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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

ANDREW MAXWELL

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Mr S Magee KC with Mr McTernaghan (instructed by W G Maginess, Solicitors) for the Appellant
Mr Tannahill (instructed by the Public Prosecution Service) for the Crown

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Before: Keegan LCJ, Colton J and Fowler J

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KEEGAN LCJ ***(delivering the judgment of the court ex-tempore)***

Introduction

[1] We are grateful to the assistance of counsel in this case and for the written skeleton arguments and the oral submissions. The court is able to provide a ruling today in relation to this appeal.

[2] This is an application brought with leave of the single judge to appeal a sentence imposed by His Honour Judge Lynch KC ("the judge") on 2 December 2022 at Craigavon Crown Court. The sentence was imposed following guilty pleas to 37 counts relating to a series of offences involving the making and distribution of indecent images of children, attempting to cause a child to watch a sexual act as well as possession of prohibited images. The ultimate sentence that was imposed was one of 20 months' imprisonment made up of 10 months in custody and 10 months on licence. Various other ancillary orders were made including a Sexual Offences Prevention Order. None of those ancillary orders are under appeal.

[3] The counts cover distributing an indecent image of a child under Category A; making indecent images of children, Category A; distributing an indecent image of a child, Category B; making indecent images of children, Category B; making indecent

images of children, Category C; possession of prohibited images, possession of extreme images and attempting to cause a child to watch a sexual act.

[4] The categorisation of the offences is explained as follows:

(i) Category A encompasses images involving penetrative sexual activity, sexual activity with an animal or sadism. This was previously Categories 4 and 5.

(ii) Category B encompasses images involving non-penetrative sexual activity which was previously under Categories 2 and 3.

(iii) Category C encompasses other indecent images not falling within A or B which was previously Category 1.

Factual background

[5] These offences arose following a police search of the appellant's home on 11 May 2017 and seizure of several items for examination thereafter. The electronic items which were seized included a mobile telephone and computer. A total of 115 images were found on the appellant's mobile telephone; 104 were classed as extreme, two were in Category A, which I have just described, two were in Category B and seven in Category C. In addition, 74 images were found on the appellant's laptop. Of these 28 were classified as extreme, two were prohibited, 20 were in Category A, eight were in Category B and 16 in Category C. Two Category A videos were also found on his laptop.

[6] It is apparent that the appellant shared and distributed images that included female children aged between 6 and 14 years of age engaging in various sexual acts. The appellant also engaged in sexualised conversations with a female, who he understood to be 15 years of age, and to whom he sent sexually graphic images. The appellant shared images of bestiality and discussed rape of babies and toddlers. He referred also to his sister in relation to rape in various online conversations he engaged in.

[7] The appellant was interviewed on 1 October 2020. He initially denied seeing anything indecent except for a pornographic cartoon depicting a young person, however, when the results of the analysis were put to him, he accepted responsibility but claimed not to recall accessing the images. He referred to being the victim of physical abuse at the hands of his father and suffering from PTSD after combat experience in the military. He admitted concocting a persona of "Lesley Crisp" in online conversations. He denied abusing his sister. When asked to explain why he said that he replied, "I think it is just to start up and then just to try and get things started, I suppose." When the evidence of distribution was put to him, he replied "So sorry" before expressing shame.

The sentencing remarks

[8] After setting out the factual background to the offences the judge referred to what he described as "strong mitigating factors in this case." These relate to the circumstances of the appellant, his clear record, his excellent work record and certificate of exemplary service in the army, acceptance of responsibility and remorse. The judge also referred to the contents of a report from a Consultant Psychiatrist, Mr Bunn. This referred to various issues in terms of the appellant's mental health, his service in the army, his use of alcohol and elicit drugs as a coping mechanism, his fragile mental health, his willingness to engage in psychological therapy.

[9] The judge also referred to the contents of the pre-sentence report. This report records that the appellant is a mature man of 62 years. It refers to his history and work record and his domestic arrangements. The probation report assessed the appellant as exhibiting a high likelihood of reoffending but not posing a risk of significant harm. Various testimonials are also referred to by the judge.

[10] The judge also dealt with a point that is pursued on appeal which is the issue of delay. The appellant was arrested in May 2017 but only interviewed in October 2020 and, therefore, there has been delay in bringing the matter to trial. The judge quite rightly, in our view, stated that the appellant was entitled to the benefit of some credit for the delay and that this should mitigate the sentence imposed by the court.

[11] It is apparent from the sentencing remarks that the judge considered the leading authorities in this area which are the settled authorities, namely the case of *R v Oliver and others* [2002] EWCA 2766, which was adopted *in Attorney General's Reference (No 8 of 2009) Christopher McCartney,* reported at [2009] NICA 52.

[12] The case of *R v Oliver* refers to the sentencing guidelines in England & Wales and sets out some guidance for sentencers in this area. In the *McCartney* case, from paras [4]-[5] the Court of Appeal applied this as follows:

> "[4] This court has not issued guidelines setting out the appropriate range of sentence for offences of this nature but for some years now sentencers have relied upon the guidelines issued by the English Court of Appeal in *R v Oliver*. We agree with that court that the primary factors determinative of the seriousness of a particular offence are the nature of the indecent material and the extent of the offender's involvement with it. The well-established categorisation of indecent material set out in *Oliver* is now widely used by police forces in the United Kingdom and the categorises 1-5 are set out which are now A, B and C."

