**[2018] EWCA Crim 3089**

**No: 201802565 A4**
**IN THE COURT OF APPEAL**
**CRIMINAL DIVISION**

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 5 September 2018

**B e f o r e**:

**LORD JUSTICE LINDBLOM**

**MRS JUSTICE MCGOWAN DBE**

**MRS JUSTICE CHEEMA-GRUBB**

**R E G I N A**
v
**PHOENIX CONSTANTINE-REES**

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**Ms C Purnell** appeared on behalf of the **Appellant**

**Mr E Connell** appeared on behalf of the **Crown**

**J U D G M E N T**

**LORD JUSTICE LINDBLOM:**

1. On 25 April 2018, in the Crown Court at Blackfriars, the appellant, Phoenix Constantine-Rees, pleaded guilty on the day of his trial to three offences: an offence of making indecent photographs of a child, in Category A, contrary to section 1(1)(a) of the Protection of Children Act 1978 (count 1 on the indictment), an offence of making indecent photographs of a child, in Category B (count 2), and an offence of making indecent photographs of a child, in Category C (count 3). For these three offences he was sentenced by His Honour Judge Clarke Q.C., on 25 May 2018, to a total of 16 months' imprisonment: 16 months on count 1, one month concurrent on count 2, and one month, also concurrent, on count 3. The judge also made a Sexual Harm Prevention Order under section 103 of the Sexual Offences Act 2003 for a period of 10 years, and an order under section 25 of the Public Order Act 1986 for the forfeiture of computers and equipment. Having been convicted of an offence listed in Schedule 3 of the 2003 Act, the appellant was also required to comply with the provisions of Part 2 of that Act ("Notification to the Police") for 10 years. And having been convicted of an offence specified in the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009, he will be included in the relevant list by the Independent Safeguarding Authority. He now appeals against sentence by leave of the single judge.

2. On 25 June 2015 the appellant had pleaded guilty to 13 offences of possessing indecent images of children, contrary to section 160 of the Criminal Justice Act 1988. Those images had been found on a USB memory stick and an SD card. For each of those offences he was sentenced to eight weeks' imprisonment, all of those sentences being concurrent. He was put on the Sex Offenders' Register for seven years. The judge who sentenced him on that occasion did not make a Sexual Harm Prevention Order.

3. In 2016, the appellant went to live in a hostel for men recently released from custody. In December 2016, in the course of their supervision of the appellant, the police "Jigsaw Team" asked him if they could install monitoring software on his computer. He agreed to that. The software was duly installed. It monitored search items typed in when the appellant was online. At the end of February 2017 the police found there were a number of search terms indicating that someone was looking for indecent images of children. It emerged that the appellant had accessed 23 indecent images on his computer. The period within which those images had been accessed, as alleged in the indictment, was the seven days or so between 24 January 2017 and 1 February 2017. The police went to the hostel, the laptop was seized, and the appellant was arrested. When interviewed by the police, he denied having either looked for or downloaded any indecent images. He said that other people had also used his computer, and that he had allowed someone else to access it remotely. The police spoke to the person the appellant said had repaired the computer, who denied having had access to it. The remote access software found on the computer post-dated the search that had revealed presence of the indecent images. Of the 23 indecent images found by the police, two were in Category A (the subject matter of count 1 on the indictment), four were in Category B (the subject matter of count 2), and 17 were in Category C (the subject matter of count 3).

4. The appellant had previous convictions for manslaughter and robbery in 2006, as well as those to which we have referred, for similar offending, in 2015. While awaiting his trial for these offences, he was recalled to prison to serve the remainder of his licence period for the offence of manslaughter.

