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IN THE COURT OF APPEAL

CRIMINAL DIVISION

NEUTRAL CITATION NUMBER: [2021] EWCA Crim 656

CASE NO 202001540/B3 & 202001542/B3

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 16 February 2021

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE LAVENDER
MRS JUSTICE ELLENBOGEN DBE

REGINA
V
MARK ANTHONY HEMUS

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The Applicant appeared in person

J U D G M E N T

MR JUSTICE LAVENDER: These are renewed applications for: (1) leave to appeal out of time against the applicant's conviction on 9 March 2020 in the Crown Court at Bristol on one count (count 2) of making an indecent photograph of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978 and one count (count 5) of possessing prohibited images of children, contrary to sections 62(1) and 66(2) of the Coroners and Justice Act 2009, to both of which counts the applicant pleaded guilty; and (2) leave to appeal against the three-year community order imposed on the applicant on 11 May 2020 on count 2, no separate penalty having been imposed on count 5, the Sexual Harm Prevention Order imposed on that occasion and the applicant's notification requirements.

On 21 May 2019 prohibited images were found on the applicant's mobile telephone. It and other devices were subsequently found to contain:

- (1) Seven category B indecent photographs of children and one moving image, which were the subject of count 2;
- (2) 69 prohibited images of children, which were the subject of count 5; and
- (3) other images which were the subject of counts 1, 3 and 4.

On 9 March 2020 the applicant pleaded guilty to counts 1, 2, 3 and 5 on the indictment. He did so on the basis that he was only admitting his guilt in relation to images found in an accessible part of the relevant device. He was subsequently permitted to vacate his plea to count 3 on 31 March 2020 and to vacate his plea to count 1 on 11 May 2020. Count 3 was ordered to lie on the file. No evidence was offered and not guilty verdicts were entered on counts 1 and 4. Count 4 charged the applicant with possession of extreme pornography.

The issue in relation to count 3 was that the applicant had expressed concern as to whether there was sufficient evidence to prove that the images to which it related had been properly described as Category C images. Due to the Covid-19 pandemic, the opportunity for

those defending him safely to view the material presented real difficulties. As a result, the prosecution did not oppose the applicant's application to vacate his guilty plea on count 3 and for this offence to lie on the file.

The reason for permitting the applicant to vacate his plea on count 1 was that it transpired that the category A image to which count 1 related was in an inaccessible part of the applicant's telephone. The forensic report on which the indictment had been based distinguished between accessible and inaccessible images on the applicant's telephone, but the author had erroneously transposed the schedule of images so that images found in the inaccessible parts of the telephone were described as accessible and those which were in the accessible parts of the telephone were described as inaccessible.

An amended basis of plea was produced on 11 May 2020, stating that the applicant had pleaded guilty to counts 2 and 5 on the basis that there was one accessible Category B image on his mobile telephone (count 2) and a number of accessible prohibited images of children on his mobile hard drive and memory stick (count 5).

The proposed grounds of appeal against conviction are as follows:

1. The prosecution were required to provide evidence of the images in the indictment. The applicant had indicated a guilty plea to counts 1 to 3 and 5 on the basis that the images were accessible and that the prosecution could prove this.
2. The applicant pleaded guilty to preserve his credit for his plea. He is on the autistic spectrum and did not feel able to reject the advice provided to him by his solicitor.
3. The applicant instructed his solicitors to obtain further information from the prosecution and establish that the images relating to counts 1, 2 and 3 were, in whole or in part, inaccessible.
4. The prosecution accepted on 11 May 2020 when the matter was listed for sentence that the

images were inaccessible and that they could not provide the evidence or descriptions of the images for counts 2 and 5, to which the applicant had pleaded guilty.

The applicant says that the reason why his appeal was late is that he was waiting for further information from the prosecution about the images.

We have considered all of the documents and considered afresh the merits of the proposed grounds of appeal. We agree with the single judge that the grounds of appeal have no arguable prospect of success. It is only in exceptional circumstances that this court will allow an appeal against a conviction based on the applicant's guilty plea. It is clear that this is not one of those cases.

The prosecution accepted that there had been a mix up between accessible and inaccessible images when the applicant pleaded guilty, but that was sorted out by 11 May 2020. He was allowed to vacate two of his pleas, but the two which remained related to accessible images, as was acknowledged in the basis of plea. It is not correct for the applicant to say that the prosecution accepted that the images referred to in the amended basis of plea were inaccessible. On the contrary, the applicant accepted that they were accessible.

We turn now to the proposed appeal against sentence. The applicant was aged 34 at the date of sentence. He had been convicted in 2007 of one offence of making indecent photographs of children and two offences of possessing an indecent photograph of a child. There was a psychiatric report which stated that the applicant displayed features which were in keeping with his diagnosis of autism spectrum disorder ("ASD"). Due to his ASD, it was unlikely that he was able to truly appreciate the seriousness of the offences either from a legal or a moral standpoint. The author of the pre-sentence report also stated that the applicant's autism meant that he sometimes struggled to understand why the images were prohibited and that he may not have fully appreciated the severity of his actions. The applicant was

assessed as having an ongoing attraction to children and as posing a medium risk of serious harm to children through downloading and watching child abuse images.

The proposed grounds of appeal against sentence are as follows:

1. The sentence imposed was excessive. The pre-sentence report was prepared with reference to counts 1, 2 and 3 and made reference to category A images which were not before the court.
2. The content of the pre-sentence report was inaccurate. The applicant did not say that he used indecent or prohibited images to stimulate himself before viewing adult material, neither did he express any interest in children.
3. The notification requirements and registration on the sex offender's register offend the applicant's human rights.
4. The Sexual Harm Prevention Order was imposed having regard to the applicant's previous convictions and inaccuracies in the pre-sentence report.

Again, we have considered the merits of these proposed grounds afresh. However, we agree with the single judge, who said as follows:

"The Judge applied the relevant Sentencing Guideline to the offences to which you pleaded guilty and passed a sentence towards the lower end of the appropriate category range. Your previous conviction was an aggravating factor of your offending and account was taken of the mitigating factors. The notification period as a sex offender was fixed by statute and the terms of the Sexual Harm Prevention Order were appropriate."

In our considered view there are no arguable grounds of appeal against sentence. Accordingly, we refuse both applications.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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