeal on this ground. We quash the extended sentence passed on count 1 and substitute for it a period of three years' imprisonment.

18. Mr Volz also contends that the current sentence passed on count 2 should have been further adjusted to take account of the appellant's guilty plea because the maximum sentence available after trial for that offence would have been five years. However, it is clear to us that the judge did not start with a five-year notional sentence after trial. If she had done so she would have reached a determinate sentence of four years. She took a notional sentence of four years and the 20 per cent discount was rounded up in the appellant's favour to get down to three years. We are not satisfied that there is any error in principle in the sentence imposed for count 2, nor is it manifestly excessive. Accordingly, that sentence as corrected by the judge under the slip rule stands.

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