5. In a pre-sentence report prepared by the Probation Service, the probation officer referred to the appellant's history of mental illness. When he and his twin brother had been arrested for manslaughter, the police had then found indecent images of children on the family computer but no prosecution had followed. In 2014 he had been found to be in possession of indecent images of children while in a secure hospital. The probation officer assessed the offences for which he was now to be sentenced as being "part of an established pattern of offending", observing that it was "of significance ... that he was being managed on Licence when he committed [them]". He was judged to present a "medium" risk of reconviction for similar offending to that for which he was now being sentenced. He had "demonstrated some motivation to address his current offending", the probation officer was not able to propose a community order or a suspended sentence of imprisonment as a realistic option, because she judged the risk presented by the applicant as being not manageable in the community.

6. A report prepared by a consultant psychiatrist, Dr Stephen Ginn, dated 16 January 2018, stated the opinion that the appellant had a "borderline personality disorder" and that he displayed "markedly disharmonious attitudes and behaviour, involving several areas of functioning".

7. In his sentencing remarks the judge acknowledged the appellant's "troubled life". But in his view the difficulty here was the appellant's previous conviction for similar offending, and the fact that he knew he was not allowed to view material of this kind. His sentence was reduced for his guilty plea, but only slightly as he had only pleaded guilty on the day of his trial. Notional sentences of one month current on each of counts 2 and 3 for the Category B and Category C images were appropriate. The sentence on count 1 would reflect the whole of the indictment. The starting point, said the judge, was 18 months' imprisonment, which would be reduced to 16 months. The judge, as we have said, also made a Sexual Harm Prevention Order for 10 years, in the terms proposed to him. The contentious part of the order is in paragraph 4 of the schedule of prohibitions, which states this prohibition:

> "4. Owning, using or possessing any personal computer, laptop computer or other equipment capable of accessing the internet, other than:
>
> (i) Internet use in a public library or
>
> (ii) Internet use at a place of his employment and in the course of that employment[,] entering, viewing or in any away becoming involved in any internet chat room or social networking sites except in

relation to use at his place of employment and in the course of his employment or voluntary workplace."

That last part of paragraph 4 having then been replicated in paragraph 5 from the word "entering" to the words "voluntary workplace".

8. The appeal has been presented to us on behalf of the appellant, in succinct, clear and helpful submissions, by Ms Catherine Purnell, on two main grounds: first, that the sentence imposed by the judge on count 1 was manifestly excessive, considering the very small number of images in Category A – namely only two – and the fact that most of the images were in Category C; and that the judge had focused more than he ought to have done on the images in Category A. And secondly, that the terms of paragraph 4 of the Sexual Harm Prevention Order are disproportionate and oppressive, amounting, in effect, to a "blanket ban" in circumstances that were not truly exceptional.

9. As to the sentence of 16 months' imprisonment, Ms Purnell relies on the decision of this court in *R. v Dixon (Geoffrey Arthur)* (unreported, 29 July 2015), in which the defendant had previous convictions for offences similar to these, and had pleaded guilty, having been found in breach of a Sexual Harm Prevention Order, in possession of 44,000 indecent images of children, which he had downloaded, most of those images being in Category C but a "large number" in Category A. In that case the sentencing judge had taken the view that the sentence should be on the basis of the Category A images. This court evidently disagreed, concluding that the criminality of the offending was better reflected in the Category B images. It therefore quashed the sentence of two years with an extension period of four years, substituting for it a determinate sentence of 18 months' imprisonment. The relevant sentencing ranges indicated in the guidelines issued by the Sentencing Council are, for Category A, 26 weeks to three years' custody with a starting point of one year; for Category B, a high level community order to 18 months' custody, with a starting point of 26 weeks' custody; and for Category C, a medium level community order to 26 weeks custody, with a starting point of a high level community order. In this case, Ms Purnell submits, the judge ought to have taken the starting point for Category B offences. Had he done so, and with a suitable reduction for the appellant's guilty plea, and having regard to the relatively small number of images – most of them in Category C – he ought to have imposed a sentence materially less than the 18 months that he took as his starting point, and indeed the sentence of 18 months that this court substituted in *Dixon*.
10. On behalf of the prosecution, Mr Edward Connell has assisted the court by referring to the relevant aggravating features which the judge was obliged to take into account, specifically the appellant's previous convictions for similar offending, the fact of his commission of offences while on licence, and the fact that he had apparently been seeking, in particular, to access images of young children. As Mr Connell observes, the offending here spanned all three categories.