The court went on at para [5] to state as follows:

> "[5] The downloading or possession of a large quantity of material at levels 4 or 5 is a serious offence and for an adult offender without previous convictions after a contested trial a custodial sentence of between 12 months and three years will generally be appropriate. The Sentencing Guidelines Council in England & Wales has now suggested a slightly lower range, but we see no reason to depart from the range set out in *Oliver*. The age of the children involved may be an aggravating feature and assaults on babies or very young children are particularly repugnant because of the fear or distress they may have induced in the victim. The manner in which the images are stored on the computer may indicate a high level of personal interest in the material. Distribution of material at any level will be a serious aggravating factor and distribution of images at levels 4 or 5 would justify sentences in excess of three years. Where the distribution is for commercial gain or by way of swapping substantially increased sentences are appropriate."

At para [6] the court also said:

> "[6] Those who distribute or make available pornographic images on the internet must expect severe sentences because the accessibility of this material has the potential to corrupt in particular the young."

Points on appeal

[13] The first appeal point is that the judge did not set out a starting point for sentence after applying aggravating and mitigating factors and assessing the delay which he had mentioned. We agree with Mr Magee that there is a difficulty in this approach. The case of *R v Stewart* [2017] NICA 1 states that it is recommended that sentencers set out a more transparent approach to sentencing. It follows that the judge should state what sentence he would have reached prior to reduction for the plea. This omission not fatal, if there is enough in the sentencing remarks to work out exactly what considerations the judge took into account and whether or not his sentence was manifestly excessive or wrong in principle.

[14] The second point which is raised by the appellant is that he was entitled to the maximum reduction of any sentence of one third. We agree with that submission as the appellant pleaded guilty at the first opportunity and expressed remorse and, in

those circumstances, following the guidance in the Supreme Court case of *R v Maughan* [2022] UKSC 13 which has recently been applied by this court he was entitled to the maximum reduction.

[15] The third point which is of more substance is whether the judge was right to opt for a range of sentence applying *Oliver* and *McCartney* within the band of 12 months to three years. In our view, in accordance with *Oliver* and *McCartney* in a case of this nature we see no reason to doubt that the bracket is between 12 months and three years and could potentially be even greater than three years in distribution cases. We find no error of law on the part of the judge. Mr Magee is right to say that sentencing should be bespoke to the facts and that guidelines are not tramlines for sentencers.

[16] The judge clearly took the aggravating factors into account in this case. We agree that this case is aggravated severely by virtue of two factors, that is the distribution of the materials and the circumstances that are described in terms of the context of the extended sexualised contact with other individuals. The judge goes on to say there is then the sexualised conversation with a person who may or may not have been 15 years old for the purposes of the conversation. We agree entirely with the judge that these are serious aggravating matters. We do not accept the argument that the relatively low number of distributed materials should bring this into a lower range of sentence.

[17] Next a court must balance the mitigating factors which have been outlined by counsel and which are considered, but all these must be set against the seriousness of the behaviour and the aggravation. The judge clearly took the mitigation into account as we have said. However, cases involving the downloading of images and distribution of Category A material will clearly result in custodial sentences whatever the personal needs of the offender for rehabilitation or treatment or whatever the offender's difficulties are with a prison sentence save in the most exceptional circumstances, which are not present here. This position is, of course, to reflect the seriousness of the offences against children who are young and vulnerable and to mark society's abhorrence of such corruption.

[18] Overall, we consider that the judge took into account the mitigating factors but was quite right to balance those against the serious aggravation in the circumstances of this case and he has made no error of law.

[19] The final point raised on appeal is whether the judge properly considered delay as the sentencing remarks are not entirely clear on this issue.

[20] The correct method for dealing with delay is explained by the Court of Appeal in *DPPs Reference (No 5 of 2019) - Harrington Jack* [2020] NICA 1. Any delay must be considered prior to reduction for the plea. In this case, we consider, that some reduction in sentence should have been made for the delay. Looking at the judge's methodology, if the judge had specified his starting point as a bracket

between 12 months and three years, which we cannot see any legal error with in this case because of the aggravating factors and the distribution of Category A, the age of the victims and the associated conversations with the victims, this would bring this to the highest end. The personal mitigation cannot count for much. However, with the delay in this case we can see that the judge from a point of roughly three years could justifiably, having considered delay, reach a point of 30 months before reduction for the guilty plea. That should be the maximum as we have said leading to a final sentence of somewhere in the region of 20 months. There is therefore, in our view, in the circumstances of this case nothing either wrong in principle or manifestly excessive about the sentence imposed.

Conclusion

[21] Accordingly, we affirm the sentence and dismiss the appeal. We also repeat the remarks of the judge when describing the effects of this type of offending as follows:

> "For every photograph it is trite to say there is an abused child, for many of the persons who appear before the court they seem to self-excuse on the basis that the abuse has already taken place. The photograph has been taken and, therefore, it is an event passed. This, of course, is distorted thinking. By virtue of involvement in this trade it ensures that abuse will continue, and such materials exist because there is a market for it. That is why severe and deterrent sentences are required in this area for these offences."