11. We agree with the observation of the single judge in granting leave, that cases of this type inevitably turn on their own particular facts. As the single judge also observed, whilst there were 23 images of which only two were in Category A, there were significant aggravating features, and a custodial sentence was inevitable. We agree with him, therefore, that the sentence imposed by the judge cannot be said to be arguably wrong in principle.

12. The question for us, essentially, is whether a notional total sentence after trial of 18 months' imprisonment for these offences was too long, so as to be not merely severe but manifestly excessive. In our view, it was. In the circumstances here, having regard to the sentencing guidelines, and in particular given the preponderance of images in Category B and Category C, most of them – 17 of the 23 – in Category C, we think that the judge's "starting point" of 18 months was too high. In our view the appropriate starting point in this case was one of 12 months. With an upward adjustment for the aggravating factors, including in particular the appellant's previous convictions for similar offending, but also allowing for his personal mitigation, including his personality disorder, this would produce a sentence of 12 months' imprisonment, after a trial. Making an appropriate reduction for the appellant's belated guilty plea would bring the sentence down to 10 months' imprisonment on count 1. That, it seems to us, would properly reflect the overall criminality of this offending. We would not interfere with the concurrent sentences of one month's imprisonment passed by the judge on each of counts 2 and 3. Thus the total period of imprisonment should be, in our view, 10 months. We shall accordingly quash the sentence imposed by the judge on count 1, and impose in its place a sentence of 10 months' imprisonment.

13. As for the Sexual Harm Prevention Order, Ms Purnell submits that the prohibition in paragraph 4 is unjustifiably onerous, denying the appellant much of "everyday legitimate living" and that this case is not one of the "most exceptional" kind such as to warrant a "blanket" prohibition of this nature, which if left in place, will endure for 10 years (see paragraph 10 of the judgment of this court in *R. v Parsons and R. v Morgan* [2018] 1 Cr. App. R. (S.) 43). Ms Purnell invites us to substitute a less onerous prohibition, modelled on that favoured by this court in *Parson and Morgan*, in these terms:

> " ...
>
> 4.1. (1) Using any computer or device capable of accessing the internet unless:
>
> (a) he has notified the police VISOR [*or appropriate designated*] team within 3 days of the acquisition of any such device;
>
> (b) it has the capacity to retain and display the history of internet use, and he does not delete such history;
>
> (c) he makes the device immediately available on request for inspection by a Police Officer, or police staff employee, and he allows such person to install risk management monitoring software if they so choose.
>
> This prohibition shall not apply to a computer at his place of work, Job Centre Plus, Public library, educational establishment or other such place provided that in relation to his place of work within 3 days of him

commencing use of such computer he notifies the police VISOR [or appropriate designated] team of this use."

14. That proposed substitute prohibition for paragraph 4 is not opposed by the prosecution.

15. Having had regard to this court's previous observations on the formulation of the terms of a Sexual Harm Prevention Order in several appeals, including *R. v Smith* [2011] EWCA Crim 1772, *R. v Bingham* [2015] EWCA Crim 1342 and *Parsons and Morgan*, we accept Ms Purnell's submissions on this part of the appeal. As she submits, the present prohibition on paragraph 4 of the Sexual Harm Prevention Order is disproportionate and unduly oppressive. There is no particular feature of the appellant's offending, nor any other circumstance in this case that can be said to warrant that prohibition. The formulation suggested is appropriate, as the prosecution properly accepts. We shall therefore quash the prohibition in paragraph 4 of the Sexual Harm Prevention Order and substitute the prohibition put forward on behalf of the appellant. The other prohibitions will remain as they are.

16. To the extent we have indicated, therefore, this appeal is allowed.